

# No Queer Child Left Behind

By ORLY RACHMILOVITZ\*

SINCE MARRIAGE EQUALITY WAS WON in the Supreme Court's June 2015 decision of *Obergefell v. Hodges*,<sup>1</sup> the lesbian, gay, bisexual,<sup>2</sup> and trans<sup>3</sup> ("LGBT") movement has been in search for the next great cause for LGBT rights. Arguably, marriage has been the movement's most important goal (or at least the most visible one). Often relying upon a rhetoric of sameness and commonality to emphasize the legiti-

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. Sexual orientation is defined as a person's predisposition or inclination toward a particular type of romantic or sexual partner, activity or behavior. BLACK'S LAW DICTIONARY, 1407 (8th ed. 2004).

3. Gender identity refers to one's psychological understanding and expression of one's gender as male, female, both, in between, or neither. The Sylvia Rivera Law Project (SRLP), a NYC based non-profit organization that provides legal services to the transgender community, defines gender identity as "how we see ourselves. Some of us see ourselves as women, some as men, some as a combination of both, some as neither. Some of us have complex identities that may even be fluid and change over time." Jody Marksamer & Dylan Vade, *Trans 101*, SYLVIA RIVERA LAW PROJECT (Feb. 17, 2016, 1:19 PM), <http://srlp.org/trans-101> [<https://perma.cc/Z4PX-XT7A>]. SRLP describes "transgender" (or "trans") as "people (very broadly conceived) . . . whose gender identity and/or expression . . . does not or is perceived to not match stereotypical gender norms associated with our assigned gender at birth." *Id.* This article will mostly use the terms "trans" or "gender non-conforming" to refer to people who do not conform to "traditional" or "expected" gender presentation. Those who are gender non-conforming may or may not identify as part of the trans community or as part of any sexual minority group, such as the lesbian and gay communities. Jody L. Herman, *Gender Regulation in the Built Environment: Gender-Segregated Public Facilities and the Movement for Change in Washington, DC, A Case Study Approach*, 4-5 (May 2010) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

macy of same-sex relationships, the fight for marriage could be seen as a fight for the legitimacy of sexual minority identity itself. In turn, the *Obergefell* decision could then be viewed as a paradigm shift from sexual minorities challenging a politics of immutability, which offered rights and protections so long as sexual minorities could be seen as “trapped” in their identities and thus blameless for their divergence from heteronormativity, to sexual minorities advancing a politics of legitimacy which finds the source of sexual minority rights in that such identities were just as acceptable and valued as their heterosexual, cisgender counterparts.

Within this new paradigm several leading advocates have suggested the issues faced by LGBT youth in schools as one important focus.<sup>4</sup> As they point out and as this article demonstrates, LGBT students are highly marginalized, struggling through discrimination, harassment, limits to free speech, exclusionary curricula and school activities, unwanted outing, and other infringements on their rights and threats to their wellbeing. LGBT students have been the subjects of derogatory name-calling and mock rapes. Their belongings have been urinated upon. They have been prohibited from bringing same-sex dates to their school proms. They face barriers using school facilities that respond to their gender identity or are prohibited from dressing according to their identities.<sup>5</sup> The process of identity development in the psychological sense—a central task at this stage of emotional and mental development—is compromised by assimilation demands because these demands hinder the achievement of a coherent sense-of-self,<sup>6</sup> and thus undermine the legitimacy of a sexual minority identity that should be free from such attacks. Social science research has shown that LGBT youth who face homophobia or transphobia through discrimination or harassment in schools are at higher risk of drug use, risky sexual behavior, suicidality, and other mental health risks than straight youth.<sup>7</sup> They are also more likely to slip in their

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4. James Esseks, *After Obergefell, What the LGBT Movement Still Needs to Achieve*, AM. CIVIL LIBERTIES UNION [hereinafter ACLU] (Feb. 16, 2016, 11:54 AM), <https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve> [https://perma.cc/LNX6-U52R]; Lana Birbrair, *Beyond Obergefell: Alumni Advocates for LGBT Rights Reflect on the Challenges that Remain*, HARVARD LAW BULLETIN, 32, 34 (2015) (Feb. 16, 2016, 11:59 AM), <https://today.law.harvard.edu/wp-content/uploads/2015/10/WEB-HLB-f15-NCN.pdf> [https://perma.cc/Z73V-CNDY]; see also Jon W. Davidson, *What Happened Today at the Supreme Court*, LAMBDA LEGAL (Feb. 16, 2016, 12:01 PM), [http://www.lambdalegal.org/blog/20150626\\_victory-analysis](http://www.lambdalegal.org/blog/20150626_victory-analysis) [https://perma.cc/B9GM-M9QD].

5. See *infra* Part II.2 and the case law discussed therein.

6. See *infra* Part I. B.

7. See *infra* Part I.C.2.

academic achievements and less likely to graduate high school or go to college.<sup>8</sup>

This article explores how the law so far has addressed heteronormative victimization,<sup>9</sup> and compares the protections available to LGBT students through courts to those available to their adult counterparts suffering such mistreatment in the workplace.<sup>10</sup> It then maps out courts' policies of extending stronger protections to children, organizing them along five categories of protection: (1) courts have not required that students demonstrate suffering a double bind when applying the sex stereotyping theory in their favor; (2) courts have more readily restricted same-sex sexual harassment; (3) courts have been more willing to interpret "sex" to include sexual orientation or gender identity; (4) even before *Lawrence v. Texas*<sup>11</sup> was decided, criminalization of sodomy was not accepted as a justification for discrimination or harassment of students; and (5) courts offer a hybrid model of free speech protection by rolling back children's rights so that their speech not undermine the educational setting while removing important obstacles common in first amendment cases. By extending stronger protections to students, courts effectively recognize children's identity interests in the educational environment, their heightened vulnerability to assimilation demands, and their greater need for legal protections from such demands. This categorization then drives the explanation (that is perhaps a partial explanation, but one that has been largely overlooked so far) that the policy of stronger protection for students fits onto children's emotional development needs.

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8. SURVEY 2013, *infra* note 102 at xviii.

9. I use "victimization" as an umbrella term for abuse, neglect, harassment, discrimination or other forms of mistreatment youth experience, whether at school or other spaces.

10. As demonstrated below, in Part II.2, there have been efforts put into legislation, whether through explicit protections from discrimination or harassment of LGBT students, or general anti-bullying litigation. However, these statutes have not been passed in every state, and indeed some states have either backtracked on previously protective statutes, or have legislated altogether new statutes, that exclude LGBT students from any specific or specific statutory protection against school victimization. Moreover, in February 2016, South Dakota became the first state to prohibit trans students' use of sex-segregated school facilities, such as restrooms and locker rooms, that correspond to their gender identity, but rather require them to use the facilities corresponding with their sex as assigned at birth. Aimée Lutkin, *South Dakota Just Become the First State to Pass an Anti-Transgender Student Bathroom Bill*, JEZEBEL (Feb. 17, 11:06 PM), [http://jezebel.com/south-dakota-just-become-the-first-state-to-pass-an-ant-1759556487?utm\\_campaign=socialflow\\_jezebel\\_facebook&utm\\_source=jezebel\\_facebook&utm\\_medium=socialflow](http://jezebel.com/south-dakota-just-become-the-first-state-to-pass-an-ant-1759556487?utm_campaign=socialflow_jezebel_facebook&utm_source=jezebel_facebook&utm_medium=socialflow) [<https://perma.cc/HVE3-AJE5>].

11. *Lawrence v. Texas*, 539 U.S. 558 (2003).

This Article also demonstrates how relying on litigation is a partial strategy to fend off school-based victimization. It closes with some proposals for how the LGBT movement may expand its efforts to take on additional non-litigation strategies to achieve an end to LGBT students' victimization. The purpose of this comparison is not to suggest that protections for adults should necessarily fall in line with those of children, or vice versa. Instead it is intended to ventilate the potential reasons behind the different legal protections so that strategic use could be made of them in the future. When we understand the motivation for different legal protections, we can identify when adverse legal protections are reasonable and when they are not, allowing us to be more persuasive and deliberate about how we work to advance such protections where they lack.

The LGBT movement continually devotes energy and resources to sexual minority students' issues because education plays a highly significant role in shaping children's identities.<sup>12</sup> Education also plays an instrumental role in preparing young people for life as contributing adult members of society. It instills in us the norms that come with citizenship, and it has an impact on the way we see ourselves and others. As such, the school environment is a primary source of assimilation demands<sup>13</sup>—pressures to assimilate into the mainstream that are coerced by others and motivated by animus<sup>14</sup> toward a particular group or identity category—on many aspects of identity, including citizenship and religion.<sup>15</sup> Sexuality is no exception. As children and

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12. Psychology defines identity as a sense of who we are, what we value, and where we are headed. See CHARLOTTE J. PATTERSON, *CHILD DEVELOPMENT* 543 (2008). Our identity is related to those biological traits or social background that “involve[ ] learning about, relating to, and committing to, socially constructed meanings associated with [those] biological [or social] status[es].” Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 *HARV. C.R.-C.L. L. REV.* 317, 331 (2007). See Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 *MINN. L. REV.* 1374, 1377 (2014) (hereinafter: “Rachmilovitz, *Assimilation Demands*”).

13. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 26–27 (2006).

14. Yoshino explains that assimilation demands are those socialization efforts that are not motivated by a legitimate reason, and highlights animus as one such illegitimate reason. *Id.* at 26–27. However, as it seems Yoshino's concern about assimilation demands actually hinges on the negative motivation at their root, in my previous writing I have also considered it a central, indeed necessary, component in identifying harmful assimilation demands which merit legal protection of identity rights. I do so in this Article as well. In this sense, it is possible that school efforts at socialization, which are not based in animus but would have a legitimate reason, would not be considered objectionable assimilation demands.

15. Schools' role in effecting children's national or religious identity has been at the root of the school prayer cases: *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 505

youth begin exploring and practicing their sexuality earlier than ever before, sexuality is no longer invisible in schools.<sup>16</sup> With an emphasis on instilling gender roles or preventing teen-pregnancy, sexually transmitted infections, and teen dating violence, schools tend to struggle with students' diverse sexual identities and conduct. Society's investment in ensuring young people's heteronormative sexuality makes schools the primary site for policing their sexuality. As a result, students face pressures to conform to heteronormative standards from a variety of sources: faculty and staff, other students, and parents.

Conflicts around how sexuality is addressed at school take two forms. First, a dispute can occur between the child and the school as a state actor. Here, students usually contest assimilation demands by faculty or staff (for instance, when a student is not permitted to take a date of the same-sex to the prom), or students will bring claims against the school for failing to protect them from assimilation demands imposed by fellow students (for example, when a student is called derogatory names referring to her sexual orientation or is physically assaulted). Courts balance the child's rights against those of other students or the obligations of school faculty and staff. Courts apply doctrines similar to those governing employment law, but use them to protect children more forcefully than they do their adult counterparts.<sup>17</sup>

This policy of heightened protections for children's identity development free from assimilation demands also extends to the second context of school based-disputes: conflicts between schools and parents. In this line of cases, parents themselves—generally motivated by concerns for their children's heteronormative development<sup>18</sup>—contest school curriculum or activities, arguing that they violate parental rights to the inculcation of their children. Although it is the child's identity that is compromised by schools' assimilation demands, parents are bringing claims against the schools following the premise that as parents they are the rights holders in directing children's identities. Resolving these suits, courts will generally examine parental rights in light of the state interest in a public, pluralistic education for future

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U.S. 577 (1992); cases addressing school children's recitation of "The Pledge of Allegiance": *e.g.* *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); as well as some parental rights cases: *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

16. WILLIAM N. ESKRIDGE, JR. & NAN HUNTER, *SEXUALITY, GENDER, AND THE LAW* 900 (2004).

17. *See infra* Part II.

18. *See infra* Part III.B.

citizens as a way to resolve the tension between what is essentially a dispute over who—parents or the state—holds the right to demand assimilation from children and thus construct their identity.<sup>19</sup> Parents are usually unsuccessful in these cases, as courts find most school programs merely expose children to different perspectives and ideas in a non-coercive manner.<sup>20</sup>

While touching on the latter set of cases for context, this article focuses on the former—where students are explicit parties (rather than having their interests purportedly represented by others, be it their parents or the state). Specifically, this article focuses on the comparison between the discrimination and harassment cases brought by students and those brought by adult employees.

Part I presents an overview of the theories on identity development and assimilation demands to show how such demands are harmful to children broadly and to LGBT youth, specifically.

Part II analyzes the case law on adults' claims against assimilation demands in the workplace and students' claims against assimilation demands in schools to show the gains made so far: how courts extend greater protections to schoolchildren than to adult employees.<sup>21</sup>

Part III hypothesizes why courts may be more willing to protect LGBT students from assimilation demands. It theorizes that protection extended to children is rooted both in their psychological developmental processes advancing from dependence on adults to agency and autonomy,<sup>22</sup> as well as in children's right to an open future.<sup>23</sup> This right is closely tied to a public interest in education as a space where children are inducted into democracy and their roles as functioning, informed adults.

Lastly, I end with looking into the future. Through problematizing the focus on litigation, successful as it may be, I aim to suggest that going forward, the LGBT rights movement ride the momentum of the recent victory regarding marriage equality to achieve a more compre-

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19. Orly Rachel Rachmilovitz, *Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention* 24–25 (May 2012) (unpublished S.J.D. dissertation, University of Virginia School of Law) (on file with author) (hereinafter: "Rachmilovitz, Masters"), Chapter Three Part II. Also *see generally* Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 *Harv. J.L. & Gender* 303 (2009).

20. Rachmilovitz, *Masters*, *supra* note 19.

21. It should be noted at the outset that this comparison focuses on Title IX public education cases (*infra* note 173) and Title VII government employment cases (*infra* note 115). As such, in a sense, it is a comparison of apples and apples.

22. *See infra* Part III.A.

23. *See infra* Part III.B.

hensive end to school-based assimilation demands. In addition to making brief suggestions for strategies focused on K-12 education to complement the litigation efforts, I briefly consider how the enhanced protection for LGBT students may inform protection from assimilation demands in another, related context—specifically for LGBT students in higher education.

## I. From Melting Pot to Melt Downs

One may be born with physical traits, such as a racial phenotype or female genitalia, or a social background, such as religious heritage or national origin, associated with identity. Yet identity in its psychological meaning refers to the process of developing a sense of who we are, what we value and where we are headed.<sup>24</sup> Our identity is related to those biological traits or social background that “involve learning about, relating to, and committing to socially constructed meaning associated with those biological [or social] status[es].”<sup>25</sup> One’s identity is well-developed (termed by developmental psychologists “identity achievement”)<sup>26</sup> once a coherent sense-of-self has emerged—that is, a person’s behavior is not random but informed by specific, well thought-out principles and values—that her sense-of-self is stable over time, and that she presents and behaves outwardly in ways that are consistent with her identity and sense-of-self.<sup>27</sup> Social scientists have studied the identity formation process extensively. Here, I outline some general, well-accepted principles of identity formation, followed by an overview of the theory of assimilation demands. I then connect the two in showing how assimilation demands burden children and youth in their identity development and emotional adjustment.

### A. Before the Schoolhouse: Identity Development

The foundation to psychology’s investigation into identity is the work of Erik Erikson. Though the field has progressed since Erikson’s writing, a look into identity research would be incomplete without attention to his contribution. To Erikson, identity, as any other aspect of development,<sup>28</sup> is a result of crisis that the child must solve in order to progress to more advanced developmental tasks.<sup>29</sup> Identity is what

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24. PATTERSON, *supra* note 12, at 543.

25. Lau, *supra* note 12.

26. Rachmilovitz, Masters, *supra* note 19, Chapter Two, Part I.A.

27. *Id.* at 330.

28. Rachmilovitz, Masters, *supra* note 19.

29. ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 92 (1968).

emerges from the conflicts we face throughout development. Each crisis resolution brings a new crisis, challenging our identity to grow in “unity, . . . good judgment, and . . . the capacity ‘to do well’ . . . .”<sup>30</sup>

Though identity development is most central in adolescence, it builds on foundations laid earlier in life. In early childhood, with increasing motor and language skills, the child’s ability to explore and question grows.<sup>31</sup> She can study and prepare for the social roles her identity will come to encompass. The adults around the child become role models.<sup>32</sup> By following their example, the child learns the tasks tied to her future role and gains a sense of initiative and worth through their practice alongside mentoring adults.<sup>33</sup>

With time, children are exposed to various social roles. The sense of worth the child previously achieved from adapting to roles she saw at home is now challenged by a sense of inferiority when these social roles are not similarly valued in the greater community outside the home.<sup>34</sup> Children become aware of how social groups, such as race or economic background, influence identity and of the value society may place on identities and roles of those associated with those groups.<sup>35</sup> Exploring different talents and skills facilitates industry in place of inferiority. The child regains her sense of worth as well as adds another layer to her identity. Beyond her belonging to a social group, her identity is now also a result of her own interests and capabilities.

During adolescence, identity development is at the forefront of children’s emotional growth. Teens consider the impacts of political ideologies and values on their identities. They utilize different sources of information and create various influential social ties to integrate ideal principles and values into a coherent philosophy according to which they choose to live their lives.<sup>36</sup> Though, for the most part, this political identity is consistent with those of peers and teachers, adoles-

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30. *Id.*

31. *Id.* at 115. Erikson is primarily concerned with children’s emerging sense of sexual differences and sexual roles that they adopt from their parents.

32. *Id.* at 120.

33. *Id.* at 121–22. At this early age, Erikson explains the child’s identity as “I am what I imagine I will be.”

34. *See id.* at 124.

35. Though attaching value to certain identity groups over others has become highly questionable, Erikson’s link between different groups and social value can be helpful as we move on to examine how assimilation demands on children may cause internalized trans/homophobia, thus creating the sense of inferiority Erikson warns about in his writing. *Id.*

36. Norman T. Feather, *Values in Adolescence*, in *HANDBOOK OF ADOLESCENT PSYCHOLOGY* 247, 254 (Joseph Adelson ed., 1980).

cents' identity formation is furthered by challenges to it.<sup>37</sup> A young person, who is prepared to protect her identity from others who threaten to change, disapprove of, or silence it, will emerge with a more resilient and stable identity. Stability and coherence will serve to maintain that identity further as the world around the teen changes. Identity stability and coherence also promotes self-regulation and a sense of direction necessary to meet future challenges.<sup>38</sup>

Going through identity development, teens experiment with different roles and identities, and may adopt identities as a form of rebellion against parents or others in their social environment. After taking the time to sort between alternative identities, a person's commitment to identity, traits and roles is more enduring.<sup>39</sup> All the different aspects of development—physical changes, cognitive skills, and social engagement—contribute to the process of morphing childhood roles into a more mature adult identity.<sup>40</sup> Without evaluation of different aspects and alternatives, a commitment to certain identities or identity traits, or lack of commitment altogether, could result in failure to sustain relationships or occupations.<sup>41</sup> Identity confusion then involves doubts regarding early forms of identity that may continue to hinder identity formation.<sup>42</sup>

Once the period of exploration is over, and the adolescent's task of identity formation is complete, a person is able to commit to values and life tasks.<sup>43</sup> She is also now able to accomplish what Erikson viewed as true intimacy: the merging of identities.<sup>44</sup> Where a coherent and stable identity has been achieved, adults enjoy higher levels of mental health than adults who have committed to identity without exploration or who have yet to achieve identity commitment.<sup>45</sup>

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37. ERIKSON, IDENTITY, *supra* note 29, at 130.

