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ARTICLE

LIFTING THE PALL OF ORTHODOXY: THE NEED FOR HEARING A MULTITUDE OF TONGUES IN AND BEYOND THE SEXUAL EDUCATION CURRICULA AT PUBLIC HIGH SCHOOLS

Carlo A. Pedrioli¹

High schools may be the most homophobic institutions in American society, and woe be to anyone who would challenge the heterosexist premises on which they operate.²

I. INTRODUCTION

High school is a difficult time for many young adults, but it is especially difficult for sexual minorities³ who struggle with the

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2. Gerald Unks, *Thinking about the Gay Teen*, in *THE GAY TEEN: EDUCATIONAL PRACTICE AND THEORY FOR LESBIAN, GAY, AND BISEXUAL ADOLESCENTS* 3, 5 (Gerald Unks ed., 1995).

3. Outside of quotations, this Article adopts the term *sexual minorities* to refer to gays, lesbians, bisexuals, transgender individuals, and other people whose sexual orientations do not fall within the realm of heterosexuality, which is the cultural norm in the United States and many other countries. Laurie Rose Kepros, *Queer Theory: Weed or Seed in the Garden of Legal Theory?*, 9 *LAW & SEXUALITY* 279, 284 (2000) (noting heterosexuality as culturally normative). The term *sexual minori-*

added burden of not fitting into a heteronormative culture. The case of a fifteen-year-old young man from Jackson, Mississippi illustrates this point. After seeing Indiana Youth Group (IYG), an Indianapolis support group for sexual minorities, on ABC's 20/20 program, the young man wrote the following to the group:

If you refuse [to help] me, all I will have left is suicide . . . I am a gay teen. When my friends found out, they all disowned me. Some even come together to beat me up. I am not afraid or ashamed to say that I have never hurt or cried as much as I am doing right now. I am so alone. Even my father will have nothing to do with me. My mother does not know, and I plan to keep it like that for as long as I can. Right now she is the

ties describes "all individuals who have traditionally been distinguished by societies because of . . . sexual orientation, inclination, behavior, or nonconformity with gender roles or identity." Marilyn Sanchez-Osorio, *The Road to Recognition and Application of the Fundamental Constitutional Right to Marry of Sexual Minorities in the United States, the Netherlands, and Hungary: A Comparative Legal Study*, 8 ILSA J. INT'L & COMP. L. 131, 132 (2001). While differences exist within and among the various groups that one might place under the rubric *sexual minorities*, individuals in these groups also have commonalities "on the basis of mistreatment due to the interplay of sex, gender and sexual orientation." Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1410 n.5 (1998). Such common mistreatment makes seeing these groups as portions of one larger group reasonable. *Id.*

Writers have employed other umbrella terms besides *sexual minorities* to describe individuals who are outside of the cultural norms of sexual orientation, but some of these terms have been more problematic. For instance, one such term is *homosexual*. Teresa de Lauretis, *Queer Theory: Lesbian and Gay Sexualities*, 3 DIFFERENCES: J. FEMINIST & CULTURAL STUD. iii, v (1991). Although used, this term carries a stigma with it, in part due to the medical association of the word. *Id.* at v. At one time, psychiatry classified homosexuality as a mental disorder. DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 206 n.96 (1995).

Another umbrella term is *Queer*, which comes from Queer theory. Kepros, *supra*, at 281. Adopting the previously pejorative term *queer* (now often capitalized as *Queer*), *id.*, Queer theorists tend to understand the term as referring to that which is "at odds with the normal, the legitimate, the dominant." HALPERIN, *supra*, at 62. The term is about positionality in relation to the normative. *Id.* Such theorists reject predetermined identities and aim to undermine "existing systems of discourse, knowledge, and power." Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory*, 26 LAW & SOC. INQUIRY 271, 273 (2001). Queer theorists adopt postmodern perspectives because these theorists assume "social conditions and human understanding of them are complex, contingent and contextual," and, in resisting "universal or unidimensional generalization," such theorists instead search "for the shifting details of nuance and particularity." Valdes, *supra*, at 1419. Despite the efforts of Queer theorists, some older members of sexual minority groups find the term *Queer* offensive because of its historically pejorative connotation. Kepros, *supra*, at 281. For another discussion of the term *Queer*, see IAN K. MACGILLIVRAY, SEXUAL ORIENTATION AND SCHOOL POLICY: A PRACTICAL GUIDE FOR TEACHERS, ADMINISTRATORS, AND COMMUNITY ACTIVISTS 10 (2004).

only person talking to me. You guys are my only hope. I beg of you to help.⁴

Inundated with over one hundred thousand letters and phone calls after the 20/20 episode, IYG was unable to respond to even one thousand of the letters and calls.⁵ Given the content of the letter from the young man in Mississippi, the low response rate that IYG could manage, and the fact that suicide is the leading cause of death among sexual minority youth,⁶ one must ask whether the author of the letter survived his high school experiences. Indeed, teenagers like this young man are desperate for support that they are not receiving from their schools or elsewhere.

Based on the above letter, the high school that the anonymous author attended likely failed to deal adequately with the issues that sexual minorities face. If the author's school is like many public⁷ high schools today, it may have limited teaching about minority sexualities⁸ in one of three ways: (1) by completely banning the topic of minority sexualities, (2) by banning the view that minority sexualities are acceptable, or (3) by requiring that teachers emphasize the view that minority sexualities are unacceptable.⁹ Regardless of the ways in which high schools send it, the message to sexual minorities is the same: Minority sexualities are socially unacceptable.

When public high schools promote heterosexuality at the cost of denying sexual minority youth the opportunity to learn about minority sexualities, these schools contribute to the disastrous situation in which many sexual minority high school stu-

4. Chris Bull, *Suicidal Tendencies: Is Anguish over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, *ADVOCATE*, Apr. 5, 1994, at 34, 42.

5. *Id.*

6. Kelli Kristine Armstrong, Note, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 *GOLDEN GATE U. L. REV.* 67, 75 (1994).

7. This Article will focus on public rather than private high schools because the U.S. Constitution generally limits governmental rather than private action. WILLIAM COHEN & JONATHAN D. VARAT, *CONSTITUTIONAL LAW: CASES AND MATERIALS* 1107 (10th ed. 1998). As the Article will argue, at stake in this case are individual rights like free speech and substantive due process liberty.

8. This Article adopts the term *minority sexualities* to stress the point that sexual minority youth can have a variety of sexualities, including gay, lesbian, bisexual, transgender, and other sexualities. See *supra* note 3.

9. Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths about Homosexuality as a Violation of the First Amendment*, 60 *BROOK. L. REV.* 1599, 1604 (1995).

dents find themselves.¹⁰ This approach, which many public high schools take, is unnecessarily destructive and warrants prompt change. Instead of helping to perpetuate many of the challenges that sexual minority students face in high school, public high schools can and need to help address these challenges.

To establish the case for such a position, this Article will begin by presenting the plight of many sexual minority high school students. Next, the Article will offer suggestions on how public high schools can help sexual minority students deal with their sexualities, namely by: forming support groups for sexual minority youth, discussing a wide variety of sexual orientation perspectives when appropriate in classes, instituting diversity training for teachers, and implementing non-discrimination policies that address sexual orientation. In addition, this Article will demonstrate that the proposed approaches are constitutional under the First Amendment because they do not violate speech rights of public high schools or of students enrolled in such high schools. Finally, this Article will demonstrate that the proposed approaches are also constitutional under the Fourteenth Amendment because they do not violate the substantive due process liberty rights of the parents of public high school students, regardless of the sexual orientations of the students.