38. Feather, *supra* note 36, at 317.

39. PATTERSON, *supra* note 12, at 544.

40. James E. Marcia, *Identity in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 159, 161 (Joseph Adelson ed., 1980).

41. PATTERSON, *supra* note 12, at 544.

42. ERIKSON, IDENTITY, *supra* note 29, at 131–132. Erikson eloquently explains the harm of identity confusion: "Youth after youth, bewildered by the incapacity to assume a role forced on him by the inexorable standardization of American adolescence, runs away in one form or another, dropping out of school, leaving jobs, staying out all night, or withdrawing into bizarre and inaccessible moods."

43. PATTERSON, *supra* note 12, at 544.

44. ERIKSON, IDENTITY, *supra* note 29, at 135. Intimacy, according to Erikson, need not be only sexual. Instead, he focuses on "a true and mutual psychological intimacy with another person." *Id.*

45. PATTERSON, *supra* note 12, at 544.

Erikson dedicated portions of his work to the development of sexuality in children through adulthood. His account of this development is highly heteronormative and reflects a binary under which sex aligns with gender and sexual orientation.<sup>46</sup> Writing in the 1960s, Erikson did not even consider the possibility of sex or gender fluidity or the transitioning between sexes to better accommodate gender identity.<sup>47</sup> He was bewildered by the ability of people with same-sex sexual orientation to function well,<sup>48</sup> and believed that female sexuality is defined by non-maleness,<sup>49</sup> rather than being independent and equally valuable. Although Erikson's work provides a platform for understanding identity formation, his work on sexuality development is of lesser help when examining the development of non-heterosexual orientation or gender nonconforming identities.

Some psychologists suggest that in order to reach full identity achievement one must also come to self-acceptance and pride regarding sexual orientation and that mere commitment is insufficient to

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46. See ERIKSON, *IDENTITY*, *supra* note 29, at 285. Biological sex, according to Erikson, dictates gender identity development that is socially understood as attached to that anatomy; that is that females develop feminine gender identities. As Erikson puts it:

Am I saying then, that "anatomy is destiny"? Yes, it is destiny, insofar as it determines not only the range and configuration of physiological functioning and its limitation but also, to an extent, personality configurations. The basic modalities of woman's commitment and involvement naturally also reflect the ground plan of her body.

*Id.*

47. *Id.* at 285–86. Erikson considers variations to be possible only within gender/sex but not between genders/sexes. Women may move from heightened femininity to decreased femininity and even a degree of masculinity. Men, too, may contribute to "motherliness" as much as society permits. However, this is not a shift in gender identity — men taking up care duties maintain the understanding of their male/masculine gender identity rather than adopt a female/feminine gender identity. *Id.*

48. *Id.* at 53. After grouping "latent homosexuality" and "psychopathic tendencies," Erikson comments that,

it is true that individuals suspected of overt homosexuality have on occasion been treated with utmost derision and cruelty . . . if we ask why men choose such a life, why they stick to it. . . and above all why they function in good health, in high spirits, and with occasional heroism, we do not have a satisfactory dynamic answer.

*Id.*

49. *Id.* at 116–17 (describing differences between girls' and boys' development in early childhood, rooting such differences in penis envy and the oedipal complex. "While the boy has this visible, erectable, and comprehensible organ to which he can attach dreams of adult bigness, the girl's clitoris only poorly sustains dreams of sexual equality . . .").

establish an identity well prepared for intimacy.<sup>50</sup> This process of adopting a sexual minority identity and coming out as such to others is an ongoing process that occurs and evolves throughout life.<sup>51</sup>

While the question of gender identity and sexual orientation's causes may bear significance in certain legal matters that turn on whether these identities are immutable,<sup>52</sup> the normative question that occupies this article is whether, once these identities begin to emerge in children, the attempt to prevent their development or to manipulate and alter them is within the contours of schools' authorities (as a state actor) or other students' rights, particularly given the potential harm to children whose sexuality is contested by others.<sup>53</sup> The following parts provide a brief overview of assimilation demands on identity and their harms to children.

## B. Assimilation Demands: The Basics

The ideal of assimilation—conforming to the mainstream—is embodied in the metaphor of American society as a melting pot. According to this metaphor, minorities are encouraged to assimilate into a neutral, American identity, which incorporates traits from different identity groups.<sup>54</sup> Law Professor Kenji Yoshino criticizes assimilation as costly to one's authentic self—denying one's freedom to develop an identity independent of pressures to conform.<sup>55</sup> Yoshino distinguishes between assimilation that is necessary for citizenship, socialization,

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50. Mary Jane Rotheram-Borus & Kris A. Langabeer, *Developmental Trajectories of Gay, Lesbian, and Bisexual Youths*, in *LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH* 97, 99, 101 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001).

51. *Id.* at 102.

52. It should be noted here that the traditional approach to immutability—that an identity or trait are fixed and cannot be changed, thus garnering constitutional protection—has evolved to encompass identities and traits whose conversion is so highly burdensome that it would be abhorrent for the state to demand its change. *See generally* *Watkins v. U.S. Army*, 875 F.2d 699 (9th Cir. 1989); Susan R. Schmeiser, *Changing the Immutable*, 41 *CONN. L. REV.* 1495 (2009). Generally speaking, and without going into nuance that is outside the scope of this paper, race and gender are possible examples of the “old” immutability, whereas religion or appearance can be considered possible examples of “new” immutability.

53. Of course, attempts to change or police normative gender identities are similarly motivated by heteronormative animus and can be oppressive as well. However because the empirical and statistical data as presented below reveal that LGBT students are more negatively affected by assimilation demands. Thus assimilation demands on normative identities are out of the scope of this paper. *Cf.* Luke A. Boso, Symposium: *Policing Masculinity in Small-Town America*, 23 *TEMP. POL. & CIV. RTS. L. REV.* 345, 346 (2014); *cf.* Luke A. Boso, *Real Men*, 37 *HAWAII L. REV.* 107, 108–09 (2015).

54. YOSHINO, *supra* note 13, at 140–41, 179.

55. *See generally*, YOSHINO, *supra* note 13.

and peaceful social order, such as speaking a language or obeying the law, from assimilation that is coerced by others and may be motivated by animus toward a particular group or identity category.<sup>56</sup> These distinctions are not always clear and straightforward. Additionally, they may shift along context, place, and time.

Yoshino articulates three types of coerced assimilation (or “assimilation demands”): conversion, passing, and covering.<sup>57</sup> Conversion is the demand that one assimilate by changing an unfavorable identity or identity trait into a more acceptable one.<sup>58</sup> Passing is defined as the demand to assimilate by concealing one’s unfavorable identity and leading others to believe that the individual identifies with the mainstream.<sup>59</sup> Lastly, covering is the demand to assimilate by muting or downplaying the unfavorable identity that one has *made known* to others.<sup>60</sup> While conversion and passing target one’s status as a member of a minority group, covering, on the other hand, is a demand that focuses on conduct that expresses a minority identity.<sup>61</sup> Another aspect of covering, reverse-covering, is the demand that the individual perform according to stereotypes associated with her identity group.<sup>62</sup> It equally compromises one’s authentic identity and conduct. Because assimilation demands and their pressures conflict with an individual’s sense-of-self and her expression of that self, and undermine the consistency between the authentic self and the outwardly expressed self, all assimilation demands are harmful to identity and to the authentic self. Therefore assimilation demands create psychological burdens, such as feelings of inferiority or self-hatred.<sup>63</sup>

Yoshino’s work illustrates the unique obstacles that minorities face when confronting assimilation demands. He focuses extensively

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56. *Id.* at 26–27. Yoshino gives examples of racial minorities required to “act white” due to white supremacy; women instructed to downplay their family responsibilities at work because of patriarchy and LGBT persons asked not to “flaunt” because of homophobia. *Id.* at xi.

57. Yoshino is inspired by Erving Goffman’s work on stigma. Goffman describes how different socially unfavorable groups navigate the performance of their “spoiled identities” to escape social burdens such as stigmatization and discrimination. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITIES* 41–102 (1963).

58. YOSHINO, *supra* note 13, at 46.

59. *Id.* at 17–18.

60. *Id.* at 18.

61. *Id.* at 22 (“[D]iscrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons.”).

62. *Id.* at 23. Yoshino elaborates on reverse-covering with the example of women in the workplace. *Id.* at 143–52.

63. Lau, *supra* note 12, at 324–25.

on the divide assimilation demands create within one's sense-of-self—a dichotomy between the authentic self, true self, and a false self whose purpose is to mediate between the true self and the world.<sup>64</sup> When assimilation demands deny an authentic identity one cannot achieve full emotional health by appreciating and expressing her identity. Thus, identity development in the psychological sense, the development of understanding who we are, what we value, and where we are headed, is compromised by assimilation demands because these demands undermine the achievement of a coherent sense-of-self.<sup>65</sup>

### C. Assimilation Demands' Impact on Children

Assimilation demands on children are highly troubling as multiple factors increase children's vulnerability to such demands. Factors such as children's stage of identity and emotional development, their attachment and dependence on adults, and the power structure within their environments, leave children vulnerable to harmful assimilation demands. Children are then more dependent on protection from outside sources such as the legal system. To conclude that assimilation's harms should be mitigated by the law first requires examining the premise that children are in fact harmed, and severely so, by assimilation demands. The extreme level and quality of harm children suffer warrants state intervention.

Though Yoshino couches his arguments about assimilation's harms to identity in the idea of the authentic self,<sup>66</sup> Erikson's work adds to the understanding of assimilation's harms to identity, and particularly children's identity development. Erikson suggested that experimentation is pivotal for a healthy identity. If one is unable to

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64. YOSHINO, *supra* note 13, at 184–85 (presenting D.W. Winnicott's theory regarding true and false selves and the relationship among them as measures of psychological health). Both Winnicott's work and Yoshino's use of it have been subject to criticism by legal scholars. Paul Horwitz suggested that: "There is reason to be skeptical of Winnicott's simple schema of the true and false selves. [These vague terms are] not much help in identifying precisely what, if anything, the True Self means." Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1289–90 (2007) (book review). Marc Poirier questions Yoshino's assertion that authenticity is a universal goal, and therefore assimilation is a universal harm. Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. C.R. & SOC. JUST. 3, 37–39 (2008). I mention Winnicott's theory here because it is the psychological foundation for Yoshino's argument. As my own project continues, I make better use of Erikson's analysis of harms to identity because of identity foreclosure, confusion, and assimilation demands' general challenge to identity achievement and intimacy.

65. PATTERSON, *supra* note 12, at 543.

66. YOSHINO, *supra* note 13, at 184–85.

develop her identity through exploration she is at risk of identity confusion and foreclosure.<sup>67</sup> Thus, achieving a coherent and stable identity is necessary for adults to enjoy higher levels of mental health than adults who have committed to identity without exploration or who have yet to achieve identity commitment. Erikson touches on what, in effect, are assimilation demands on youth's identities. While adolescents struggle to forge a coherent identity that is natural and authentic to them, outside pressures to assimilate into an expected, more desirable identity may result in a range of harms to that teen. Put differently, assimilation demands threaten identity achievement because they discourage the exploration and experimentation necessary before committing to an authentic identity and thus may lead to the harms of identity confusion against which Erikson warns.<sup>68</sup> Without exploring the authentic self, identity foreclosure occurs, and with it the inability to accomplish intimacy as well as overall weakened emotional health.

Though, under Yoshino's and Erikson's theories, we are all harmed by assimilation demands that foreclose our identity exploration and compromise our healthy identity development, children are exceptionally vulnerable to assimilation demands because of their incomplete development.<sup>69</sup> Where adults who have completed their identity development are vulnerable to identity harms, certainly children who are still forming their identity are increasingly vulnerable to those harms. A legal framework that would aspire to end assimilation demands must deflect the particular and exacerbated harm assimilation demands create for children. Though Yoshino makes a compelling case for protecting adults from assimilation demands that violate their civil rights, the case for children's protection might be more challenging to make. That there are harms to children that are different and worse than harms to adults may not be an argument persuasive enough to overcome the state's strong interest in creating a productive and informed citizenry through education and its authority to do so. However, the state's power to educate should not justify a blanket rule against protection but rather require the development of more refined legal tools that can identify where protection is needed

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67. According to Erikson, identity confusion involves doubts regarding early forms of identity that may continue to hinder identity formation. ERIKSON, *supra* note 29, at 131. Identity foreclosure is the result of inability to explore identity options, roles or otherwise develop a sense-of-self. This hinders reaching identity achievement and the intimacy and overall emotional health. *Id.* at 135.

68. ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 131–132 (1964).

69. Lau, *supra* note 12, at 327.

and the form said protection should take. I illustrate immediately below the two primary reasons for legal intervention to protect children from assimilation demands: ensuring children's optimal development and the distinctive harms to LGBT youth.

### 1. Children's Optimal Development

The distinct and elevated harms children's identities suffer when subject to assimilation demands are a result of their developmental stage.<sup>70</sup> The law should take it upon itself to compensate for children's inability to deflect harmful assimilation demands since children have yet to fully develop coping skills and lack the resources that allow them to handle assimilation demands and their harms. More importantly, this leaves children particularly prone to assimilation demands that impose an identity that may not ring true.<sup>71</sup> Yoshino is primarily concerned with the individual's opportunity to develop her authentic self,<sup>72</sup> not with how she actually would accomplish doing so. Nowhere is the denial of exploration in identity development more critical than to children in a developmental stage that centers around this task. Yoshino's concern about assimilation demands restricting opportunities for exploration and experimentation with identity and authenticity is perhaps most relevant to children.

Because their identity has not yet formed, adults consider children waverers who must be protected from developing an unfavorable identity and converted to comply with expectation of what their identity should be.<sup>73</sup> Accordingly, schools may wish to indoctrinate or expose students only to values and goals the state sees appropriate. To preserve heteronormative social standards (a public interest whose validity is at least questionable under the Supreme Court jurisprudence

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70. *Id.* See also, Rotheram-Borus & Langabeer, *supra* note 50, at 105.

71. Lau, *supra* note 12, at 327.

72. Yoshino terms this "self-elaboration," which is "the most important work we can do." YOSHINO, *supra* note 13, at 184.

73. *Id.* at 44. It is also important to consider how the content of assimilation demands may vary depending on context and may be colored by how they implicate multi-faceted identities. Rachmilovitz, Masters, *supra* note 19, at 64. For example, the meaning of a "desirable" identity that the child develops will be different in a conservative versus a liberal community or family (see generally Boso, *Real Men*, *supra* note 53) or in transracial adoptions where the child's racial identity may be different than the parents (see Kim H. Pearson, *Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption*, 19 MICH. J. GENDER & L. 149 (2012); Kim H. Pearson, *Legal Solutions for APA Transracial Adoptees*, UC IRVINE L. REV. 1179 (2013)). Further on the issue of context, assimilation demands may be imposed by minority groups on their own members as well, see Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809 (2007); Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping* (forthcoming).

on LGBT cases in recent decades)<sup>74</sup> schools may utilize variously aggressive tactics in the context of sexuality such as discrimination or restrictions on speech or failure to prevent or end harassment of LGBT students by school staff or fellow students, all of which, sends students a message that same-sex sexual orientation or gender non-conformity are undesirable and punishable. Thus, schools often make students vulnerable to assimilation demands in their most severe forms (conversion and passing). And indeed LGBT students, as a whole, tend to be better protected by the law in this context from assimilation demands than adult employees, university students, or children experiencing assimilation demands at home.

Conformity to assimilation demands causes children and youth to abandon their sense-of-self and commit to goals and values they are expected to adopt even when these are inconsistent with their identity.<sup>75</sup> As teens struggle with developing their identity, assimilation demands jeopardize a strong sense-of-self and psychological health, resulting in a young person's reduced productivity, depression, and difficulty forming and sustaining intimate relationships.<sup>76</sup> Other unfortunate consequences of victimization are high rates of suicidality,<sup>77</sup> substance abuse,<sup>78</sup> and homelessness due to either running away from home or being cast out by parents.<sup>79</sup> Faced with assimilation demands, children realize they cannot depend on their close contacts for support in their identity explorations.<sup>80</sup>

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74. *Lawrence*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996); *Obergefell*, 135 S. Ct. 2584 (2015). See *infra* Part III.B.

75. Lau, *supra* note 12, at 332.

76. *Id.* at 329–30.

77. Rotheram-Borus & Langabeer, *supra* note 50, at 111–13. See also Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay and Bisexual Young Adults*, 123 *PEDIATRICS* 346, 229 (2009), (Feb. 7, 2016, 10:56 AM) <http://pediatrics.aappublications.org/content/123/1/346.full?ijkey=NrncY0H897IAU&keytype=ref&sitevid=aapjournals> [<https://perma.cc/GY74-L9YX>] (presenting data regarding depression, suicidality and the link between them). Additional studies show that youth at the intersection of sexual orientation and race/ethnicity are at even greater risk for depression and suicidality.

78. Rotheram-Borus & Langabeer, *supra* note 50, at 97–98.

79. PATTERSON, *supra* note 12, at 491–92. See also Rotheram-Borus & Langabeer, *supra* note 50, at 104 (reporting high rates of negative reactions from parents upon children's disclosure of same-sex sexual orientation, including high rates of children being expelled from home pursuant coming out).

80. Rotheram-Borus & Langabeer, *supra* note 50, at 105, mainly referring to parents and friends, but the same may apply to teachers, school staff or fellow students. See also SURVEY 2013, and SURVEY 2009, *infra* note 102.

## 2. Assimilation's Harms on LGBT Youth

While Yoshino centers his theory primarily on sexual minorities because he believes some assimilation demands apply to this group more than others, I concentrate on sexual minority youth because they are more vulnerable to assimilation demands than other groups are. Indeed, the younger children who come out as LGBT are more likely to experience victimization at school, as younger children and teens tend to be less accepting of LGBT peers.<sup>81</sup>

Research in psychology has identified several specific negative outcomes linked to victimization of LGBT students in schools, both in the short term and later in life,<sup>82</sup> such as depression, compromised life satisfaction,<sup>83</sup> and lower self-esteem.<sup>84</sup> Other outcomes are harmful behavior such as suicide attempts, illegal drug use, risky sexual behavior<sup>85</sup> (including higher risk of HIV or sexually transmitted infections and diagnoses),<sup>86</sup> delinquency, and aggression.<sup>87</sup> One study found that severe victimization almost doubled the rates of these negative health outcomes, across the board, compared to mild or low victimization.<sup>88</sup> Another study found that adults who have experienced victimization in school because they were gender nonconforming regardless of sexual orientation are at higher risk of developing post-traumatic stress disorder later in life than those who were not gender nonconforming.<sup>89</sup>

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81. Stephen T. Russell, Russell B. Toomey, Caitlin Ryan & Rafael M. Diaz, *Being Out at School: The Implications for School Victimization and Young Adult Adjustment*, AM J. OF ORTHOPSYCHIATRY 84(6) 635, 636–37 (2014) [hereinafter *Out at School*]. The argument may, however, be made that coming out earlier can be beneficial, as younger children may have a more fluid concept of difference, especially on gender identity and expression lines. I am only aware of anecdotal, rather than research-based, evidence in support of this proposition.