II. THE SPECIAL CHALLENGES OF SEXUAL MINORITY HIGH SCHOOL STUDENTS

In addition to facing the normal challenges that high school students face, sexual minority students face various additional other challenges. For instance, sexual minority students must deal with the harsh reality of being outsiders in a heteronormative culture. This difficulty manifests itself in such cases as high school proms, dating more generally, and advertising aimed at teens. These phenomena all involve the promotion of young men and young women together as the cultural sexual ideal. Sexual minority students soon learn that their sexualities are not acceptable. To describe this phenomenon of the forced and

10. Public high schools are by no means the sole cause of the challenges that sexual minority high school students face. For example, non-accepting family members and heteronormative advertisers, among others, are complicit, too. However, as this Article will argue, public high schools can help remedy not only the problems that public high schools themselves create, but also some of the problems that other parties create.

expected heterosexual climate, one author has used the term *compulsory heterosexuality*.¹¹

Moreover, not only do sexual minority youth suffer from being unable to fit into a heteronormative environment, but they also become direct victims of this environment. For instance, peers at school name-call, ostracize, and sometimes even physically abuse sexual minority youth.¹² Sexual minority youth who have not come out may suffer from the ongoing stresses of hiding their sexualities and fearing discovery.¹³ Depression, anxiety, fear, and low self-esteem can follow such victimization.¹⁴

In addition to not fitting into a heterosexual environment and to being victims of that environment, sexual minority youth suffer from sexual health problems. Sexually transmitted diseases are the second most commonly diagnosed infectious diseases in adolescents in general, but the risk of infection for sexual minority youth is even higher than it is for heterosexual youth.¹⁵ In part, the reason for the increased risk of infection in sexual minority youth is the lack of supportive environments for open socialization, and this lack of support often leads to anonymous sexual encounters and other high-risk behaviors.¹⁶ Young gay individuals suffer even more as they are in the highest risk group for exposure to HIV.¹⁷

Furthermore, difficulties arise when sexual minority youth face the issue of discussing their sexualities with their parents. Sexual minority youth fail to fit into the U.S. culture's Heterosexual Family Myth,¹⁸ which is a plan for what individuals alleg-

11. ADRIENNE RICH, *BLOOD, BREAD, AND POETRY* 23 (1986). In using the term *compulsory heterosexuality*, Rich refers to the environment in which lesbians, particularly lesbians in scholarly circles, find themselves. *Id.* However, the term might just as well describe the experiences of multiple sexual minority groups, not just lesbians, both inside and outside of academic circles because the term effectively captures the general sexual culture in the United States.

12. CAITLIN RYAN & DONNA FUTTERMAN, *LESBIAN & GAY YOUTH: CARE & COUNSELING* 23 (1998).

13. *Id.* at 21.

14. *Id.* at 24.

15. *Id.* at 39.

16. *Id.*

17. *Id.* at 105 (also noting that young females are at increased risk for contracting HIV).

18. GILBERT HERDT & BRUCE KOFF, *SOMETHING TO TELL YOU: THE ROAD FAMILIES TRAVEL WHEN A CHILD IS GAY* 16 (2002). Of importance is the point that the heterosexual family can be beneficial for many people. However, problems arise when society imposes this model on individuals who do not fit within the model.

edly should strive to achieve in society.¹⁹ This social ideal includes heterosexual parents and heterosexual children. Under this paradigm, when sexual minority youth fail to meet social expectations of heterosexual children in a heterosexual family, mainstream society labels such youth as "abnormal" or "flawed."²⁰ Some sexual minority youth no doubt internalize their "shortcomings" and let that internalization erode away at them from the inside. Other sexual minority youth may reveal their sexual orientations to their parents but suffer from conditional parental love, by which parents love their children only so long as those children contribute to the ideal of the heterosexual family.²¹ In other words, to receive love from their parents, the teenagers need to be heterosexual.