82. *Id.* at 636.

83. Russell B. Toomey, Caitlin Ryan, Rafael M. Diaz, Noel A. Card & Stephen T. Russell, *Gender-Nonconforming Lesbian, Gay, Bisexual and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 1(s) PSYCHOLOGY OF SEXUAL ORIENTATION AND GENDER DIVERSITY 71, 75 (2013).

84. Russell et al., *Out at School*, *supra* note 81, at 640.

85. *Id.* at 641.

86. Stephen T. Russell, Caitlin Ryan, Russell B. Toomey, Rafael M. Diaz, Jorge Sanchez, *Lesbian, Gay, Bisexual and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81(5) J. OF SCHOOL HEALTH 223, 229 (2011) [hereinafter *School Victimization*].

87. *Id.* at 224, 228. Tying these outcomes to physical victimization, and finding them in greater incidence in boys than in girls.

88. *Id.* Fig. 1, at 228.

89. Toomey et al., *supra* note 83, at 73.

Unfortunately, many sexual minority children are not raised in supportive environments (i.e. families and/or schools) that stand by them regardless of their sexual orientation or gender identity and which can temper the effects of victimization. Coupled with family rejection, school-based mistreatment leads to a lack of educational opportunities, and thus lower income potential.<sup>90</sup> Studies on the state of LGBT youth in additional contexts, such as homelessness or the criminal juvenile system,<sup>91</sup> reflect the pervasive and egregious consequences that LGBT youth suffer because of assimilation demands. Thus the negative outcomes of assimilation demands are compounded with the impact of several sources of victimization, for instance families, peers, and other life circumstances, such as socioeconomic status, quality of relationships, and personality factors.<sup>92</sup> On the bright side, being out at school (that is, being better able to resist assimilation demands in some way) has been linked to better emotional adjustment.<sup>93</sup> These findings together illustrate the urgency of systemic change to end the disempowerment and vulnerability of LGBT youth.<sup>94</sup>

But what is it about sexual orientation or gender identity that makes LGBT youth so vulnerable to harmful environments? Sexual orientation and gender identity, as identity categories, are independent of the sexual orientation or gender identity of family members. As opposed to racial or religious minority youth whose community may typically share their racial or religious identity and can therefore provide guidance, support, and encouragement during the stages of identity development, LGBT youth usually have no such inherent support system.<sup>95</sup> LGBT youth are faced with exploring, forming, disclos-

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90. Considering the harms to education rights and equity and the negative education outcomes described throughout this piece, it is only a logical conclusion that such compromised education would lead to lower earning potential.

91. For a study on the vulnerability of LGBT youth for over-involvement in and higher penalties from the juvenile system, see Kathryn Himmelstein & Hannah Bruckner, *Criminal Justice and School Sanctions Against Nonheterosexual Adolescents: A National Longitudinal Study*, 127 PEDIATRICS 49, 52 (2011), (Feb. 7, 2016, 11:05AM) <http://pediatrics.aappublications.org/content/127/1/49.full.pdfhtml> [https://perma.cc/LH3X-5Z8Q]; NICHOLAS RAY, NATIONAL GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 21–22, 59, 71 (2006), (Feb. 7, 2016, 11:09AM) [http://www.thetaskforce.org/static\\_html/downloads/HomelessYouth.pdf](http://www.thetaskforce.org/static_html/downloads/HomelessYouth.pdf) [https://perma.cc/R47X-PTJA].

92. Toomey et. al, *supra* note 83, at 78.

93. Russell et al., *Out at School*, *supra* note 81, at 635.

94. See also suggestions regarding institutional change, *id.* at 641.

95. STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION & GENDER IDENTITY IN AMERICAN PUBLIC EDUCATION 124 (2010) (“[A]n LGBT identity often emerges quietly

ing, and performing their sexuality without assistance, and often with hostility.

Heteronormative culture translates into LGBT youth often suffering the most extreme type of assimilation demands, which in turn, renders them prone to the most severe harms as a result of such demands. American society and its legal system tend to be uncomfortable with the sexuality of children and youth, and particularly with the prospect of young people developing non-heteronormative identities. This “moral panic”<sup>96</sup> guides courts deciding custody disputes involving lesbian or gay parents,<sup>97</sup> informs education policies such as “No Promo Homo” laws,<sup>98</sup> and ultimately motivates mistreatment of non-heteronormative children, whether they identify as LGBT or not.

Although all children may be vulnerable to assimilation demands, sexual minority children are at higher risk because they are left to develop their sexual orientation or gender identity often without community support.<sup>99</sup> Moreover, developing and asserting sexual minority identities comes at a higher cost to emotional health due to social heteronormativity—whether internalized or from outside sources—and pursuant isolation.

Sexual minority youth may find themselves required to defend their sexuality. To the extent that same-sex sexual orientation or gender nonconforming identities are becoming more acceptable for adults, these identities should be respected as valid for youth, as well. Presumably, LGBT adults used to be LGBT youth.<sup>100</sup> Assimilation demands designed to prevent or mitigate non-heteronormative sexual orientation and gender identity should be considered equally as unac-

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and secretly within a young person. It may be the case that the young person has no one to turn to—no friends to talk with about it, no family or community members to open up to.”). *But see* Pearson, *APA Transracial Adoptees*, *supra* note 73, at 1189; Pearson, *LGBT Transracial Adoption*, *supra* note 73.

96. See GILBERT HERDT, *INTERSECTIONS: MORAL PANIC, SEX PANICS: FEAR AND THE FIGHT OVER SEXUAL RIGHTS* 5 (2009). Moral panic involves “[l]arge social events occurring in troubled times when a serious threat by evil-doers incites societal reaction.” *Id.* at 5.

97. See Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 *YALE J. L. & FEMINISM* 257, 285 (2009).

98. See William N. Eskridge Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 *N.Y.U. L. REV.* 1327 (2000) (discussing policies and laws prohibiting positive discussion of homosexuality in school programs and curricula, or any such discussion at all).

99. YOSHINO, *supra* note 13, at 184.

100. This, of course, does not discount LGBT adults who have arrived at their sexual identity later in life, or the fluidity in sexual orientation or gender expression some may experience throughout life, for example of exceptions to this statement. This is why it is qualified with “presumably.”

ceptable because they, too, reflect homophobia and are motivated by it. Still, one could argue that although possessing these identities as adults is value-neutral, it is important to prevent or mitigate them in children because avoiding early queer identities might reduce the discrimination or harassment children would grow to encounter as adults. This argument is unpersuasive. If LGBT identities were truly value-neutral, as they should be and are becoming under cases such as *Lawrence*, *Romer*, and *Obergefell*, these potential rights infringements (themselves assimilation demands) or other forms of mistreatment adults experience would not be a concern—they would no longer exist as acceptable or tolerated behavior toward sexual minorities.

## II. Behind the Schoolhouse Gate: Enhanced Protections for Sexual Minority Students

Two main areas of jurisprudence govern problems of state-based assimilation demands in educational settings.<sup>101</sup> The first is discrimination and harassment law, where sexual minority youth suffer unequal or hostile treatment at school because their sexuality does not conform to heteronormativity. The second relevant area of jurisprudence is free speech, where students dispute the limitations of whether and how they are allowed to express their sexuality in the educational setting.

Beyond the fact that mistreatment of LGBT students infringes upon their legal rights, such mistreatment has the effect of compromising children's educational interests. Mistreatment at school impacts LGBT students' access to education and their ability to have a meaningful and beneficial education. About a third of students participating in a school climate survey<sup>102</sup> reported missing at least one day

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101. Other contexts, while state-based, reflect a conflict between parents' rights and state authority in forming children's identities and directing their education. These contexts may include religious education, sexual education, or LGBT-related issues woven into the general curriculum. Because this paper examines primarily state-based education as conflicting with students' rights, rather than parents' rights, and because adults (whose rights do not depend on a third party in the way children's rights do on parents,) rendering the comparison between children and adults generally lacking in any meaningful utility, aside from their discussion below, those contexts of school-based assimilation are generally beyond the scope of this paper.

102. See Joseph G. Kosciw, et al., *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 13* (2013) [hereinafter *SURVEY 2013*] (The survey sample consisted of over 7,898 LGBT students between the ages 13–21 from all 50 states and the District of Columbia.); cf. Joseph G. Kosciw, et al., *The 2009 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 13* (2010) [hereinafter *SUR-*

of school a month because they feel unsafe. Sixty-one percent of students who have been severely or frequently victimized based on their sexual orientation missed school, compared to 18.2% of students who experienced lower victimization because of their sexual orientation.<sup>103</sup> Similar rates are reported regarding gender expression: 58.6% of students who experienced higher victimization on this basis missed school, compared to only 17.3% of students experiencing lower victimization.<sup>104</sup> The mean grade point average for students who have been frequently harassed because of their sexual orientation or gender identity is over half a grade lower than that of students who were harassed less often (2.8 for sexual orientation and 2.9 for gender identity versus 3.3).<sup>105</sup> Also, LGBT students who experienced higher levels of victimization were far less likely to pursue higher education than LGBT students who experienced lower levels of victimization.<sup>106</sup>

The import of education is reflected in a system of legislative protections for education access and equity, both at the federal and state levels. At the federal level, statutes such as No Child Left Behind,<sup>107</sup> the Education Equal Access Act,<sup>108</sup> and Title IX of the Education Amendments Act of 1972<sup>109</sup> are all designed to ensure children in the United States receive an education that prepares them for adult life, as well as offer some protection to LGBT students. The Education Equal Access Act, for example, ensures that a school that permits student groups to operate at school, must extend the same to LGBT student groups such as Gay-Straight Alliances. Title IX has been interpreted to extend protection mainly to trans and gender non-conforming students, guaranteeing them access to the bathrooms and locker rooms consistent with their gender identity or ensuring that they may dress according to their gender identity.

California is an apt example for protections on the state level, as a state with strong protections for equity in education both generally and for LGBT youth specifically. California prioritized education so

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VEY 2009] (Just over a quarter reported missing at least one day of school a month because they felt unsafe in the 2009 survey, consisting of over 7,200 LGBT students between the ages 13–20 from all 50 states.).

103. SURVEY 2013, *supra* note 102, at xviii.

104. SURVEY 2013, *supra* note 102, at 49.

105. *Id.* at 47, at xvii (compared to 2.7 versus 3.1 SURVEY 2009, *supra* note 102).

106. *Id.*, at xviii (8.7% of LGBT students who experienced higher levels of victimization, compared to 4.2% of LGBT students who experienced lower levels of victimization). *See also id.*, n. 29 and accompanying text.

107. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002).

108. 20 U.S.C. § 4071 (2011).

109. 20 U.S.C. § 1681(a) (2011).

much that it has enshrined the right to education in its Constitution.<sup>110</sup> Establishing a Constitutional right to education, the CA Constitution highlights the significance of: “[a] general diffusion of knowledge and intelligence [as] being essential to the preservation of the rights and liberties of the people.”<sup>111</sup> California’s Constitution and laws require the State to provide basic education opportunities to every child. The public education system must be open and equal for all students so that no student is denied the necessary conditions to learn. California’s Student Safety and Violence Prevention Act guarantees equal rights and opportunities in education to all students, regardless of their actual or perceived sexual orientation or gender identity.<sup>112</sup> In the summer of 2011, California became the first state in the nation to require school curriculum and textbooks to incorporate instruction about the contribution of LGBT people in history and social science classes.<sup>113</sup> Additionally, children in California are obligated by law to attend school, as they may face sanctions for truancy otherwise.<sup>114</sup>

Against this background of the alarming data and legislative response, this Part more deeply examines the legal protections available for LGBT employees and those available for LGBT students. It analyzes the seminal case law relevant to the two contexts in order to show that indeed courts tend to better protect children than adults from assimilation demands targeting sexual orientation or gender identity. It then offers a taxonomy for the ways in which courts protect children where they do not extend the same to adults.

The purpose of this comparison and the taxonomy that follows is not to suggest that protections for adults should necessarily fall in line with those of children, or vice versa. Instead it is to ventilate the potential reasons behind the different legal protections, so that strategic use could be made of them in the future. When we understand the motivation for different legal protection, we can identify when adverse legal protections are reasonable and when they are not, and thus more persuasive and deliberate about how we work to advance such protections where they are lacking.

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110. CAL. CONST. art. IX, §§ 1, 5.

111. CAL. CONST. art. IX, § 1.

112. CAL. EDUC. CODE § 200.

113. 2011 Cal. Stat. 1914; Patrick McGreevy, *Gov. Brown Signs Bill Requiring Teaching of Gay Accomplishments*, POLITICAL: L.A. TIMES BLOG (Feb. 7, 2016, 11:28 AM), <http://latimesblogs.latimes.com/california-politics/2011/07/governor-signs-bill-requiring-textbooks-to-include-gay-accomplishments.html> [https://perma.cc/U3SR-K6J3].

114. 2010 Cal Stat. 3447.

## A. Discrimination and Harassment

Below I examine assimilation demands on adults in the workplace, first to explain discrimination and harassment as assimilation demands but also to lay the foundation for the claim that students experiencing this type of assimilation demands are better off than adults.

### 1. Sex Discrimination and Sexual Harassment in Employment: Limited Protection for Adult Employees

Discrimination and harassment jurisprudence under Title IX draws from its employment counterpart, Title VII of the Civil Rights Act of 1964. Like Title IX in the education context, Title VII prohibits discrimination in employment opportunities and conditions because of sex,<sup>115</sup> whether in the form of disparate treatment or disparate impact.<sup>116</sup> An employer can defend its adverse decision by showing that sex is a *bona fide* occupational qualification (“BFOQ”) reasonably necessary to the normal operation of that particular employer.<sup>117</sup> As Title VII does not mention sexual orientation or gender identity as grounds for protection from discrimination in employment, as a result claimants facing such discrimination have brought their cases under sex discrimination theories, arguing that sexual orientation or gender identity are considered problematic only when they do not align with expectations as to what it means to be of a particular sex. Our understanding of “sexual orientation” or “gender identity” are then a function of our understanding of “sex.” As the argument goes, same-sex sexual orientation is a basis for discrimination because had one been of the opposite sex, her sexual orientation would have been acceptable (i.e., it is acceptable for a man to be sexually attracted to or to partner with women, but it is not acceptable for a woman to be attracted to or to partner with women. Put differently, but for one’s sex, her choice of partner would be a legitimate choice). Therefore, the discrimination does not turn on sexual orientation but rather on the sex of the persons involved. Hence, sexual orientation discrimination is to be considered within the contours of sex discrimination. How-

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115. 42 U.S.C. § 2000e-2(a)(1).

116. WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION LAW 449 (3d ed., 2008) (explaining disparate treatment as the differential treatment of employees, whereas disparate impact refers to instituted policies that “while neutral on their face have a negative and disproportionate effect on a protected class”).

117. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242–43 (1989). The BFOQ is also understood as the business necessity test. One example of when the test could be satisfied is when discrimination based on sex is imperative to the employer’s efficiency.

ever, courts have rejected this argument, finding that the basis for discrimination (i.e., disapproval of a same-sex relationship, applied equally both to men (gays) and women (lesbians) and therefore did not constitute sex discrimination).<sup>118</sup> With this framing by courts, sexual orientation discrimination as sex discrimination claims have been generally unsuccessful,<sup>119</sup> with the exception of the “sex stereotyping” theory which has at times generated positive results for LGBT claimants.<sup>120</sup>

The Supreme Court first recognized the “sex stereotypes” theory in *Price Waterhouse v. Hopkins*.<sup>121</sup> Ann Hopkins, a senior manager at Price Waterhouse, sued the firm for denying her partnership because of her sex. Hopkins argued that despite her accomplishments and contributions to the firm,<sup>122</sup> she was denied partnership because she did not conform to stereotypes regarding femininity in her demeanor and presentation.<sup>123</sup> Based on the partners’ comments about Hopkins, the Court found that the firm’s decision not to promote Hopkins to partner was based on sex stereotypes,<sup>124</sup> and that evaluating employees based on their conformity with stereotypes associated with

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118. *DeSantis v. Pacific Telephone & Telegraph, Co., Inc.*, 608 F.2d 327, 331 (9th Cir. 1979). *But see* the latest moves by the Equal Employment Opportunity Commission (“EEOC”), going in the opposite direction, as discussed below in Part III.D. *See also* Boso, *Acting Gay*, *supra* note 73.

119. *DeSantis*, 608 F.2d at 329–30 (“Giving the statute its plain meaning . . . Congress had only the traditional notions of “sex” in mind . . . [I]n passing Title VII Congress did not intend to protect sexual orientation and has repeatedly refused to extend such protection.”).

120. *But see* Omar Gonzalez-Pagan & Ria Tobacco Mar, *Laws Barring Sex Discrimination Also Protect Sexual Orientation*, N.Y. L. J., (Feb. 7, 2016, 11:45 AM), <http://www.newyorklawjournal.com/id=1202747483046/?slreturn=20160021130214> (a review of the 2015 decision of the EEOC that sexual orientation is in fact a form of “sex” for purposes of Title VII) [<https://perma.cc/LRF2-A8BC>].

121. *Price Waterhouse*, 490 U.S. 228. Under the “sex stereotypes” theory, employers expected employees to perform at their jobs while still conducting themselves according to stereotypes associated with their sex. Employers who penalized employees for failing to conform to sex stereotypes could be held liable for sex discrimination. Ann Hopkins, therefore, was expected to be an effective professional (presumably, perform as well as a man) but do so while maintaining her femininity.

122. *Id.* at 233–34. Hopkins was considered to perform at “partner level,” worked long hours, was a “highly competent project leader” and landed a \$25 million contract for the firm.

123. *Id.* at 235. Partners found her too aggressive and abrasive for a woman, recommended she take a “course in charm school” and that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” *Id.*

124. *Id.* at 250 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

their group was an impermissible measure of evaluation under Title VII.<sup>125</sup>

Since *Price Waterhouse*, LGBT plaintiffs have tried, with mixed results, to utilize the sex stereotypes theory to pave the way for inclusion of sexual orientation discrimination under the sex discrimination protections of Title VII.<sup>126</sup> Success has been more notable in cases of sexual harassment, a subset of sex discrimination. At the time *Price Waterhouse* was decided, in order to make the case that one had suffered sexual harassment she would have to show, in addition to having been discriminated against because of sex, that she endured one of two types of sexual harassment: *quid pro quo* or hostile environment. *Quid pro quo* cases are those where the employer conditions employment, firing, demoting or promoting upon engaging in a sexual relationship with the employee,<sup>127</sup> or that her work conditions or continued employment status are such because the employee would not acquiesce to her supervisor's unwanted sexual advances.<sup>128</sup> A hostile environment case concerns work conditions that are sufficiently hostile to members of one sex so as to make it difficult for the harassed parties to perform at work. The harassment must be severe or pervasive, must be objectively hostile according to a reasonable person standard as well as subjectively hostile to the specific victim.<sup>129</sup>

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125. *Id.* at 251 (“[A] number of the partners’ comments showed sex stereotyping at work. As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . . Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”).