Additionally, in response to the coming out of a child, parents may go through a variety of reactions that are harmful to the now-out youth. Such reactions include denial of the child's sexual orientation,²² anger at realizing that the status quo has changed with the child's coming out,²³ bargaining with the child that if the child renounces coming out the parents will pretend that the coming out never happened,²⁴ and parental depression.²⁵ The effects of these reactions on the sexual minority youth can be crushing because the parents are providing no support when their child most needs that support.

Often forced away from home by this type of parental intolerance, many sexual minority youth end up on the street.²⁶ In fact, twenty-six in out of one hundred sexual minority teenagers are forced to leave their homes after revealing their sexual orientations.²⁷ Sexual minority street youth comprise a disproportionately high percentage of street youth in general, perhaps one in four.²⁸ In some large metropolitan areas, the percentages may be higher. For example, in Los Angeles, sexual minority youth

19. *Id.* at 15.

20. *Id.* at 16.

21. *Id.* at 17.

22. RITCH C. SAVIN-WILLIAMS, MOM, DAD, I'M GAY: HOW FAMILIES NEGOTIATE COMING OUT 37 (2001).

23. *Id.* at 39 (noting that types of anger vary from agitation to dismay to rage).

24. *Id.* at 41.

25. *Id.* at 42.

26. Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, 64 ALB. L. REV. 915, 933-34 (2001).

27. Armstrong, *supra* note 6, at 76.

28. RYAN & FUTTERMAN, *supra* note 12, at 25.

make up about twenty-five to thirty-five percent of street youth.²⁹ In Seattle, sexual minority youth make up approximately forty percent of street youth.³⁰ Unfortunately, many of these sexual minority youth on the streets turn to prostitution and drugs.³¹

The results of not fitting into a heterosexual school environment, the negative responses from peers, sexual health problems, parental rejection, and street life can be deadly. Not surprisingly, suicide is the leading cause of death among sexual minority youth.³² Between six and thirteen in out of one hundred adolescents in general have attempted to commit suicide,³³ but between twenty and forty in out of one hundred sexual minority adolescents have attempted to commit suicide.³⁴ The suicide attempt rates for sexual minority youth who are homeless, runaways, or victims of violence may be even higher.³⁵ Thus, almost one in three sexual minority youths has attempted suicide, while sexual minority youth are about three times more likely than heterosexual youth to try to commit suicide. Although adolescents in general have many challenges to address, sexual minority youth have those challenges plus the added weight of their sexual orientations.

As grave as the suffering of sexual minority youth may be, society as a whole also suffers costs associated with the challenges of young sexual minorities. For instance, legitimizing prejudice against sexual minority students undesirably legitimizes prejudice and discrimination against other minority students and minorities in general.³⁶ This legitimization of discrimination against sexual minority students offers all students a "poor lesson[] in citizenship."³⁷ Moreover, sexual minority youth who fail to become socially productive due to their many challenges almost inevitably will need public assistance, and ultimately taxpayers may have to pay the bill.³⁸ For instance, unsympathetic

29. *Id.*

30. *Id.*

31. *Id.*

32. Armstrong, *supra* note 6, at 75.

33. RYAN & FUTTERMAN, *supra* note 12, at 56.

34. *Id.* at 60.

35. *Id.*

36. Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446, 475 (1986).

37. *Id.* at 476.

38. *Id.* at 475-76.

parents may expel an out lesbian child from their home and in effect force her to live on the streets. Such ensuing homelessness becomes a societal problem. Because the well-being of sexual minority students can help minimize these social costs, economic and otherwise, society has a financial and ethical stake in the well-being of sexual minority youth.

III. SOME APPROACHES TO THE SPECIAL CHALLENGES OF SEXUAL MINORITY HIGH SCHOOL STUDENTS

With the possible exception of the matter of parental rejection, public schools can implement several approaches to the aforementioned challenges that sexual minority high school students often suffer. These proposed approaches involve both dialogue³⁹ on and argumentation⁴⁰ about sexual minority issues. Specifically, this part of the Article will address formation of support groups, discussion of a wide variety of sexual orientation perspectives when appropriate in classes, diversity training for teachers, and non-discrimination policies that address sexual orientation.

To begin with, schools can offer support groups for sexual minority youth in which youth can discuss issues of concern, including sexuality, sexual minority social life, and suicide.⁴¹ Spe-

39. The term *dialogue* can refer to "talk . . . that affirms the person-to-person relationship between discussants and which acknowledges their collective right and intellectual capacity to make sense of the world." NANCY M. DIXON, PERSPECTIVES ON DIALOGUE: MAKING TALK DEVELOPMENTAL FOR INDIVIDUALS AND ORGANIZATIONS 24 (1996). Dixon adds that dialogue affirms the positions of discussants but that it can lead to the examination of one's own positions and the positions of others. *Id.* at 24-25. Although dialogue can lead to examination of discussants' positions, it is not judgmental. *Id.* at 28.

40. The term *argumentation* tends to refer to "the discursive techniques allowing [people] to induce or to increase the mind's adherence to the theses presented for its assent." CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 4 (John Wilkinson & Purcell Weaver trans., Univ. Notre Dame Press 1969) (1958). Another definition suggests that the term *argumentation* can refer to "reason giving in communication situations by people whose purpose is the justification of acts, beliefs, attitudes, and values." AUSTIN J. FREELEY & DAVID L. STEINBERG, ARGUMENTATION AND DEBATE: CRITICAL THINKING FOR REASONED DECISION MAKING 3 (10th ed. 2000). As these definitions would suggest, some risk is inherent in argumentation over sexual minority issues.

41. Armstrong, *supra* note 6, at 89. It would be hard for schools to keep confidential the identities of students who attended such support groups because talk can spread quickly on high school campuses. Hence, if a campus were somewhat intolerant of sexual minorities, a degree of risk would be present for sexual minorities who chose to attend such groups. Schools still would need to offer, but not require, such groups since the alternative could be not providing sexual minorities with a venue

cial speakers can come to talk with sexual minority youth about such pressing issues.⁴² A model example of a support group for sexual minority youth is Project 10, which Los Angeles counselor and science teacher Virginia Uribe founded at Fairfax High School in 1984.⁴³ The program's goal is "to keep students in school, off drugs, and sexually responsible."⁴⁴ Project 10 has received widespread attention and even led to an East Coast counterpart, Project 10 East in Cambridge, Massachusetts.⁴⁵

Although support groups can help sexual minority teenagers, such groups alone cannot fully address the exigencies of the situation. Indeed, heterosexual youth and teachers can benefit from exposure to sexual minority perspectives because a broad education can help "all students by providing more accurate pictures of the world and of the cultures that make up that world."⁴⁶ Thus, in addition to heterosexual perspectives, sexual minority perspectives also call for discussion in appropriate classroom contexts. For instance, sexual minority issues should arise naturally in sexual education classes, but such issues also may come up in literature and history classes as subject matter warrants. An important character in a play or a key individual in a historical period may be gay. Given time and an environment of tolerance, discourse can help to build a broader understanding about human sexuality in its many forms.⁴⁷

for discussing issues of concern. Each sexual minority student would have to determine the potential risk of attending a support group and whether the benefits of attendance would outweigh the potential harms that might come from intolerant peers on campus.

42. *Id.* at 90.

43. *Id.* at 85.

44. DONOVAN R. WALLING, *GAY TEENS AT RISK* 25 (1993).

45. Armstrong, *supra* note 6, at 87. Although Uribe received various accolades for her efforts, Project 10 also received negative attention from parties who believed that taxpayers' money should not go to counseling sexual minority youth. Regardless, over half of the student body at Fairfax High School viewed the program positively. *Id.*

46. MICHELE S. MOSES, *EMBRACING RACE: WHY WE NEED RACE-CONSCIOUS EDUCATION POLICY* 86 (2002) (specifically addressing multicultural education and its merits).