126. An example of successful application of the sex stereotyping theory to sexual orientation is *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (explaining that the sex stereotypes theory “would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine. But, under this theory, relief would be available for discrimination based upon sexual stereotypes.”). However, an example of the rejection of the sex stereotypes theory as protecting from sexual orientation discrimination is *Dawson v. Bumble & Bumble*, where the employee, a hair assistant sued her employer, a hair salon, claiming she was discriminated against because she was a lesbian whose overall appearance was masculine. 398 F.3d 211 (2d Cir. 2005). The court held that to the extent that the employee was alleging discrimination based on her sexual orientation, she could not satisfy the first element of a *prima facie* case under Title VII because it did not recognize LGBT persons as a protected class. *Id.* See also *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015); see discussion below in Part III.D.; and, see also *Boso, Acting Gay*, *supra* note 73.

127. RUBENSTEIN ET AL., *supra* note 116, at 450.

128. The Court moved toward this doctrine, the “tangible employment action” doctrine, in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

129. RUBENSTEIN ET AL., *supra* note 116, at 450.

In *Rene v. MGM Grand*,<sup>130</sup> the court considered the same-sex sexual harassment of a gay employee who was harassed by fellow employees for over two years.<sup>131</sup> The court found that the victim's sexual orientation was irrelevant in sexual harassment claims,<sup>132</sup> and that demonstrating that the harassment was of a sexual nature was sufficient to establish a sexual harassment claim.<sup>133</sup> The concurring opinion adopted the sex stereotypes theory, finding that Rene's co-workers treated him as they would a woman and that the abusive treatment related to Rene's gender.<sup>134</sup> The dissent, however, rejected both options and maintained that Rene's harassment was not protected under Title VII because according to Rene's own testimony it was harassment because of sexual orientation.<sup>135</sup> The feminine conduct that Rene exhibited was rooted in his sexual orientation and therefore the dissent viewed his sexual orientation as the real motive behind the harassment.<sup>136</sup> The dissent also rejected Rene's sexual harassment claim because it was inconsistent with the options of prohibited same-sex sexual harassment that the Supreme Court had articulated in *Oncale v. Sundowner*.<sup>137</sup>

In *Oncale*, the Supreme Court considered whether same-sex sexual harassment, in addition to opposite-sex sexual harassment, could be protected under Title VII. There, the employee sued his employer for failing to protect him from sexual harassment and sexual assaults he endured while working on an all-male oil platform.<sup>138</sup> The Court

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130. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002).

131. *Id.* at 1064 ("The harassers' conduct included whistling and blowing kisses at Rene, calling him 'sweetheart' and 'muneca' (Spanish for 'doll'), telling crude jokes and giving sexually oriented 'joke' gifts, and forcing Rene to look at pictures of naked men having sex. On 'more times than [Rene said he] could possibly count,' the harassment involved offensive physical conduct of a sexual nature. Rene gave deposition testimony that he was caressed and hugged and that his coworkers would 'touch [his] body like they would to a woman.' On numerous occasions, he said, they grabbed him in the crotch and poked their fingers in his anus through his clothing. When asked what he believed was the motivation behind this harassing behavior, Rene responded that the behavior occurred because he is gay.").

132. *Id.* at 1066.

133. *Id.* at 1068.

134. *Id.* at 1068-69 (Preggerson, J., concurring).

135. *Id.* at 1077 (Hug, J., dissenting).

136. *Id.*

137. *Id.* at 1072-73 (discussing *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998)).

138. *Oncale*, 523 U.S. at 77 ("On several occasions, Oncale was forcibly subjected to sex-related, humiliating actions against him . . . in the presence of the rest of the crew. [Two co-workers] also physically assaulted Oncale in a sexual manner, and [one of them] threatened him with rape.").

ruled that nothing in Title VII bars anti-discrimination protection simply because the harasser and victim are of the same sex.<sup>139</sup> However, the Court limited the scope of this protection to three possible scenarios. The first scenario for possible same-sex sexual harassment, acting under the basic assumption that sexual harassment is motivated by sexual desire, would require the harasser to have a same-sex sexual orientation.<sup>140</sup> However, conceding that not all sexual harassment is motivated by desire alone, the second scenario considers that animus to the presence of members of one sex as a group in the workplace may motivate harassment. Therefore, hostile or derogatory treatment that is sex-specific toward an employee of the same-sex could constitute sexual harassment.<sup>141</sup> In the third scenario, harassment is directed only to members of one sex in a mixed-sex workplace.<sup>142</sup> The Court then remanded the case for factual findings on whether the circumstances at hand fit into any of these three scenarios.

Yoshino offers an assimilation demands perspective to these cases that further illuminates the difficulty in relying on sex discrimination claims to protect sexual orientation. Yoshino observes that Hopkins was, in essence, caught in a double bind—or as he puts it, reverse-covering. Reverse-covering is Yoshino’s term for situations where the dominant group imposes assimilation demands on the minority, pressuring one to *flaunt* her minority status, traits and characteristics and to conform to stereotypes associated with that minority group.<sup>143</sup>

At the same time, Hopkins was experiencing pressures at her workplace both to cover her femininity (by being an aggressive, go-getting business woman) and to flaunt it (wear make-up and jewelry, and attend charm-school).<sup>144</sup> Her superiors expected her to bring the

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139. *Id.* at 79.

140. *Id.* at 80 (“Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.”).

141. *Id.* (“But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.”).

142. *Id.* at 80–81 (“A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.”).

143. YOSHINO, *supra* note 13, at 143–44.

144. *Id.* at 155.

results any man would, but to go about accomplishing those results as an attractive woman would.<sup>145</sup> When she failed to walk the fine line between covering and reverse-covering, the partners penalized her by denying her partnership. Finding that this form of discrimination—the double bind—falls under Title VII, the Court implied that Hopkins could not have balanced differently the assimilation demands she faced. Yet, Yoshino asserts that Hopkins' ability to cover and reverse-cover simultaneously should be immaterial. Suggesting that the demands Hopkins' encountered were motivated by an attempt to preserve stereotypical gender roles, Yoshino maintains that protection from covering and reverse covering demands that are contingent on the existence of a double bind (i.e., that both types of demands must co-exist) leaves subjects of assimilation demands vulnerable.<sup>146</sup> In support, he notes that his research yielded “no federal Title VII case after *Hopkins* in which a ‘feminine’ woman prevailed against an affect-based covering demand on sex-stereotyping grounds.”<sup>147</sup> The law, therefore, continues to condone the requirement that women and gay men perform their minority identities, as a way to maintain male dominance in the workplace. When the standard for professional success is still the straight man, but the expected methods to gain success are measured against one's minority identity, the result is both a personal and social harm. Women and gay people must still conduct themselves in ways that are pleasing, or at least non-threatening, to straight men and their masculinity. Female and gay identities are thus devalued and objectified so that power imbalances and hierarchical relationships, dominated by straight men, can remain the prevalent social order.

The dissenting opinion in *Rene*, which generally falls in line with most other cases addressing the possibility of Title VII protection for sexual orientation discrimination,<sup>148</sup> suggests an additional reason to

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145. *Id.* at 145, 149 (“In many workplaces, women are pressured to be ‘masculine’ enough to be respected as workers, but also to be ‘feminine’ enough to be respected as women . . . . If women are not ‘masculine’ enough to be respected as workers, they will be asked to cover. If they are not ‘feminine’ enough to be respected as women, they will be asked to reverse cover.”).

146. *Id.* at 161.

147. *Id.* at 161 (“I could find no federal Title VII case . . . in which a ‘feminine’ woman prevailed against an affect-based covering demand on sex-stereotyping ground. This finding suggests what women have in common with gays and racial minorities: a profound legal vulnerability to the demand that they cover the behaviors stereotypically associated with their group.”).

148. For cases reaching similar conclusions regarding sexual orientation harassment as unprotected under Title VII, see *Higgins v. New Balance Athletic Shoe*, 194 F.3d 252 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001). *But see Centola v. Potter*, 183 F.Supp.2d 403

exercise care when relying on sex discrimination claims to protect sexual orientation discrimination. The dissent rejects the argument that sexual orientation is encompassed in sex, and maintains that Title VII precludes protection to employees harassed because of their sexual orientation.<sup>149</sup> In rejecting the possibility that Rene had been harassed because of his effeminacy—his nonconformity to male sex stereotypes—the dissent opines that Rene was performing his gender in feminine ways because of his sexual orientation.<sup>150</sup> In assimilation demands terms, the dissent saw the harassment as if Rene’s co-workers’ demanded he cover his sexual orientation, not reverse-cover his masculinity—a covering demand that the dissent finds permissible under Title VII. Interestingly, by failing to protect Rene from this covering demand the dissent effectively imposes on Rene (and through him, on other potential gay or lesbian litigants) a passing demand; that Rene’s sexual orientation was known to his co-workers and to the court seemed material for the dissent’s conclusion that Title VII was not applicable. Perhaps if neither knew of Rene’s sexual orientation, the dissent would have entertained the covering demand as sexual harassment prohibited by Title VII and would have found in favor of Rene. Perhaps not. Still this possibility creates a passing demand as it discourages gays and lesbians from coming out in the workplace, and then later, in court.

## **2. Sex Discrimination and Sexual Harassment in Education: Greater Protections for Schoolchildren**

Courts heavily borrow from the adult employment context to resolve sex discrimination and harassment cases in school. LGBT students have generally been more successful in court than adults; this reflects a policy to extend greater protection to children, even when parallel claims by adults fail. Undoubtedly, the success of litigation efforts is an important feat for the LGBT rights movement. Despite these important accomplishments, however, the statistics on school climate for LGBT youth—which have gone down in recent years<sup>151</sup>—remain alarming; statutory protections are not in place in many states (some have even rolled back on protections), and cases continue to

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(D.Mass. 2002) (finding that sexual orientation discrimination, alongside sex discrimination, should not be held against the plaintiff).

149. *Rene*, 305 F.3d at 1075–76 (Hug, J., dissenting).

150. *Id.* at 1077–78.

151. See and compare the data below, e.g. *infra* notes.

be brought to courts.<sup>152</sup> So, although courts crack down on schools and educators more aggressively than on employers, the LGBT movement's litigation strategy has only served as a partial cure for school-based assimilation demands. Still, in order to design future strategies, it is worth considering the achievements so far.

Below are four examples for how courts better protect LGBT students from discrimination and harassment (a fifth example, in regard to speech will be discussed in the next part): (1) courts have not required that students demonstrate suffering a double bind when applying the sex stereotyping theory in their favor;<sup>153</sup> (2) courts have more readily restricted same-sex sexual harassment;<sup>154</sup> (3) courts have been more willing to interpret "sex" to include sexual orientation or gender identity;<sup>155</sup> and (4) even before *Lawrence v. Texas*<sup>156</sup> was decided, criminalization of sodomy was not accepted as a justification for discrimination or harassment of students.<sup>157</sup> However, there is one way in which courts put obstacles in the way of students raising discrimination or harassment claims that is not present in adult cases: students must demonstrate that their academic achievement has been affected by the mistreatment.<sup>158</sup> Adults, on the other hand, need not show any adverse impact to their performance at work. Still, by extending stronger protections to students, courts effectively recognize children's identity interests in the educational environment, their heightened vulnerability to assimilation demands, and their greater need for legal protections from such demands.

Social science findings on the effects of bias against lesbian, gay, bisexual, or transgender persons, or others who have relationships with LGBT persons,<sup>159</sup> expressed through discrimination or harassment, reveal the particularly harmful effect on those experiencing it. Schools that have committed to combating homophobia mitigate its

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152. Consider recent litigation around HB-2, as well as *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3202 (U.S. Oct. 28, 2016) (No. 16–273), pending at the United State Supreme Court (as of February 2017), *see* <https://www.aclu.org/cases/gg-v-gloucester-county-school-board> [<https://perma.cc/T2WY-U5V2>].

153. See *infra* Part II.A.2.i.

154. See *infra* Part II.A.2.ii.

155. See *infra* Part II.A.2.iii.

156. *Lawrence v. Texas*, 539 U.S. 558 (2003).

157. See *infra* Part II.A.2.iv.

158. See *infra* Part II.A.2.

159. Homophobia negatively affects students who have relationships with LGBT persons as well. For instance the pervasive use of the term "gay" or the phrase "you're/that's so gay" as an insult or negative reference, can be emotionally detrimental and an infringement of educational rights of students whose parents, friends or relatives are LGBT.

harms and facilitate safer school environments. At 64.5%, a majority of students participating in school climate surveys<sup>160</sup> reported hearing homophobic remarks, with 51.5% hearing them from school staff.<sup>161</sup> A majority of students also reported that they experienced incidents of harassment and assault at school.<sup>162</sup> The findings show school personnel intervening at strikingly low rates. Overall, over a half (55.5%) of participating students reported they felt unsafe in school because of their sexual orientation, and 38.7% reported feeling unsafe because of their gender expression.<sup>163</sup> Almost half (43.3%) of students have reported these incidents to school staff,<sup>164</sup> yet about two thirds of reporting students (61.6%) said school staff had taken no effective action or no action at all.<sup>165</sup> About a third (32.5%) of students explained they do not report incidents because they doubt any effective intervention would be made, or because they feared making the situation worse (23.7%).<sup>166</sup> When schools adopted comprehensive policies addressing issues relating specifically to sexual orientation and gender identity, incidences of discrimination and harassment decreased and school staff effectively intervened at higher rates.<sup>167</sup>

Anti-LGBT verbal and physical harassment are alarmingly widespread in American schools. Of participating students, 64.5% in the national school climate survey reported hearing derogatory remarks referencing sexual orientation or gender identity often, including more than half (51.4%) who reported hearing remarks made by school staff.<sup>168</sup> Over half (56.4%) of participating students also heard transphobic remarks, and a similar number (55.5%) reported hearing such remarks from school staff.<sup>169</sup> Seventy-four point one percent report having been harassed at school because of their actual or perceived sexual orientation, and 55.2% report the same regarding

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160. SURVEY 2013, *supra* note 102, at 16 (Compare to 88.9% in 2009. SURVEY 2009, *supra* note 102, at xvi.).

161. SURVEY 2013, *supra* note 102, at 16 (Compare to about two-thirds in 2009. SURVEY 2009, *supra* note 102.).

162. SURVEY 2013, *supra* note 1052, at xvi–xvii.

163. *Id.* at 12 (Compare to 61.1% and 39.9%, respectively in 2009. SURVEY 2009, *supra* note 102.).

164. SURVEY 2013, *supra* note 102, at 28 (Compare to 63.7% in 2009. SURVEY 2009, *supra* note 102.).

165. SURVEY 2013, *supra* note 102, at 34 (Compare to 38.8% in 2009. SURVEY 2009, *supra* note 102.).

166. SURVEY 2013, *supra* note 102, at 29.

167. *Id.* at 61, 76.

168. SURVEY 2013, *supra* note 102, at 16.

169. *Id.* at 18, 19.

gender identity.<sup>170</sup> Sixteen and one-half percent were physically assaulted because of their actual or perceived sexual orientation and 11.4% assaulted because of their gender identity or expression.<sup>171</sup>

There are two main forms of discrimination relevant to LGBT students. The first is sexual orientation discrimination: the differential treatment of students because of actual or perceived sexual orientation or gender identity compared to other straight or perceived to be straight students. The second is sex discrimination because of their sex: when students or school staff treat male students differently than female students in similar situations, or the other way around. Discrimination, whether on the basis of sexual orientation or sex, refers also to unequal enforcement. Schools that are subject to state anti-discrimination laws or regulations (mandated by the state or the school board) must enforce them on an equal basis.<sup>172</sup>

Title IX of the Education Amendments Act<sup>173</sup> prohibits public, federally-funded schools from discriminating in access or conditions of education on the basis of sex.<sup>174</sup> In addition to this federal prohibition on sex discrimination, some states have opted to protect against sexual orientation or gender identity discrimination and harassment in their state laws. Fifteen states and the District of Columbia prohibit discrimination or harassment in education on the basis of sexual orientation or gender identity,<sup>175</sup> and one additional state enumerated only sexual orientation as prohibited grounds for discrimination or harassment in schools.<sup>176</sup> Other states have enacted anti-bullying and safe schools statutes that protect students from violence regardless of

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170. *Id.* at 22.

171. *Id.* at 23. Compared to 18.8% and 12.5%, respectively in 2009. SCHOOL CLIMATE SURVEY 2009, *supra* note 102, at 27.

172. *See Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1137–38 (9th Cir. 2003).

173. Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a).

174. *Id.* (Stating the general prohibition against discrimination: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

175. States that protect students from discrimination and harassment because of their sexual orientation or gender identity include: California, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, Vermont, Washington, and Oregon. *Human Rights Campaign, Maps of State Laws and Policies: Statewide School Non-Discrimination Laws & Policies*, HUMAN RIGHTS CAMPAIGN (Feb. 7, 2016, 11:58 AM), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) (providing details of state statutes that protect LGBT students against discrimination, harassment or bullying, and those states that do not offer such protections) [<https://perma.cc/T9D3-4MMV>].

176. Wisconsin has a statute protecting students from discrimination and harassment because of sexual orientation alone. Wis. Stat. § 118.13 (2008).

its reason, though some may cover sexual orientation and gender identity, while others explicitly prevent protection on these bases.<sup>177</sup> Where such laws are not in place students have only Title IX to rely on for protection, and the question of whether “sex” includes sexual orientation or gender identity bares even more significance.<sup>178</sup>

Title IX prohibits discrimination and harassment in educational environments on the basis of sex.<sup>179</sup> For discrimination to fall under Title IX, it must be motivated by the student’s gender or their non-conformity to stereotypical behavior associated with their sex, as was the case in *Price Waterhouse*. Another way discrimination can come under Title IX, where sexual orientation is concerned, is through sexual harassment. Harassment in this context takes place when students are mistreated or bullied by other students or by school faculty or staff because of their sexual orientation or gender identity. Research suggests that school faculty or staff fail to intervene and even blame the harassed students for bringing it on themselves.<sup>180</sup> In doing so, school faculty or staff violate their obligation to supervise and act reasonably toward students. When students are injured while in school care and the injury is related to school employees’ acts or failures to act, both the employees and the school district are exposed to liability under Title IX.<sup>181</sup>

Sexual harassment is harassment that involves sexual references or behavior meant to humiliate a student, regardless of their actual or perceived sexual orientation or gender identity.<sup>182</sup> The harassment must be severe and pervasive enough to effectively deny a student ac-

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177. States with general anti-bullying laws and policies that cover LGBT students are: Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington. States with general anti-bullying laws and policy that prevent school districts from specifically protecting LGBT students are Missouri and South Dakota. *Maps of State Laws and Policies: Statewide School Anti-Bullying Laws & Policies*, HUMAN RIGHTS CAMPAIGN (Feb. 7, 2016, 12:00 PM), [http://www.hrc.org/state\\_maps](http://www.hrc.org/state_maps) [<https://perma.cc/T9D3-4MMV>].

178. Notably, however, this issue of the meaning of “sex” in Title IX protection is relevant in all states, as it is a federal statute and claims against all federally-funded schools can rest on its provisions, sometimes in addition to those embodied in state anti-discrimination laws. See 20 U.S.C. § 1681(a).

179. *Id.*

180. BIEGEL, *supra* note 95, at 17, 52 n.31 (discussing lawsuits brought by students against school personnel that were either won or settled in favor of the students).

181. *Id.* at 26 (reviewing generally *Glaser v. Emporia Unified Sch. Dist. No. 253*, 21 P.3d 573 (Kan. 2001); *Carny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 679 N.W.2d 198 (Neb. 2004)).

182. Rachmilovitz, Masters, *supra* note 19, at 90–91.

cess to education.<sup>183</sup> Over half (59.3%) of students participating in the national school climate survey reported having been sexually harassed.<sup>184</sup> The harasser and victim do not have to be of different sexes for such harassment to constitute sexual harassment.<sup>185</sup> A school district is liable for the sexual harassment of one student by others if the school knew about the harassment and was deliberately indifferent to the harassment that was severe and pervasive enough to deprive the victim access to education.<sup>186</sup>

Yet this outcome requirement effectively hinders students' protection and no parallel requirement exists for adults regarding their performance at work. Protecting only severe and pervasive harassment means that harassment that is limited to one incident, however severe, may not lead to the school being found liable for failure to protect the student.<sup>187</sup> Conversely, repeated harassment that the court might find innocuous could also result in a school escaping liability.<sup>188</sup> Moreover, a particularly bright or poor student, who suffers harassment without it hindering her academics (namely, that her grades had not dropped) would then also be left unprotected under this test. Lastly, arguably the greatest obstacle for protection is the requirement that a school be found "deliberately indifferent" to the harassment.<sup>189</sup> This might not be easily demonstrated to a court unless the abuse has happened during class, or when there is a record of reporting to school

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183. *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F.Supp.2d 1299, 1308–309 (D. Kan. 2005).

184. SURVEY 2013, *supra* note 102, at 24 (compared to 68.2% of the survey participants reporting experiencing sexual harassment in 2009. SURVEY 2009, *supra* note 102, at 27).

185. *Oona R.-S. v. McCaffrey*, 143 F.3d 473, 476 (9th Cir. 1998); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 468 (8th Cir. 1996); *Torres v. Nat'l Precision Blanking*, 943 F.Supp. 952, 956 (N.D. Ill. 1996); *Rodkey v. Trans World Airlines, Inc.*, 1997 WL 823568, at \*22–26 (W.D. Mo. Oct. 7, 1997).

186. *Murell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999).

187. A California student was expelled from school for giving a hickey to another female student. The school maintains it has a duty to expel the student for sexual harassment of another student. The student argues that this is not sufficient grounds for expulsion because—in addition to her belief that the sexual activity between the two students was in fact consensual – it was an isolated incident and therefore does not rise to the level of harassment under the Title IX "pervasive" standard. Interview with Asaf Orr, former staff attorney, Learning Rights Law Center, in Los Angeles, Cal. (Oct. 12, 2010) (Orr served as the student's attorney representative).

188. A suit by a female student who was repeatedly addressed in derogatory terms by fellow students ("slut," "whore") failed because the court believed this was not "severe" harassment for the purposes of Title IX. *Id.*

189. See generally, Asaf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN'S RTS. L. REP. 117 (2008).

personnel.<sup>190</sup> Such a requirement, too, is not in place for employment discrimination or harassment cases.

### **i. No Double Bind Requirement**

Despite the limits of Title IX, students have prevailed in their claims against schools. One case where a student won a harassment suit against his school based on the sex stereotype theory was *Theno v. Tonganoxie*.<sup>191</sup> Dylan Theno suffered harassment from fellow students that was centered around name calling, derogatory remarks about his sexual orientation, and mimicking same-sex sexual activities.<sup>192</sup> The harassment went on for four years, often in class in the presence of teachers, and escalated to physical violence on at least one occasion.<sup>193</sup> The school argued that the harassment was not motivated by Theno's sex, or by his atypical gender performance, but rather that his behavior, style, and interests were socially atypical and therefore unacceptable to his peers.<sup>194</sup> Additionally, the harassment was not motivated by sex, but rather was the other students' attempt to be funny by focusing on a socially awkward subject matter.<sup>195</sup> At trial, Theno expressed his belief that he was harassed because he "wasn't an alpha male" and that the other boys saw him as a "girly girl."<sup>196</sup> The court agreed that the harassment was motivated by the students' disapproval of Theno's gender performance.<sup>197</sup> They harassed him, the court found, because he did not conform to expectations regarding how a teenage boy should act.<sup>198</sup> Consequently, the harassment was meant to undermine Theno's masculinity. Using in effect the sex stereotyping

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190. However, when the harassment takes place outside the classroom (perhaps in the hallway, restrooms, or school bus) where faculty and staff might not be present, when the harassed student does not report the harassment to school officials, or when the school takes limited and futile action, the standard proves itself too high to properly motivate vigilant action and protection by the schools. *Id.*

191. 394 F.Supp.2d 1299 (D. Kan. 2005).

192. *Id.* at 1305–06 (Other students called Theno "fag," "flamer," "sissy," "queer," "masturbator," etc. They started a rumor that he was caught masturbating in the restrooms, often made remarks in reference and peeked over the restroom stalls to "make sure you're not masturbating in there." On one occasion, at lunchtime, one student handed Theno a banana, saying: "Here you stupid faggot. Why don't you shove this up your ass? I'm sure you'll like it." On a different occasion, another student put a piece of string cheese in his mouth and said, "Look at this. I'm Dylan sucking cock.").

193. *Id.* at 1305–06.

194. *Id.* at 1304 (Theno had an unusual hair style, wore earrings and took an interest in martial arts. He also dropped out of the school's football team.).

195. *Id.*

196. *Id.* at 1306–07.

197. *Id.* at 1307.

198. *Id.*

theory, the court ruled that this was sexual harassment prohibited under Title IX and held the school liable for not protecting Theno.

Similar to the plaintiff in *Price Waterhouse*, Theno was harassed as an assimilation demand; the other boys found his gender performance non-conforming and therefore pressured him, through harassment, to assimilate to their expectations. Theno's actual sexual orientation or whether he identified as gender non-conforming is not explicitly mentioned in the opinion. If in fact he was gay or gender non-conforming, the harassment could be viewed as a demand to cover his sexual orientation (or, if he was gay, but his sexual orientation was unknown to his fellow students, this was a passing demand) as the harassment communicated to Theno that being gay was a basis for ridicule and shaming. On the other hand, if Theno was straight, the demands he faced were reverse-covering demands—the demand that he present his masculinity to a heightened degree. Notably, however, Theno was pressured toward one *or* the other. Unlike Ann Hopkins, Theno did not suffer a double bind. Yet the court still applied the sex stereotyping theory to protect him where adults would likely remain unprotected under current case law. This suggests that Yoshino's hypothesis that absent a double bind, subjects of covering or reverse-covering are left vulnerable might be limited to adults because courts have found assimilation demands and sex stereotyping harmful to children even when only one form of them exists. Perhaps courts are more willing to protect children from assimilation demands that constitute sex stereotyping due to their general vulnerability at this stage of identity development and their dependence on adults.<sup>199</sup> Allowing students to recover without being subjected to a double bind may reflect courts' acknowledgment that children who are still forming their identity have a greater interest in legal protection of their identity formation in an environment free from assimilation demands, and that such demands are overly burdensome in and of themselves and that subjecting students—whose coping mechanisms and resilience skills

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199. For another case where the court considered a sex stereotyping claim as a basis for Title IX protection absent a double bind, see *Doe v. Southeastern Greene Sch. Dist.*, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. Mar. 24, 2006). There, the court denied the school's motion for summary judgment as the court found that evidence of derogatory name-calling related to the student's sexual orientation, stabbing his behind with a pencil, masturbating in front of him and requesting he perform oral sex on the other student was sufficient for "a jury [to] find that his harassment was 'so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school.'" *Id.* at \*22. The court allowed the student to proceed with his Title IX sex discrimination claim. *Id.*; see also *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D.Minn. 2000).

are still developing—to the requirement to rebuff conflicting demands may be far beyond their capabilities.

## ii. Same-Sex Sexual Harassment

The courts' greater willingness to advance protections against sex discrimination for children above and beyond those for LGBT adults is evident again in the case of *Nabozny v. Podlesny*.<sup>200</sup> Despite rejecting similar claims in adult contexts, the formal sex discrimination argument led to findings in favor of the harassed student.<sup>201</sup> After coming out in seventh grade, Nabozny began experiencing harassment from his fellow students, both verbally and physically.<sup>202</sup> Over time, the harassment grew worse, culminating in two students pushing Nabozny to the floor and performing a mock rape on him in class in front of about 20 other students.<sup>203</sup> During the mock rape the two harassers expressed that Nabozny “should enjoy it.”<sup>204</sup> When Nabozny reported the incident to the principal (who was also in charge of school discipline) she replied that “boys will be boys” and that if Nabozny was to be out as a gay student, he should expect this sort of treatment.<sup>205</sup> The harassment continued throughout middle school and into high school with more beatings, students throwing dangerous objects at him, and forcing him into a urinal.<sup>206</sup> The school continued to overlook the harassment, which drove Nabozny to attempt suicide on at least two separate occasions.<sup>207</sup> School officials repeatedly told Nabozny that being an openly gay student, he should expect the harass-

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200. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

201. As the argument goes, but for the victim's sex, she would not have suffered the disparate treatment. In *Rene*, the argument was that had Rene been a woman his harassers would not have mistreated him for his effeminacy. The majority and concurrence found in favor of Rene on other grounds. The dissent, as discussed above, refused to see the case as sex discrimination, but rather sexual orientation discrimination that is not prohibited by Title VII. On the other hand, in *Nabozny*, a similar argument held up in court. 92 F.3d 446 (7th Cir. 1996). In another case, *Flores*, the court again found that schools have a duty to protect LGB students from harassment in the same manner that they must protect straight students. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003). Further, schools have a duty to enforce any school policy in regards to LGB students as much as that duty exists in regards to straight students. *Id.* at 1137.

202. *Nabozny*, 92 F.3d at 451 (“Nabozny’s classmates regularly referred to him as ‘fag-got,’ and subjected him to various forms of physical abuse, including striking and spitting on him.”).

203. *Id.* at 451.

204. *Id.*

205. *Id.*

206. *Id.* at 451–52.

207. *Id.* at 451–52.

ment and they suggested he take time off from school.<sup>208</sup> They later altered his schedule so that he would have limited contact with his harassers and eventually placed him in a special education class.<sup>209</sup> Finally, Nabozny dropped out of school in the eleventh grade.

Nabozny made a constitutional Equal Protection claim and argued that had he been a female student, the school would have addressed the harassment.<sup>210</sup> He submitted evidence that when boys physically assaulted girls, or addressed them in derogatory ways that invoked their gender, the school acted aggressively to stop that harassment.<sup>211</sup> The court took particular issue with the school's response to the mock rape, opining that the comment "boys will be boys" demonstrates that the school did not consider that act to be serious because the students involved, and Nabozny, were male.<sup>212</sup> This indicated to the court that had the victim been a female student, the school would not have reacted with such indifference. This finding differs from protections grounded in sex stereotyping theory. It emphasizes formal equality (i.e., a male student compared to a female student) as opposed to substantive protections for differential identity protections (i.e., an effeminate boy compared to masculine boys).

Applying intermediate scrutiny, the court found that absent an important governmental interest, the school indeed was required to treat the harassment the same as if it targeted a female student.<sup>213</sup> Though this is not explicit in the opinion, effectively, the court applied the *Oncale* rule regarding same-sex harassment. One of the categories for impermissible same-sex harassment under *Oncale* is that members of one sex are suffering harassment that is not imposed on

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208. *Id.* at 452. After one occasion when Nabozny was kicked in the stomach repeatedly for 10 minutes, a school staffer to whom Nabozny complained laughed and told Nabozny that Nabozny deserved such treatment because he was gay. *Id.*

209. *Id.*

210. Nabozny also made a due process claim. However, in the interest of focusing on discrimination/harassment jurisprudence, I only discuss the equal protection claim here. In short, Nabozny's claim, that the school created or exacerbated his risk of harm by failing to act against his harassers, was rejected by the court for lack of persuasive evidence. *Id.* at 459-60.

211. *Id.* at 454 ("Nabozny contends that a male student that struck his girlfriend was immediately expelled, that males were reprimanded for striking girls, and that when pregnant girls were called 'slut' or 'whore,' the school took action.").

212. *Id.* at 454-55 ("[W]hen he was subjected to a mock rape [the principal] responded by saying 'boys will be boys,' apparently dismissing the incident because both the perpetrators and the victim were males. We find it impossible to believe that a female lodging a similar complaint would have received the same response.").

213. *Id.* at 456.

members of the other sex.<sup>214</sup> When the court accepts Nabozny's argument that the school would have taken action were the harassed students girls, it essentially applies *Oncale*. However, that *Oncale* is not referenced in the case, and although there is no discussion of the categories under which same-sex harassment may be impermissible, suggests that the *Nabozny* court perhaps is more lenient with the child than it may have been with an adult, who presumably would have been required to explicitly take the step of demonstrating how being harassed by people of the same-sex is consistent with the *Oncale* precedent.

### iii. "Sex" Means "Sexual Orientation"

The *Nabozny* court addressed the possibility of sexual orientation discrimination as well. Here, the court applied rational basis review, as it declined to determine whether sexual orientation is a suspect or quasi-suspect classification, and relied on precedents applying rational basis review to sexual orientation discrimination.<sup>215</sup> Even with this lower standard, the court found no rational basis for allowing one student to harass another because of sexual orientation.<sup>216</sup> Further, the court rejects the possibility that the Supreme Court ruling in *Bowers v. Hardwick*<sup>217</sup> provides a rational basis for the discrimination in *Nabozny*. Under *Bowers*, criminalization of sodomy could render gay students dissimilarly situated to straight students and the school's discrimination permissible.<sup>218</sup> However, the court did not substantively examine this suggestion. Instead, it admonished the school for relying on *Bowers* as authority for the appropriate standard of review, without suggesting *Bowers*, or any other precedent, as the rational basis to justify their disparate treatment of Nabozny.<sup>219</sup> The court ruled in the student's favor and found school staff accountable for failing to protect him from harassment.<sup>220</sup>

The *Nabozny* court is primarily concerned with two forms of assimilation demands: passing and conversion. School personnel to whom Nabozny reported the abuse dismissed his complaints by telling him that being an out gay student meant being harassed and that violent

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214. *Oncale*, 523 U.S. at 80–81.

215. *Id.* at 458.

216. *Id.* at 458.

217. *See generally* *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding the constitutionality of state criminal anti-sodomy laws).

218. *See Nabozny*, 92 F.3d at 458.

219. *Id.*

220. *Id.* at 455–56.

responses from peers were to be expected. Such an argument attempts to excuse any failure to act against the harasser. It delegitimizes LGBT students' right to express and reveal their sexuality and violates students' right to be safe at school—regardless of identity. It uses the justification of violence as a valid response to one's openness about a seemingly inferior, undesirable identity—a highly threatening passing demand. And as a passing demand, the school's response is in and of itself a discriminatory action. The court, though not explicitly, seems to see that. The court reiterates that Nabozny got this response from several school staff, though this pattern was not necessarily material for a holding based on sex stereotyping discrimination.<sup>221</sup> Unlike the dissenting opinion in *Rene*, the court did not see Nabozny's openness about his sexual orientation as reason to reject his sex discrimination claim. The court did not insist that this was actually sexual orientation discrimination and therefore outside the contours of Title IX. This is another example of how courts protect children more fully than adults in similar circumstances.

#### iv. Criminalization of Sodomy Not a Defense

The Nabozny court also offered protection to LGBT students where it is denied to adults in its discussion of *Bowers* as a potential rational basis for the school's failure to act against Nabozny's harassment. Anti-sodomy criminalization has served society as a legal tool to convert LGBT persons into heterosexuality.<sup>222</sup> Yoshino argues that while conversion demands have subsided over the years for adults, they are often still in full force when children's sexuality is concerned.<sup>223</sup> And while *Lawrence v. Texas* has indeed eliminated the criminalization of adult same-sex sodomy, it has not—at least not explicitly—done the same for same-sex sexual conduct involving (or between) teens. Though the conversion rationale might still hold in

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221. The response the court did see as determinative was the principal's statement that "boys will be boys," insinuating that had girls been involved there would be cause for concern and action by the school. *Id.* at 454–55. The court expressly relies on this statement, rather than those indicating that harassment of an openly gay student is to be expected, to find in favor of Nabozny's sex discrimination claim. *Id.*

222. Like marriage, bars on same-sex sexual activity "substantially burden the right to choose homosexual relations and relationships" and are a means for the law to channel one into heteronormative behavior. In this sense they are a legal tool of conversion. *See generally*, Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012); YOSHINO, *supra* note 13, at 41 (discussing immigration law as another example for legal strategies of "gay conversion.").

223. YOSHINO, *supra* note 13, at 44–45.

other contexts<sup>224</sup> the Nabozny court eliminates the potential argument that conversion is a rational basis for harassment of LGBT students. Notably, it does so in a time when conversion demands on adults (i.e. the criminalization of sodomy) were still upheld by the Supreme Court. Regardless of whether the Nabozny court assumed LGBT students were not involved in same-sex sexual activity due to their age or saw them merely as potential violators of anti-sodomy statutes needing to be deterred from such activity (in Yoshino terms, children are “classic sexual waverers”),<sup>225</sup> the court would not entertain the merits of sodomy criminalization as a rational basis for harassment. The message is that students must be protected from their peers’ abusive behavior even if that behavior would be acceptable against adults because the state is entitled to criminalize that adult’s conduct. Once more, children are afforded more legal protection than adults.

So far, we have seen four ways in which courts better protect students from discrimination and harassment in education than their LGBT adult counterparts in employment. Before exploring more in depth why this may be—that is, what it is about children and education that inspires courts to extend protection where adults may not enjoy it—it is worth exploring another context, that of free speech, in which courts both roll back children’s rights compared to adults in that their speech must not undermine the educational setting, but also remove important obstacles common in first amendment cases from schoolchildren’s way: the community standards test.

### **B. Sexual Minority Students’ Free Speech: Hybrid Protections**

A common area of discrimination against LGBT students concerns freedom of speech and expression. Although students are not stripped of their freedom of speech while at school, there are limits on children’s free expression rights that seem more far-reaching than restrictions on adults’ speech. Primarily, students’ free expression must not conflict with the characteristic of the educational setting.<sup>226</sup> Students, therefore, have the right to discuss and express their sexuality,<sup>227</sup> as long as such speech does not interfere substantially and mate-

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224. See *infra* Part III.B regarding “No Promo Homo” laws and policies.

225. YOSHINO, *supra* note 13, at 44.

226. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506, 509 (1969) (stating that First Amendment rights are limited in school if “engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school[ ]’”).

227. *Henkle v. Gregory*, 150 F.Supp.2d 1067, 1076 (D. Nev. 2001).

rially with schoolwork, discipline, and the rights of other students.<sup>228</sup> As demonstrated by *Nabozny* and additional cases discussed below, courts have held school districts and school personnel accountable for preventing students from coming out, as well as for failing to protect students from harassment and discrimination after they express their sexuality.<sup>229</sup>

The Supreme Court established school children's free expression rights in *Tinker v. Des Moines*.<sup>230</sup> In that case, several high school and junior high school students were suspended for wearing black armbands in protest of the Vietnam War.<sup>231</sup> The students brought a First Amendment claim against the school's disciplinary action. The Court found that as long as the expression at question is appropriate in a school environment, neither students nor teachers surrender their free expression rights "at the schoolhouse gate."<sup>232</sup> Indeed, students' freedom of expression extends beyond the classroom and is to be upheld at all school activities, as the school environment is to be viewed in its broader meaning.<sup>233</sup> Therefore, restrictions on students' speech, then, can only be limited when there is a substantial disruption to school function, and cannot be motivated by disagreement or discomfort with the views expressed by the student(s) or the unpopularity of such views.<sup>234</sup> The Court based its strong protection for students' free expression in the notion that the classroom was the quintessential free market of ideas, where students should be allowed to engage, test, or reject different opinions, as long as they do so in a manner that is consistent with a school's educational purpose and does not undermine school functions.<sup>235</sup> Put differently, the Court aspired for pluralism in diverse educational settings. This pluralism in turn facilitated protection of children's rights to explore and express their identities, views and values free of the school's assimilation demands.<sup>236</sup>

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228. *Tinker*, 393 U.S. at 509. Interference does not mean a school is not obligated to take reasonable measures to protect and foster free speech and to prevent violence by attempting to create such interference. See *Fricke v. Lynch*, 491 F.Supp. 381, 388-89 (D.R.I. 1980).