47. As with support groups, a degree of risk is inherent in class discussion on minority sexualities. Immaturity can cloud students' thinking, and sexual minority youth may be at verbal risk. In the interest of education, this risk may be necessary, but a seasoned teacher can establish an appropriate atmosphere for class discussion and hold students to such a standard. The ensuing discussion may be one in which students have the chance to think carefully about issues that they had never considered at length before.

Furthermore, in many cases professional development through diversity training for teachers may be necessary.⁴⁸ High school teachers can learn to become more knowledgeable regarding diversity of sexual orientations as a part of diversity overall, which includes diversity of race, culture, gender, religion, disabilities, and the like. Such training can involve presentations, discussions, and readings that allow teachers to deal more effectively with attacks on sexual minorities.⁴⁹ This new awareness of diversity would manifest itself in more inclusive curricula, which, as appropriate, would deal with sexual minority issues in class lessons and reading assignments.⁵⁰ Of particular note, the sexual education class in the curriculum needs to include a component on minority sexualities, as such a class already focuses on heterosexuality. Also, teachers should become more aware of making sure that school libraries include materials on sexual minority issues so that sexual minority and heterosexual students have access to those materials and can learn from them.⁵¹

Finally, schools need non-discrimination policies that prohibit discrimination based on sexual orientation.⁵² Such policies should ban discrimination based on sexual orientation much as they already ban discrimination based on race, culture, gender, religion, disability, and the like. In implementing these non-discrimination policies, schools need to adhere to the policies in all respects, beginning when school districts hire new employees who may well be sexual minorities.⁵³ Drafting non-discrimination policies should not be too laborious since various legal groups already offer model policies.⁵⁴

48. Armstrong, *supra* note 6, at 91; WALLING, *supra* note 44, at 22.

49. Armstrong, *supra* note 6, at 91-92.

50. WALLING, *supra* note 44, at 21.

51. *Id.* at 23.

52. *Id.* at 21.

53. *Id.*

54. See, e.g., American Civil Liberties Union, *Model Anti-Harassment and Discrimination Policies for Schools*, ACLU ONLINE (Oct. 23, 2001), at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=9214&c=106> (last visited Jan. 31, 2005) (on file with UCLA Women's Law Journal). The ACLU's model discrimination policy states:

The _____ School District is committed to equal opportunity for all students and all staff.

It is District policy that no one shall be treated differently, separately, or have any action directly affecting him or her taken on the basis of race, religion, national origin, marital status, sex, sexual orientation, gender identity, or disability where a person is otherwise qualified or could be with reasonable accommodation.

Eventually, these proposed policies should lead to positive results. For instance, a sexual minority student body population that has a voice in matters related to sexual orientation will be less marginalized and thus healthier. Also, both sexual minority individuals and heterosexual individuals at school should gain from their studies a greater understanding of diversity that exists within a democratic society.⁵⁵ In due time, students ought to be able, at a minimum, to tolerate individuals of other sexual orientations. Pragmatically, many heterosexuals may have sexual minority siblings, friends, or colleagues,⁵⁶ and many sexual minorities may have heterosexual siblings, friends, or colleagues.

IV. CONSTITUTIONAL QUESTIONS AND ANSWERS

In light of the rights of schools and students to free speech and of parents to raising their children, several constitutional concerns over the proposed policies may arise. This part of the Article lays out current law on speech in schools as well as cur-

The immediate remedy for any act of discrimination shall be to end it, treat the individual equally, and, as much as practically possible, to eradicate any effects of discrimination. Discipline should be imposed where appropriate.

Id.

Furthermore, the ACLU has provided a model policy that addresses harassment. *Id.* Assumedly, harassment is a specific type of discrimination. This second model policy, in relevant portion, fleshes out how students can be victims of harassment:

Harassment of a student by another student or by a teacher or other staff member is a violation of school policy. This includes (but is not limited to) harassment based on race, national origin, marital status, sex, sexual orientation, gender identity, religion, or disability. Punishable harassment is conduct, including verbal conduct, (1) that creates (or will certainly create) a hostile environment by substantially interfering with a student's educational benefits, opportunities, or performance, or with a student's physical or psychological well-being; or (2) that is threatening or seriously intimidating.