229. *Henkle*, 150 F.Supp.2d 1067; *Nabozny*, 92 F.3d 446.

230. *Tinker*, 393 U.S. at 511.

231. *Id.* at 504.

232. *Id.* at 506 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

233. *Id.* at 512-13.

234. *Id.* at 509.

235. *Id.* at 512.

236. See *Lau*, *supra* note 12.

*Tinker* established students' rights to quietly and passively display political symbols. The right to free expression under *Tinker* includes students' rights to reveal their sexual orientation or express support for LGBT students at school, by displaying LGBT supportive symbols, such as a rainbow or pink triangle, on their clothes or other personal belongings.<sup>237</sup>

Protections for passive expression have been extended to expressive conduct in the case of *Fricke v. Lynch*.<sup>238</sup> Aaron Fricke was a high school student who requested the school's permission to attend the prom with a same-sex date. Only students who had dates were allowed to participate in the event. In a conversation with the principal, Mr. Lynch, the two discussed the possibility that Fricke was bisexual or that he would date girls, but he expressed a "commitment to homosexuality."<sup>239</sup> The principal then refused to allow Fricke to be accompanied by a same-sex date to the prom. The principal cited two reasons for his decision: first, an increased threat of violence directed at the two boys, and possibly other attendants, and second, that allowing same-sex dates at school events would send a message that the school condones homosexuality.<sup>240</sup> Fricke brought a First Amendment claim that the school's decision violated his rights to free association and free expression. He argued that bringing a same-sex date to school activities has an expressive and educational function, as their

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237. Others, including teachers and administrators, are prevented from discouraging or forbidding any behavior that limits students' right to be out. As we've seen in the previous section, discrimination or harassment cannot be justified or blamed on the students themselves because of their actual or perceived sexual orientation or gender identity or because they have chosen to reveal their sexual orientation or gender identity to others (i.e. "come out"). Discrimination or other forms of mistreatment should not be expected or accepted simply because of a student's sexual orientation or gender identity. Furthermore, since free expression is not limited to the classroom, free expression cannot result in limited participation in school activities, such as the prom even when active speech or expressive conduct is involved. Nonetheless, since schools are to foster tolerance and diversity among all students, other students may express their disapproval of same-sex sexual orientation or gender non-conformity. They too are allowed to display messages such as "straight pride" on their clothing, for example. So there are ways students may acceptably express their views that homosexuality is immoral, but there are also limits, including hate speech, inciting violence, and behavior that impinges on another student's ability to receive an education or if the speech disturbs the educational environment. See *Chambers v. Babbitt*, 145 F.Supp.2d 1068 (D.Minn. 2001). Other t-shirts, the messages on which were found by the court to be "verbal assaults," and therefore unacceptable and unprotected under the First Amendment, read "I will not accept what God has condemned" and "homosexuality is shameful." See discussion of *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), in *Lau*, *supra* note 12, at 365-66.

238. *Fricke*, 491 F.Supp. 381.

239. *Id.* at 383.

240. *Id.* at 383-84 n.2.

attendance carries the political message of equality and human rights for sexual minorities.<sup>241</sup> The court relied on *Tinker* to find that attending a function with a same-sex date is political speech that is protected, and rejected the possibility that safety concerns can constitute a substantial interference with school function under *Tinker*.<sup>242</sup> Allowing objections from the audience to excuse limits on speech would be tantamount to a “heckler’s veto,” which is inconsistent with free expression protections. The school, therefore, could not suppress speech because of concerns for the reaction it may engender.<sup>243</sup> A substantial interference cannot be solely from the audience, but from the speaker herself.<sup>244</sup> The *Fricke* court protected the student’s identity expression right because it was not harmful to others. Community standards expressed by a heckler’s veto, are not such a harm under the court’s definition because they are neither caused by the speaker herself nor infringe on another’s identity expression. Additionally, the court believed that the school should have explored a less restrictive approach; allowing the boys to attend the prom while increasing security to ensure students’ safety.<sup>245</sup> The court recognizes that to truly protect Fricke’s free speech, it must consider practical and logistical ways in order to ensure Fricke’s rights. It therefore looks for a compromise between Fricke’s rights and the school’s legitimate interest in guaranteeing the safety of students attending the prom. Ultimately, the court required the school to provide additional security so that the boys could attend the prom as a same-sex couple.

Although the *Fricke* decision was favorable to the student and his right to express his sexual orientation at school, it is also somewhat concerning. The court emphasizes Fricke’s “commitment to homosex-

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241. *Id.* at 385.

242. *Id.* at 387.

243. *Id.* at 385, 387 (“It is certainly clear that outside of the classroom the fear however justified of a violent reaction is not sufficient reason to restrain such speech in advance, and an actual hostile reaction is rarely an adequate basis for curtailing free speech. [E]ven a legitimate interest in school discipline does not outweigh a student’s right to peacefully express his views in an appropriate time, place, and manner. To rule otherwise would completely subvert free speech in the schools by granting other students a ‘heckler’s veto,’ allowing them to decide through prohibited and violent methods what speech will be heard. The first amendment does not tolerate mob rule by unruly school children.”).

244. *Id.* at 387 (“[The school has] failed to make a ‘showing’ that Aaron’s conduct would ‘materially and substantially interfere’ with school discipline.”); *see, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (where a school prohibited a student from delivering a speech riddled with profanity and offensive language, the Court found that the school did not violate the student’s freedom of expression as the speech was disruptive to school functioning).

245. *Fricke*, 491 F.Supp. at 385–86.

uality” as material to its decision to allow him to bring a same-sex date to the prom.<sup>246</sup> The conversation between Fricke and Lynch about bisexuality (i.e. Lynch imposing a conversion demand on Fricke) is only troubling to the court because of the strength of Fricke’s conviction regarding his sexuality. To the court, the significance of bringing a same-sex date to the prom as expressive conduct does not lie, as Fricke argued, in a message of equality and LGBT rights, nor in rejecting the school’s concern for condoning homosexuality, but rather, it lies in the view that Fricke’s homosexuality is immutable. The court’s reliance on immutability as a determinative factor for identity protection highly burdens children as perceived “sexual waverers” whose “true” sexuality is second-guessed by adults who assume they have yet to fully form their sexual orientation or gender identity. But what of children who are “sexual waverers”? Bisexuals are similarly burdened and in need of the law’s protection. Caught between the myth of bisexuality as a transient identity on the way to same-sex sexual orientation and the demand that bisexuals “choose” heterosexuality simply because they “can,”<sup>247</sup> bisexuals lack the protections for identity rights that hinge on immutability, which are not entirely meaningful. Yoshino’s argument that protection from conversion demands must be based on the legitimacy of the identity at stake and not its immutability comes to life in *Fricke*,<sup>248</sup> where reliance upon “commitment to homosexuality” rather than the legitimacy of homosexuality (or bisexuality) as ground for protection leaves those still questioning and exploring their sexuality vulnerable to restrictions on their freedom to express that still developing identity.

Assimilation demands on children in school are inconsistent with ideals of pluralism and diversity that prepare children for life as citizens in a democratic society because pluralism ensures children’s identity exploration and expression.<sup>249</sup> *Tinker*, *Fricke* and other cases<sup>250</sup> all follow from courts understanding that children’s identities ought

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246. *Id.* at 384–85 (the court describing Fricke’s testimony as to why he is interested in bringing a same-sex date to the prom and finding it to have “significant expressive content”).

247. Boucai, *supra* note 222.

248. YOSHINO, *supra* note 13, at 47–49.

249. *See* Lau, *supra* note 12.

250. *See also* *Doe v. Yunits*, No. 00-1060-A, 2000 Mass. Super. LEXIS 491 (Oct. 11, 2000). Finding that prohibiting a trans student from expressing her gender identity through her clothing was tantamount to discrimination because of sex under the sex stereotyping theory, because by dressing as a girl the student, who was assigned a male sex at birth, was not conforming to stereotypes about how males should dress. Thus students have a right to dress according to their gender identity. *Id.*

to be protected so that children can continue to develop a healthy sense-of-self. However, courts cannot be relied upon as the only, or even primary, port of call for protecting LGBT students from assimilation demands. Courts cannot prevent the injuries that have already happened to plaintiff students. Nor has the focus on litigation strategies been able to fully eradicate school-based assimilation demands. But before elaborating on this point, it is worth exploring why LGBT youth have been more successful in courts than LGBT adults. Identifying which of children's needs have fallen on sympathetic ears and designing future strategies around them or around the reasonable differences in outcomes might advance other accomplishments, for teens and for adults, through and outside of litigation.

### **III. Beyond The Schoolhouse Gate: Rationales and Implications**

Now that we have seen that LGBT students are better protected by the legal system than their adult counterparts are in the workplace, we must consider why this may be and whether this is sufficient in fending off the harms assimilation demands at school cause to LGBT students. Below I theorize that there may be two explanations for why children are better protected, and that both can be attributed to the overarching concern regarding children's development. The first considers that students are still forming their identity, and that the law reflects the knowledge produced by social science that children require enhanced protections in order to ensure healthy identity development. The second considers children as future adults and citizens who may need adults to guard their opportunities—their open future—while they are still in the process of determining how to live their adult lives. Whereas the first argument centers on psychological reasoning, the second employs social science and liberal theory to produce a policy argument.

#### **A. Child Development: From Dependence to Autonomy**

Erikson established his child development theory around fundamental concepts such as basic trust, basic mistrust, autonomy, shame, and doubt.<sup>251</sup> These concepts are opposites of each other, one of two possible resolutions to conflicts between the child and her environment. The way in which conflicts are resolved in each stage of development directs the child's development in the following stages. Trust

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251. PATTERSON, *supra*, note 12, at 216.

results from a combination of sensitive care for a child's needs along with fostering a strong sense that the child can depend on her parent.<sup>252</sup> This way, children learn the world is safe to explore and are confident about their social interactions.<sup>253</sup>

As they grow older, children wish to be more independent. Still, caregivers must establish limits to ensure safety. Allowing maximum freedom within reasonable limits lets children become confident and proud of their actions, whereas instituting overly restrictive boundaries leaves children ashamed and doubtful about their competence.<sup>254</sup> Parents must balance fostering their child's autonomy with placing limits regarding safety, because children are still incapable of distinguishing between activities that are productive and those that are dangerous.<sup>255</sup> Striking this balance is a constant task in childrearing. Much of how the child-parent relationship is shaped and maintained over time and its impact on the child's wellbeing and relationships later in life is a result of how parents succeed in striking this balance between fostering their child's autonomy and ensuring her physical and emotional safety.

Parenting that balances autonomy with limits allows children to negotiate behavior, daily tasks, and rules and to increase their responsibilities and control.<sup>256</sup> Many conflicts stem from teens' increasing desire for autonomy and following their personal choices and their parents' ongoing enforcement of rules and boundaries of right and wrong.<sup>257</sup> Conflicts become less frequent as children become more independent<sup>258</sup> and learn to achieve autonomy in ways that fulfill both their own needs and those of others in a socially accepted manner.<sup>259</sup> When a balance (or imbalance) between autonomy and closeness in the parent-child relationship emerges, it becomes a prototype

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252. ERIKSON, CHILDHOOD AND SOCIETY, *supra* note 68, at 249.

253. PATTERSON, *supra* note 12, at 216.

254. *Id.*

255. ERIKSON, CHILDHOOD AND SOCIETY, *supra* note 68, at 252–53 (defining shame as self-consciousness and warning about shame turning into feelings of self-rage and self-hatred causing the child (and later, adult) to rid herself of that within herself which causes such shame).

256. *Id.* at 441.

257. PATTERSON, *supra* note 12, at 548–49.

258. *Id.*

259. Joseph P. Allen, J. Lawrence Aber, & Bonnie J. Leadbeater, *Adolescent Problem Behavior: The Influence of Attachment and Autonomy*, 13 *PSYCHIATRIC CLINICS N. AM.* 455, 460 (1990); Joseph P. Allen, Maryfrances Porter, & Christy McFarland, & Kathleen Boykin McElhaney, *The Relation of Attachment Security to Adolescents' Parental and Peer Relationships, Depression, and Externalizing Behavior*, 78 *CHILD DEV.* 1222, 1222 (2007).

for future relationships and the balance between autonomy and closeness in those future relationships.<sup>260</sup>

Courts have granted children heightened protections, where similar claims from adults have failed, in order to adjust to the particular needs of children who are still developing their identity and therefore tend to be more and uniquely vulnerable to assimilation demands. We see this, for instance, in the *Nabozny* court's willingness to protect same-sex sexual orientation as "sex" or prohibiting same-sex sexual harassment. Both these moves demonstrate perhaps how courts understand there is something different about children and teens—that, as Erikson's theory suggests, their identities need the safe space to form through experiment, role modeling, expression, and other methods, and that adolescents still require the protection of adults in order to achieve healthy identity development.

The understanding of youth as an ongoing developmental process in terms of emotional and mental capacities was also integrated into the law, in a non LGBT-related context. In *Roper v. Simmons*,<sup>261</sup> the Supreme Court eliminated the death penalty for offenders under eighteen years of age for similar reasons. The opinion there is perhaps the go-to example of how the law acknowledges the differences in psychological development between minors and adults and relies on these differences to justify greater legal protections for minors. In addition to pointing out that children's identity is more fluid and flexible and not yet fully formed (and in doing so, relying on Erikson's work),<sup>262</sup> the Court details two more rationales to treat children differently than adults: first, teens' lower ability to foresee or care about consequences<sup>263</sup> make them less mature and more reckless than adults, and second, teens are more vulnerable to negative influences and external pressures, including peer pressure, and have a decreased measure of control over their environments.<sup>264</sup> Applied to other contexts such as schools, it may flow from the idea of children's vulnerability that *children and teens are less able to negotiate their worlds and navigate the assimilation demands they face in order to emerge from them unscathed*. As a result, even more resilient children, still require the assistance of adults and institutions such as schools and courts to protect

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260. Robert J. Waldinger et al., *Attachment and Core Relationship Themes: Wishes for Autonomy and Closeness in the Narratives of Securely and Insecurely Attached Adults*, 13 PSYCHOTHERAPY RES. 77, 81 (2003).

261. *Roper v. Simmons*, 543 U.S. 551 (2005).

262. *Id.* at 570.

263. *Id.* at 569.

264. *Id.* at 569.

them from assimilation demands compromising their identity development and emotional strength.

Vulnerability to assimilation demands does not only lead to the general (though necessary) protections such as *Nabozny's* inclusion of sexual orientation and same-sex harassment under the umbrella prohibitions on sex discrimination, but may have also motivated the removal of the *Price Waterhouse* double-bind requirement for a prevailing sex stereotypes argument. Recall that the *Theno* court ruled the student experienced sexual harassment because he did not conform to male stereotypes, a reverse-covering demand (assuming *Theno* was not gay, this remains unclear) without any additional assimilation demand. This is unlike Ann Hopkins who prevailed because she suffered both a covering demand—perform like men in your professional achievements—and a reverse-covering demand—present yourself in a feminine and appealing manner, as is associated with and expected from women.<sup>265</sup> This also reflects the court's understanding that at this stage of development, when it is so difficult to weather assimilation demands at all, it might be too burdensome and harmful for teens to be expected to have experienced the set of assimilation demands that create the double binds that merit protection in the case of adults. One type of assimilation demand might be injurious enough without a young person having to navigate the inconsistencies of more.

As an ongoing process, identity development creates tensions between dependence on the protection of adults and vulnerability to assimilation on one hand, and control and autonomy over one's environment and identity formation or expression on the other. These tensions are highlighted when *Fricke* and *Nguon v. Wolf*<sup>266</sup> are analyzed together to explore privacy and the coming out process as more gradual and sensitive for children than for adults.

Charlene Nguon was suspended from her high school for engaging in inappropriate public displays of affection (PDAs) with another female student.<sup>267</sup> When notifying Charlene's mother about the disciplinary measures against her daughter, the principal told the mother that Charlene was kissing another girl. Charlene and her mother filed suit against the school,<sup>268</sup> arguing that the suspension constituted sex-

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265. See *Price Waterhouse*, 490 U.S. 228.

266. *Nguon v. Wolf*, 517 F.Supp.2d 1177 (C.D. Cali. 2007).

267. *Id.* at 1179–80.

268. One could infer from the fact that Charlene Nguon's mother was a party to the suit that the disclosure of Charlene's sexual orientation to her mother was not detrimental

ual orientation discrimination and that the principal's detailing of Charlene's same-sex conduct amounted to a disclosure of her sexual orientation to her mother and therefore violated Charlene's privacy rights.<sup>269</sup> The court analyzed the behavior of the two girls in light of the school's policy regarding public displays of affection and concluded that the girls' conduct was sufficiently inappropriate and extreme to justify disciplinary measures.<sup>270</sup> Additionally, the court found that students engaged in similar different-sex PDAs were and would be equally disciplined for their comparable behavior.<sup>271</sup>

Recognizing that Charlene had a right to keep her sexual orientation private from her parents, the court exhibits an understanding of the complexities of coming out during adolescence, but by placing significant discretion with the disclosing party the court missed the opportunity to fully ensure that the child's privacy is safe from unwarranted invasion by adults. The court began its privacy analysis by defining the scope of Charlene's privacy expectations and found that because the PDAs were limited to school grounds, and because her parents were not involved in Charlene's school life, Charlene could reasonably expect that her parents would not be aware of occurrences at school.<sup>272</sup> For her, home and school were separate environments. Therefore, although the PDAs negated Charlene's reasonable expect-

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to their relationship, and thus caused no harm to Charlene. However, Charlene's mother's participation as a plaintiff was a procedural requirement under California law because of Charlene's status as a minor. Email from Christine Sun, plaintiff's representing attorney, to author (Nov. 17, 2011, 5:32 PST) (on file with author). But even if Charlene's mother was not named as a plaintiff strictly for procedural reasons, the point of privacy rights is to protect the information itself, not only the result of disclosure. Thus privacy rights for children protect them from the *potential* for parental mistreatment, not only the mistreatment itself. To make privacy rights contingent upon the harmful result of disclosure would empty these rights because the protection will be only post-fact when harm has already occurred, rather than preemptive of an undesirable disclosure. *Id.*

269. *Nguon*, 517 F.Supp.2d at 1179, 1192. The principal argued that disclosing the sex of Charlene's partner was not a disclosure of Charlene's sexual orientation. The court rejected that defense:

by telling [Charlene's mother] that Charlene had been kissing another girl, [the principal] conveyed Charlene's sexual orientation to her mother. His statement was unvarnished, and it was far more likely that [the mother] would infer that Charlene was gay rather than merely acting out or mimicking a rockstar. That is the inference which [the mother] drew from the conversation.

*Id.* at 1192.

270. *Id.* at 1186–87.

271. *Id.* at 1184–87.

272. *Id.* at 1191.

tation of privacy regarding her sexual orientation at school, her expectation of privacy regarding her home remained intact.<sup>273</sup>

In separating the spaces of privacy, the court recognizes that the coming out process, particularly for youth, can be gradual with one choosing to pass as straight in certain environments while being out as LGBT in others.<sup>274</sup> This is particularly true for many teens that come out in social circles or at school before they come out to their parents. Teens come out to parents later than to peers partly because the dependence of children upon their parents and their enhanced vulnerability at the intersection of age and sexual orientation render that disclosure highly threatening to adolescents.<sup>275</sup> Moreover, separating the spaces of privacy and recognizing that openness about sexual orientation in one spatial or social context does not negate privacy expectations regarding another is a departure from how sexual orientation privacy is applied to adults. When a news story about the man who had prevented the assassination of President Ford included details of his sexual orientation, it became the subject of a privacy suit.<sup>276</sup> The court ruled that since the plaintiff was a known activist in the gay rights movement, his sexual orientation was already public knowledge and that he could no longer have an expectation that such information would be kept private.<sup>277</sup>

At first blush, Charlene Nguon's case seems inapposite to that of Fricke, the boy who sought permission to bring a same-sex date to his school prom. Charlene wanted to keep her sexual orientation under wraps, whereas Fricke fought for the right to make it exceptionally public. But digging deeper, we can see how in effect both students wished to take control of the disclosure and expressions of their identities, and both wished to do so free and protected from assimilation demands. Colored in this light, the opinions in both cases teach us

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273. *Id.* at 1191 (“Charlene ha[s] a constitutionally protected privacy right with respect to disclosure of her sexual orientation. . . . At school [the girls] were open in their expressions of affection for one another. . . . Charlene had no reasonable expectation that her sexual orientation would not be disclosed in the context of her school. Her conduct at school was inconsistent with any right to keep her sexual orientation private. . . . It does not follow that disclosure in one context necessarily relinquishes the privacy right in all contexts. . . . Charlene’s home was an insular environment, and . . . her activities . . . at school were unlikely to be known to her parents unless they were expressly informed. Thus, . . . Charlene had a reasonable expectation of privacy concerning her sexual orientation at home.”).

274. YOSHINO, *supra* note 13, at 64–65.

275. Lau, *supra* note 12, at 370–71.

276. *Sipple v. Chronicle Pub’g Co.*, 154 Cal.App.3d 1040 (1984).

277. *Id.* at 1047 (“[T]here can be no privacy with respect to a matter which is already public or which has previously become part of the ‘public domain.’”).

how important it is for young people to have autonomy over their coming out process and to control—without fear of harm from others—whether, when, how, and to whom they come out. These cases remind us that indeed, coming out is a process, which is closely interwoven with the broader process of identity development.

This process, like discrimination or harassment generally, and the tensions between heightened vulnerability and growing autonomy, have—and should—warrant greater protections for students experiencing assimilation demands because this heightened protection preserves children’s ability to continue on the developmental task of identity achievement. In this sense, the case law has developed, based on the law that applies to adults, to meet children’s unique psychological needs.

By “greater protection,” I mean both greater than current protections to students, and greater than the protections available to adults. Charlene Nguon’s case also demonstrates how courts could be more vigilant in protecting children. The court rejected her discrimination claim because it found that her sexual orientation—or the sex of her partner—were irrelevant to the decision to suspend her. Yet it also found that the school was within its authority to notify her mother of her partner’s sex so that Charlene Nguon and her parents could mount a defense. This is internally inconsistent—if the sex of her partner was indeed irrelevant, how would it have been helpful in objecting to the suspension? In this regard, the court could have been more forceful in insisting that disclosure by the school must be exceedingly limited. Perhaps a rebuttable presumption is in place. This is not like the current structure of such claims where a student must first demonstrate that her rights have been infringed and then the burden shifts to the school that the infringement had an educational purpose—similarly to how discrimination claims for adults require first a showing of discrimination and then a failure of the employer to demonstrate a BFOQ. The idea of a rebuttable presumption would increase students’ protection both compared to where they are now and compared to adults. However, the details of this are beyond the scope of this paper.

## **B. Policy Considerations: Open Future**

In addition to allowing children to reach identity achievement and to protect them from the emotional wounds of assimilation demands, I would suggest that courts in the cases discussed above were motivated by a related concern for the foreclosure of children’s iden-

tity interests in the legal and social policy sense as well. Most rules established in those cases can be seen as protecting the foundations of LGBT identities and validating them as acceptable so that children grow up able to pursue and express their identities safely and fully the closer they come to adulthood. Those rules also demonstrate that their wellbeing and autonomy is protected in order for them to grow up to be productive and informed members of society.

In contrast to other scholars who advocate children's autonomy rights but struggle with the issue of a child's actual capacity to make autonomous decisions, Joel Feinberg would have these rights protected as anticipatory rights for children.<sup>278</sup> Feinberg categorizes children's rights as belonging to one of two groups. Dependency rights are rights that are based in children's dependence on adults for their basic needs and survival.<sup>279</sup> Rights-in-trust are those rights that adults hold but whose exercise is contingent upon a child's capacity and development. Rights-in-trust should be "saved" for children until they are able to enjoy them. Violation of rights-in-trust is conduct that denies the child of future options.<sup>280</sup> Therefore, conceptually, children's self-determination and autonomous decision-making rights are not their own, but rather they are the adult's that the child is to become.<sup>281</sup> These rights are protected in advance so that the potential adult will later be able to make meaningful decisions.

Feinberg uses the example of education of Amish children in cases such as *Wisconsin v. Yoder*<sup>282</sup> to further explain the concept of children's open future. For Feinberg, these were not cases about parents' rights, but about children's rights, which the state as *parens patriae* must protect.<sup>283</sup> However, the Amish children were disserved by courts that allowed parents to pull them out of school early. This costs them the opportunity to benefit from a well-rounded education. The Amish children were limited to an education that prepared them only for one way of life. Their upbringing, as condoned by courts, irreversibly revoked any real possibility for these children to later opt for any-

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278. Joel Feinberg, *The Child's Right to an Open Future, in WHOSE CHILD?: CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER* 124, 125 (William Aken & Hugh LaFollette eds., 1980).

279. *Id.* at 125.

280. *Id.* at 125–26 (“[The child's] right while he is still a child is to have these future options kept open until he is a fully formed self-determining adult capable of deciding among them.”).

281. *Id.* at 127.

282. 406 U.S. 205 (1972).

283. Feinberg, *supra* note 279, at 132.

thing other than life as part of the Amish community. Feinberg argues that in such conflicts, options that keep as many possible choices available to the child for when she is able to make her own decisions, and therefore privilege her open future, are to prevail.<sup>284</sup> Accordingly, childrearing and education should be motivated by the maximization of children's opportunities for self-fulfillment.<sup>285</sup> The goal is to keep as many open possibilities as would best equip the child with knowledge and skills to enable her to determine which way of life best fits her sense-of-self.<sup>286</sup> A child is denied an open future when her autonomy is violated in advance in ways that vital and determinative decisions are made by others before she herself has the capacity to make such decisions.<sup>287</sup>

The same policy of preserving the child's open future can be found in cases regarding LGBT students. While educators, fellow students and parents may try to steer LGBT students into heteronormativity, courts have refused to accept that avoiding homosexuality is a legitimate public interest. As a matter of law, then, heteronormativity is not an assimilation demand that the government may validly pursue. Recall, that in *Nabozny* the court rejected the school's arguments that, relying on *Bowers* and the criminalization of sodomy, there was a rational basis for the school's discrimination of Nabozny and its failure to protect him from harassment.<sup>288</sup> In doing so, the court can be understood to reject the idea that the state has the power to impose conversion demands on LGBT children, whether it be through school-based discrimination, harassment, or through the criminalization of sodomy.<sup>289</sup> Similarly, the *Theno* court would not accept that the school there was within its rights not to protect him from the harassment he suffered for being a "girly-girl," for example.<sup>290</sup> In other words, the court there also rejected the idea that it would be permissi-

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284. *Id.* at 13–33.

285. Feinberg defines self-fulfillment as "the development of one's chief aptitudes into genuine talents in a life that gives them scope, an unfolding of all basic tendencies and inclinations." *Id.* at 143. Autonomy, according to Feinberg, is the right of self-determination and is instrumental for self-fulfillment. *Id.*

286. *See id.* at 135.

287. *Id.* at 143.

288. *Nabozny*, 92 F.3d at 458.

289. It is possible, however, that the court's rejection of criminalization of sodomy as a rational basis regarding the mistreatment of students is the assumption that, perhaps, because of age of consent and statutory rape laws, the court wished to avoid the considering the relationship between sodomy and adolescence. Perhaps the court was willing to de-link sodomy laws as a rational basis by assuming that LGBT students would not, due to their age, be engaging in sodomy.

290. *Theno*, 394 F.Supp.2d 1306–1307.

ble for a school and fellow students to violently impose assimilation demands in order to compel a student to conform to stereotypically gendered behavior or a heteronormative identity and expression. These two cases demonstrate how courts that penalize schools for imposing assimilation demands (or being silent when fellow students do) protect LGBT students from having to abandon the path toward developing their authentic self for fear for their safety. By doing so, courts preserve LGBT students' ability to continue to explore their identities and preserve their future rights vis-à-vis those identities.

There are, however, examples of cases where courts, even wanting to protect children from assimilation demands, go about it in ways that restrict children's rights-in-trust and limit their open future. *Fricke*, insofar that the court relied on Fricke's "commitment to homosexuality," can be seen as an example. One of the factors that seemed material for the court's decision to protect Fricke's right to bring a same-sex date to the school prom was the conversation he had with Mr. Lynch about the possibility of dating girls.<sup>291</sup> Fricke insisted that he was interested in boys, perhaps indicating he had reached identity achievement in his sexual orientation. The court can be understood as respecting this. However, the fact that this was even an issue that came up is troubling. Straight children are not similarly expected to consider dating partners of the same-sex before being allowed to bring their date of choice to a school function (though perhaps Erikson, who supported identity exploration and experimentation, would today approve of such expectations). And courts would presumably not base their holdings regarding the rights of straight students on them meeting a burden of demonstrating exploration and then conviction as to their sexual orientation. But the reason this is most concerning is that the demand to demonstrate "conviction," which is not expected of his straight counterparts, may have led Fricke into identity foreclosure—denying him the opportunities of true explorations. Put differently, Mr. Lynch and the court, together and separately, may have pushed Fricke to make a decision about his sexual orientation earlier than he otherwise would have, thus making him commit to an identity too early and without meaningful opportunity to preserve his future rights, for instance, taking a girl to the prom the following year as expressive conduct of a potentially fluid identity, experimentation, or once more as part of the process toward identity achievement.

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291. See *supra* Part II.B.

In addition to the traditional discrimination, harassment, and free speech cases discussed above, perhaps another compelling example for the theory that a concern for children's open future has motivated courts to protect LGBT students from assimilation demands more strongly than they do adults, is discrimination in school curricula—also referred to as “No Promo Homo”<sup>292</sup> statutes and policies. These are education policies discouraging the “promotion” of homosexuality in schools that have been adopted in several states by statute and/or at the school board level.<sup>293</sup> Some such policies avoid any mention of homosexuality within the curriculum, as a purported means to achieve neutrality on the matter. However, commentators have asserted that the invisibility of sexuality, particularly homosexuality, denies its place in school culture—leaving LGBT teens vulnerable and isolated.<sup>294</sup> A more severe approach is acknowledging homosexuality solely through its denunciation and providing no other acknowledgement of sexual diversity. These policies aim to teach children heteronormativity and the superiority of heterosexuality in an attempt to construct their sexuality in ways society considers productive and desirable. Thus, they reflect an assumption that children are not yet fixed in their sexuality and that adults around them are responsible for preventing their conversion to an inferior and undesirable same-sex sexual orientation.

“No Promo Homo” policies, prevalent in a significant number of states,<sup>295</sup> prohibit any exposure, and often explicitly prohibit any positive exposure, of students to sexual orientation or gender identity matters. They may also be used to oppose LGBT-positive student groups, such as Gay-Straight Alliances, from operating at school, despite the fact that under certain circumstances federal law protects these groups' activities.<sup>296</sup>

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292. Eskridge, *supra* note 98.

293. ESKRIDGE & HUNTER, *supra* note 16, at 1010.

294. *Id.* at 1011.

295. According to GLSEN, these states currently include Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah. *No Promo Homo*, GLSEN (Oct. 19, 2016, 1:15pm), <http://www.glsen.org/learn/policy/issues/nopromohomo> [<https://perma.cc/BS3X-YV53>].

296. The Equal Access Act of 1984 provides that federally funded public schools that allow non-curricular student groups access to school facilities and services, may not discriminate between those groups, and may not discriminate based on sexual orientation or gender identity. 20 U.S.C. § 4071 (2011). Therefore, as long as a school has groups meeting on school grounds that are allowed to use school services such as bulletin boards or public address systems it must allow all groups the same access regardless of the content or subject-matter of the group. A non-curricular student group is a group whose subject-matter does not directly relate to classes offered by the school, where participation is neither

These policies and other educational strategies designed to marginalize LGBT people (such as abstinence only sexual education, which teaches abstinence or marital sex as the only means to avoid unwanted pregnancies and sexually transmitted infections) result in the exacerbated isolation and exclusion of LGBT youth from school life through invisibility, lack of resources and support systems within the school,<sup>297</sup> and the subtle dissemination of homophobia and transphobia through ignorance, silence, and de-legitimization. Another troubling consequence is that LGBT children do not receive a beneficial education that will prepare them for the life they are likely to lead, a right that courts have continually protected. In the case of LGBT children, who do not ordinarily share the sexual aspects of their identities with parents or other family members, an education that is value neutral (or preferably positive) toward sexual diversity is all the more necessary. School curriculum that is silent or negative on sexual diversity does not engage children in education that is respectful to sexual minorities. This assimilation indoctrinates children to idealize an exclusionary and restrictive construct of sexuality that revolves around marital heteronormative sexuality. Substitution of parental control over school's educational authority impacts a larger number of children's sexual identities and sexual health, and is reason for concern over public health as well.

"No Promo Homo" policies were tested in court, for example, in *Parker v. Hurley*,<sup>298</sup> where parents sought to essentially force a school

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required for classes nor results in academic credit. *See* Bd. of Educ. of the Westside Cmty. Schs. v. Mergens, 496 U.S. 226, 241–42 (1990); *Boyd Gay Straight Alliance v. Bd. of Educ.*, 258 F.Supp.2d 667 (E.D. Ky. 2003).

297. Examples of such resources and support systems can be identifying a school staffer who is supportive to LGBT students, or creating "safe zones"—designated times and places at school where a student is welcome to approach teachers and discuss personal or other concerns in private. Having teachers and administrators out or supportive increases students' sense of safety and belonging at school, lowers numbers of missed schooldays and leads to higher rates of students planning to go to college. As sexual orientation and gender identity are a sensitive issue for most LGBT students, particularly when they are still associated with concerns of exclusion, discrimination and harassment, many will avoid turning to others to discuss what they may be going through. Resources that will allow students to intellectually explore sexual orientation or gender identity issues can complement other support systems to which students may hesitate to reach out. Resources such as books, videos or computers should be available for exploratory research. Also, resources should be accessible in a manner that is private and discrete.

298. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). For similar parental challenges to curriculum that discuss LGBT content, see *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2005) (parental positive rights to excuse children from classes their parents find objectionable would make administering public education impossible); *Brown v. Hot, Sexy, & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (ruling that granting parents rights to direct

to adopt such policies. The parents there attempted to persuade the court to exempt their children from programs they feared would expose the children to homosexuality that may encourage them to develop non-heteronormative identities.<sup>299</sup> The parents requested to excuse their children from certain school classes (“opt out”) that discuss homosexuality and same-sex marriage as part of the school’s non-discrimination and diversity education based on their free exercise and parental rights.<sup>300</sup> Because these classes were limited to diversity education,<sup>301</sup> the court found these classes to be squarely within the policy to promote engagement pluralism in schools. The court rejected the parents’ opt out demands as it saw the references to homosexuality, which focused on tolerance and did not engage discussions on physical or sexual implications of homosexuality, as outside the scope of sexual education.<sup>302</sup> Moreover, the curriculum had no coercive component. While the First Amendment protects an individual from coercion to adopt or disavow beliefs forbidden or required by one’s religion,<sup>303</sup> the school did not require any such action. The students, found the court, were not compelled to embrace the views presented in the diversity classes or reject their religion in any way.<sup>304</sup>

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public education would be unworkable and create impossible burdens on schools to design specific curriculums for many students); *Morrison v. Bd. of Educ. of Boyd County*, 419 F.Supp.2d 937 (E.D. Ky. 2006) (rejecting parents’ request to excuse children from diversity training because it did not include an anti-LGBT perspective, finding that such instruction did not constitute one-sided indoctrination).

299. *Parker*, 514 F.3d at 90. These classes, for example, included readings about families with same-sex parents.

300. *Id.* The parents sought to opt their children out of these classes until the children reached, at the very least, the seventh grade.

301. Sexual education is generally understood to include lessons on human sexual health issues such as reproduction, sexually transmitted infections (STIs) and the prevention thereof. Instruction of materials that discuss gender, sexuality or families without discussing reproductive organs and their functions generally does not constitute sexual education. Rachmilovitz, *Assimilation Demands*, *supra* note 12, at 188–89.

302. *Parker*, 514 F.3d at 92. For a discussion of the statutory sources of opt out rights, and the different forms they may take across states, see Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curricular Discussions about Sexual Orientation and Same-Sex Marriage?*, 2011 BYU EDUC. & L.J. 423, 438–60 (2011) (“[A]lthough federal courts do not allow curriculum opt-outs on constitutional grounds, most states have statutes or administrative regulations that grant curricular exemptions in varying situations for public schools. . . . [S]tatutes or administrative regulations in all fifty states and the District of Columbia [ ]grant parents a specific right to excuse their children from some part of the public school curriculum. These statutes and regulations were then categorized into three groups: states with opt-out laws that are ‘restrictive,’ states with opt-out laws that are ‘permissive,’ and states that are categorized as ‘non-existent’ (meaning that these states have no curriculum opt-out law.)”).

303. *Parker*, 514 F.3d at 104–05.

304. *Id.* at 105–06.

They were not even required to actively participate in the discussion of tolerance for homosexuality.<sup>305</sup> Therefore, because the school's action was not, strictly speaking, an assimilation *demand*, the court found it to be permissible.

The court relied on Massachusetts policy to facilitate engagement pluralism in schools by teaching respect and diversity in order to eliminate sex and race stereotypes and found that goal to also eliminate stereotypes about homosexuality.<sup>306</sup> Because of the legislatures' and courts' policy to ensure engagement pluralism, free exercise rights do not create freedom from any reference to non-traditional families or to same-sex relationships.<sup>307</sup>

In addition to reinforcing pluralism as preparing children for adult civic life and reiterating exposure and non-coercion as the markers of engagement, the *Parker* opinion can be seen as incorporating an "open future" concept as a limiting principle to parental rights, and in turn school powers. The *Parker* court does what the *Yoder* court failed to do. In *Parker*, the court saw that an education that would best prepare children to become adults in mainstream American society requires knowledge and intellectual tools additional to those their parents might provide.<sup>308</sup> In *Parker*, the differences in views to which children are exposed are meant to supplement each other; neither parents nor schools are restricted from exposing children to values they see appropriate to teach. The decision sees the benefit of exposing children to both worlds, rather than closing off any potential values sets. The court in *Parker* truly facilitates an open future for children who are engaged in several different perspectives and are trusted to test these perspectives before adopting or rejecting them. By allowing the children to have an open future, maintaining a full range of opportunities to explore the values and principles that will come to construct their identity—religious, sexual, or otherwise—the court also fostered the children's opportunity to reach a well-formed identity in the manner that Erikson believed necessary for emotional health and well-being. It also keeps students' potential political involvement, their rights, and their decision-making open to critical thinking and fuller participation in the democratic process while be-

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305. *Id.* at 106.

306. *Id.* at 91.

307. *Id.* at 106. Further, free exercise does not grant parents the power to control the substance of school curriculum, as the First Amendment does not include positive rights. *Id.* at 102–103.

308. *Id.*; see also *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); see generally *Davis v. Page*, 385 F.Supp. 395 (D.N.H. 1974).

ing more informed, having a healthier sense of self, and less influenced by messaging that devalues diverse identities and groups, whether they identify with those or not.

This is not only better for their emotional adjustment or function as contributing, thoughtful adults in a democracy, but also a fundamental right. After *Lawrence*,<sup>309</sup> *Romer*,<sup>310</sup> and *Obergefell*,<sup>311</sup> in which the Supreme Court held that the state could not constitutionally bar same-sex sexual conduct, could not target lesbian, gay, or bisexual people for discrimination based on animus, or prohibit marriage equality, respectively, an LGBT identity can no longer be sanctioned by the state as less desirable. The state, including schools as state-actors, must at least remain neutral<sup>312</sup> on the value of sexual minority identity thus eliminating assimilation demands in state controlled environments as they can no longer be justified in putting forth a heteronormative social, political and legal landscape.

### C. LGBT Youth Vulnerability: Plethora of Risks; Dearth of Responses

The argument made in this article, that courts tend to protect LGBT children from school-based assimilation demands better than LGBT adults in the workplace must not lead us to misguided notions that LGBT youth are safe in schools or that the law no longer need be concerned with their wellbeing. It is undoubtedly positive—indeed necessary—that courts are stepping up and protecting LGBT students, but relying solely on courts to ensure their equitable education, physical safety, and emotional health is insufficient.

As the social science data presented throughout demonstrate, LGBT youth who suffer assimilation demands remain overrepresented among at-risk youth<sup>313</sup> but are under-protected by the legal system as a whole, possibly in part because of the focus on protecting children

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309. *Lawrence*, 539 U.S. 558 (2003).

310. *Romer v. Evans*, 517 U.S. 620 (1996).

311. *Obergefell*, 135 S.Ct. 2584 (2015).

312. Perhaps, as analogous to religion, the State should not be directing or expressing a preference in regard to sexual identities. However, an opposite view is possible whereby in light of past practices, like sodomy laws or marriage inequality, and ongoing ones like “No Promo Homo” laws and the failure to enact the Employment Non-Discrimination Act to cover sexual orientation and gender identity, the state has already inflicted significant damage and must now correct the strong heteronormative messaging it puts forth. This debate, however, is beyond the scope of this paper.

313. Russell et al., *Out at School*, *supra* note 81; Toomey et al., *supra* note 83; Russell et al., *School Victimization*, *supra* note 86; Himmelstein & Bruckner, *supra* note 91; Ray, *supra* note 91; SURVEY 2009, *supra* note 102; SURVEY 2013, *supra* note 102.

through litigation rather than effective prevention. Consider, for example, the recent legislation prohibiting the explicit protection of LGBT students in anti-bullying legislation.<sup>314</sup> These are statutes that specifically and explicitly decline to protect a segment of the student population that data and case law have identified as particularly vulnerable to bullying. Instead, they lump them together with other bullied students as if there is nothing uniquely troubling about assimilation demands that target a student for her sexual minority identity, thus devaluing and mistreating a student for who she is. Perhaps courts are prepared to protect students better than they do adults because they see themselves as the only real line of defense. The ongoing prevalence of school harassment and discrimination, perhaps, indicates that students' only meaningful recourse is through the courts. Yet, students have already suffered emotional distress and educational harms by the time they prevail in court. In fact, they must be able to demonstrate that they already suffered harm in order to prevail in their claims,<sup>315</sup> which shows that the litigation route might be considered too little, too late for these specific children.

Social science research has identified a variety of increased negative outcomes and risks for LGBT youth and has tied those outcomes to troubled relationships. Because LGBT youth are so disempowered by assimilation demands they may be unable to access the legal system. Children and teens who experience assimilation demands—particularly when they experience rejection from parents, too—are less likely to have access to the financial resources often required for securing legal representation or initiating court proceedings. They may also fear that waging legal battles against schools or other students would further victimize them by worsening their relationships with teachers or fellow students. As the reluctance to report<sup>316</sup> and the reason for this reluctance (i.e., the doubt that effective action would be taken, or that they would suffer retaliation<sup>317</sup>) indicate, LGBT youth who are subjected to homophobia and mistreatment from a range of sources might distrust the courts and doubt that judges will protect them.

Getting past such obstacles opens the door to a whole host of other challenges. Children and teens may not yet be resourceful enough to identify and locate services that can help them. They may

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314. See HUMAN RIGHTS CAMPAIGN, *supra* note 175 and accompanying text.

315. See OTT, *Harassment and Hostility*, *supra* note 189.

316. SURVEY 2013, *supra* note 102, at 28, 34.

317. *Id.* at 29.

not be aware nor have the tools to learn about advocacy organizations able to help them. Many school libraries program computer filters to block any website using terms such as “gay,” “lesbian,” “transgender,” and the like as a way to prevent children’s access to pornography.<sup>318</sup> As a result, youth are unable to use these computers, which may be the only computers to which some students have access, or have somewhat private access to, to look online for legal assistance that fits their needs as LGBT students. Without access to this information, it is difficult for youth to recognize that they have rights against their schools, school staff, or fellow students, or for schools to understand and follow their duties to protect students. Thus, even in states where there is legislation in place prohibiting discrimination and harassment based on sexual orientation and/or gender identity, schools may not understand what type of behavior these statutes target and students may not know when and how to assert their rights. Put differently, the many obstacles standing in LGBT students’ way to empower themselves and gain protections against their school-based assimilation demands are compounded by barriers put up by the educational system itself. Consequently, the victimization and disempowerment of LGBT children and adolescents continue.

To best complement the work done by courts, and ultimately to reduce reliance on litigation, greater efforts toward preventing assimilation demands must be made. As argued, efforts at the school level to implement statutory policies and case law are not enough because assimilation demands remain prevalent and courts seem to remain the primary effective port of call. It appears not enough is being done at the school level to implement statutory policies and the case law.<sup>319</sup> Changes on the ground, such as school policies and changes in curricula, have been found effective in reducing the discrimination and harassment of LGBT students.<sup>320</sup> Social scientists studying the adjustment of LGBT students in later life have also suggested strategies such as adopting and enforcing non-discrimination and harassment policies that are understandable to students and staff and that include protections for LGBT students; developing mechanisms disseminating infor-

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318. *Anti-LGBT Web Filtering*, AM. CIVIL LIBERTIES UNION (Feb. 8, 2016, 10:40 AM), <https://www.aclu.org/issues/lgbt-rights/lgbt-youth/anti-lgbt-web-filtering> [https://perma.cc/D6ST-VMRQ]. For cases on online filtering litigated by the ACLU, leading to the removal of such LGBT-related page blockers, see ACLU (Feb. 8, 2016, 10:43AM) [https://www.aclu.org/search/?f%5B0%5D=field\\_issues%3A226&f%5B1%5D=type%3Acase](https://www.aclu.org/search/?f%5B0%5D=field_issues%3A226&f%5B1%5D=type%3Acase) [https://perma.cc/S4EA-PPL2].

319. Russell et al., *School Victimization*, *supra* note 86, at 229.

320. SURVEY 2013, *supra* note 102, at 61, 76.

mation about sexual minority identities and providing support for students with related concerns; training school staff to regularly and effectively intervene when assimilation demands take place; establishing student support groups and activities, such as gay-straight alliances.<sup>321</sup> As one study concludes:

School administrators and educators must continue to advocate for and to implement LGBT inclusive policies and programs to promote safe and supportive learning environments where all students are protected from bias-motivated victimization and harassment and are free to learn and flourish in schools. For too many LGBT [. . .] students, school victimization has resulted in. . . restricted life chances. . . and undermine their human potential.<sup>322</sup>

#### D. After the Schoolhouse Gate: Higher Education

Now that we know that better protections exist in education than in employment, we might ask ourselves: Could this trend extend beyond K-12 education and into institutions of higher education? On one hand, college and university students are young people who may still be developing their identities and are still working through dependence on adults toward autonomy and agency. It therefore seems that similar rationales for protecting schoolchildren would apply to them too, and therefore, courts might be persuaded to extend stronger protections to them also. On the other hand, college students are mostly legal adults who have reached the age of majority. This means, in the eyes of the law, that their rights and obligations vis-à-vis that state and others are different than those of minors. Generally, their age means that the state, including courts, would be less inclined to intervene in their lives, even if this is for their own protection. The tension between autonomy and paternalism in their relationship with the state is heightened for LGBT students in higher education.

Still, to truly tackle the issues of LGBT youth and young adults struggling with assimilation demands in their educational settings, and to continue to entrench a politics of LGBT identity legitimacy, LGBT rights advocates should not overlook this group. Protection would remain necessary as students in higher education continue to experience the assimilation demands that their younger counterparts experience. In a study published in 2008, social scientists found that as many as 58% of participating LGBT college students experienced

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321. Russell et al., *School Victimization*, *supra* note 86, at 229; Russell et al., *Out at School*, *supra* note 83, at 641.

322. Russell et al., *School Victimization*, *supra* note 86, at 229.

some form of homophobic mistreatment on campus, and as many as 39% of their straight counterparts reported homophobic experiences as well.<sup>323</sup> College and university students seem similarly vulnerable to victimization as K-12 students, but by virtue of their adulthood are at risk of losing whatever protections they may have enjoyed before.

It seems the development of a hybrid model between employment and high schools is most likely. Title IX and the special characteristics and goals of education would lead to greater protections for college students than for employees in the workplace, but because college students are mostly adults rather than minor children, they may be seen as less vulnerable, and so the protections they receive would be less extensive. Arguably, as opposed to young schoolchildren, college students are adults who need to learn to cope with pressures and even aggression from others. However, the Supreme Court has found that young adults have certain vulnerabilities in their psychological development, and that the age of 18 is an arbitrary line that may not represent accurately the rate of development in all cases.<sup>324</sup> So perhaps the rationale of protecting identity development should extend from high school students to college students as well.

A recent indication that this may indeed be the direction of the case law is the motion to dismiss decision in *Videckis v. Pepperdine University*.<sup>325</sup> There, two college students filed a Title IX suit against their university for discrimination and harassment they experienced as members of the school's women's basketball team because they were perceived to be lesbians dating each other.<sup>326</sup> The discrimination and harassment was designed to get the two students to quit the team.<sup>327</sup>

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323. Perry Silvershantz et al., *Slurs, Snubs, and Queer Jokes: Incidence and Impact of Heterosexual Harassment in Academia*, 58 *SEX ROLES* 179, 187 (2008).

324. *Roper*, 543 U.S. at 601–02. But consider doctrines like “mature minor” or “rule of seven” which evaluate a child’s maturity to make medical decisions or designate criminal responsibility according to age in seven-year intervals, respectively, as well as the case law on abortions or emancipation. These areas of the law are all based on the assumption that maturity and autonomy move on a spectrum, and may be understood to support moving the age of majority, decision-making rights, and thus possibly rights, obligations or other protections granted to younger people earlier rather than later, usually around age 14. Rachmilovitz, *Assimilation Demands*, *supra* note 12, at 63–65 (mature minor), 65–71 (abortion), 71–75 (emancipation), 337 (rule of seven).

325. Amended Order Denying Defendant Pepperdine University’s Motion to Dismiss Third, Fourth, & Fifth Causes of Action of the Third Amended Complaint, *Videckis v. Pepperdine Univ.*, 100 F.Supp.3d 927 (2015) (No. 15–00298), available at <https://assets.documentcloud.org/documents/2648492/Pepperdine-Title-IX-Ruling.pdf>. [<https://perma.cc/SNX4-AC3G>].

326. *Id.* at 2.

327. *Id.*

For example, in meetings with staff they were repeatedly asked personal questions about their sleeping arrangements and their dates.<sup>328</sup> In a team meeting, the coach stated he was greatly concerned about same-sex relationships as they were the reason teams lose, and that they would therefore not be tolerated.<sup>329</sup> He later told other team members that the two were bad influences.<sup>330</sup> Among other claims, the students claimed they suffered sexual orientation discrimination under Title IX.<sup>331</sup> The university moved to dismiss these claims arguing that sexual orientation is not protected under Title IX.<sup>332</sup> In response, the students argued that Title IX does protect sexual orientation discrimination or, alternatively, the discriminatory behavior constituted sex stereotype discrimination.<sup>333</sup>

The court found in favor of the students, and ruled that Title IX does indeed protect against sexual orientation discrimination.<sup>334</sup> The court explained that because the distinction between “sex” in Title IX and in Title VII and sexual orientation or sex stereotypes is unclear, at best, these two provisions prohibit sexual orientation discrimination, though not independently.<sup>335</sup> The court applied this new rule, that sex, sexual orientation, and sex stereotypes are inextricable, to the specific case of the Pepperdine students thus: “If the women’s basketball staff in this case had a negative view of lesbians based on lesbians’ perceived failure to conform to the staff’s views of acceptable female behavior, actions taken on the basis of these negative biases would constitute gender stereotype discrimination.”<sup>336</sup>

The court also considered how this case would fit into the formal sex discrimination argument (had one been of the other sex, their same behavior would not have been unacceptable). It found that had the students been men dating women, rather than women dating women, they would not have been subjected to the treatment they suffered.<sup>337</sup> The court denied Pepperdine’s motion to dismiss in December 2015.<sup>338</sup>

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328. *Id.* at 3.

329. *Id.* at 4.

330. *Id.* at 5.

331. *Id.* at 9.

332. *Id.* at 10.

333. *Id.* at 12.

334. *Id.* at 12, 13.

335. *Id.* at 12.

336. *Id.* at 17.

337. *Id.* at 18.

338. *Id.* at 22.

This decision is consistent with the case law on LGBT K-12 students in two important ways: it includes sexual orientation in the category of “sex” as a prohibited motivation for discrimination and harassment and it applies the sex stereotypes theory without requiring the student to have experienced a double bind. The *Videckis* court presents two rationales for finding that Title IX covers sexual orientation in the categories of impermissible discrimination and harassment. First, it finds the distinction between “sex” and “sexual orientation” incoherent, artificial, confusing, and misguided, almost indicating that in this case, and possibly in others, one’s sexual orientation is the cause of their perceived transgressions against the stereotypes associated with their sex. In other words, one’s sexual orientation *is* the very way in which one does not meet the stereotypes of one’s sex. This reasoning leads the court to the second rationale, which is reminiscent of *Theno*. It is the formal approach to sex discrimination—that had the students been men dating women, rather than women dating women—they would not have been subjected to the mistreatment of their coaches and the team staff. Similarly, the *Theno* court found *Theno*’s argument that had he been a girl suffering the same harassment from male students, the school would have taken action persuasive. By finding so, both the *Theno* and the *Videckis* courts followed the logic that the same treatment would garner a different response from the school had the students involved been of the different sex.

As for the *Videckis* court, too, dropping the double bind requirement, consider that the students there were pressured to conform to their presumably straight teammates in their dating, sleep habits, and other personal matters. However, they were not expected to perform a certain way on the team or in games (whether the comparator being straight female or male basketball players). They only faced the single pressure to conform to heteronormativity and there is no other identifiable set of assimilation demands. Thus, the *Videckis* case is unlike *Price Waterhouse* where the employee was expected to perform like a man but look and act like a woman—i.e. expected to navigate a double bind—and thus prevailed in court. It is, however, like the *Nabozny* decision, where the student was only expected to conform to the stereotypes associated with teenage masculinity, but still prevailed—without demonstrating a double bind—under the sex stereotypes theory.

While this decision seems to bring higher education students closer to the level of protection enjoyed by K-12 students, it is unclear

whether this trend will stick. It is only the first decision in this context to hold as such, and the holding of the decision may be unstable because of its procedural posture as a motion to dismiss. At the end of the litigation, the court may expand or narrow this initial decision. Notably, the decision states that sexual orientation can garner Title IX protections only as a sub-set of sex discrimination. However, at this point the court has yet to develop this qualifier with any further detail. It remains to be seen what this means and whether it chips away at or cements higher education students' ability to harness Title IX protections when experiencing discrimination or harassment based on their sexual orientation. In any event, one would hope that all the education-based interests that motivate courts' protection in the high school context would persist at the university level, too. Both levels of education hold similar educational missions—such as allowing free and safe market of ideas or preparing students for life in a diverse and pluralistic democracy. Courts would do well to be guided by these principles when deciding higher education harassment, discrimination, or curriculum cases.

### **Conclusion**

Marriage equality was probably the greatest goal of the LGBT movement in recent years. Now that the Supreme Court has declared restrictions on same-sex marriage unconstitutional, the LGBT rights movement is open to new and exciting possibilities as to the goals that remain. This article joins the voices in the movement that have long advocated for LGBT youth and students and that now suggest their concerns come closer to center stage. The article also fits into the rich body of scholarship addressing the issues of LGBT students. However, the article is unique in that it maps where and how the struggle to protect LGBT students has been more successful than that addressing the needs of the LGBT adults.

These successes have so far been limited primarily to litigation, where courts hearing cases on discrimination and harassment of LGBT students have come to their aid. Courts have done so by removing some important obstacles to protection in these cases, such as removing the requirement of a double-bind in sex stereotyping cases or by finding that sex discrimination includes sexual orientation as well. Two possible rationales have been presented here to explain why courts have opted to better protect schoolchildren: first, the need to allow children to develop healthy identities free of assimilation demands and their harms, and second, the public interest in protecting

children's open future and anticipatory rights so that they can grow up to become productive, contributing, and informed citizens.

Still, that the struggles of LGBT youth in educational settings persist indicates that the successes of litigation have been insufficient. Improving the lives of LGBT youth and ending their struggles is to be fought on many fronts—schools, out of home care, the criminal system, and homes—with a range of strategies in addition to litigation, some of which have been mentioned above. Perhaps now that marriage equality has been achieved, the LGBT rights movement would be willing and able to devote more effort and resources to fight the battle for LGBT students on multiple fronts, building on the considerable accomplishments made in courts and continuing to cement them at the statutory, policy, and implementation levels, so that the right to be free of assimilation demands becomes the lived experience of all LGBT students.