...

To prevent harassment in the first instance, staff members should teach — teach why harassment is wrong and teach that tolerance and respect are essential to a free society. In response to an act of harassment, staff members should intervene immediately to stop the harassment and, if appropriate, should punish the harassment promptly, consistently, and proportionately to the seriousness of the act. But the response should not end there; rather, staff members should deter future harassment with continuing lessons of tolerance and respect.

Id.

55. MOSES, *supra* note 46, at 86 (discussing multicultural education and its merits).

56. Armstrong, *supra* note 6, at 96 (commenting on siblings and friends only).

rent law on the rights of parents to raise children and will address potential constitutional concerns.

A. *Speech Rights of Schools and Students*

1. The Law on Speech Rights of Schools and Students

In providing the rules for regulating speech in the public school setting, the U.S. Supreme Court has offered a pair of tests under the Free Speech Clause of the First Amendment.⁵⁷ First, under the *Tinker* test, when attempting to regulate speech that happens to occur on a school campus, the school must show that the speech leads to a material and substantial interference with the school's appropriate discipline.⁵⁸ Moreover, a hypothetical threat of interference is insufficient to allow the school to restrict speech.⁵⁹

Second, under the *Hazelwood* test, when speech could be construed as school-sponsored, the school may restrict the speech by demonstrating that the speech restrictions "are reasonably related to legitimate pedagogical concerns."⁶⁰ This test applies in situations such as "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the community might reasonably perceive to bear the imprimatur of the school."⁶¹ For the restriction to violate the First Amendment, there must be "no valid educational purpose" to the restriction.⁶² The *Hazelwood* test is an easier standard for the school to meet than the *Tinker* test and permits a greater degree of restriction on speech.

In addition to meeting the *Tinker* and *Hazelwood* tests, public schools, as agents of the government, may not discriminate against a particular viewpoint.⁶³ Viewpoint discrimination occurs

57. The second of these tests also arose under the Free Press Clause of the First Amendment. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

58. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (restrictions on students' wearing black armbands to protest the war in Vietnam a First Amendment violation). *Tinker* involved the speech of junior high and high school students. *Id.* at 504.

59. *Id.* at 508.

60. *Hazelwood Sch. Dist.*, 484 U.S. at 273 (censoring of portions of high school newspaper which discussed pregnant students and quality of parenting not a First Amendment violation because privacy rights of pregnant students potentially harmed and parental rebuttal opportunity not provided).

61. *Id.* at 271.

62. *Id.* at 273.

63. *Tinker*, 393 U.S. at 509. Arguing that complete viewpoint neutrality exists would be difficult. While schools are not supposed to pick and choose among view-

when “the government targets . . . particular views taken by speakers on a subject.”⁶⁴ An example of viewpoint discrimination would be a school’s granting access to its bulletin boards to certain outside political groups but not to other outside political groups.⁶⁵ The general legal prohibition against viewpoint discrimination pertains to public fora, such as public parks, and non-public fora, such as public schools,⁶⁶ as well as to designated public fora like meeting spaces that the government has opened for public discussion.⁶⁷ A public forum is public property where people traditionally have gathered to express ideas and exchange views,⁶⁸ while a nonpublic forum is public property not traditionally considered an arena for public communication.⁶⁹ A designated public forum is a nonpublic forum that the government has made available for public discussion.⁷⁰

In the school context, viewpoint discrimination can be particularly harmful for several reasons. For instance, viewpoint discrimination limits students’ opportunities to discuss controversial issues. Discussing controversial issues helps to stimulate new ideas in the minds of students and also assists students in developing critical inquiry skills.⁷¹ Moreover, viewpoint discrimination in education allows the state to mold students into citizens who serve the needs of the dominant powers within the state,

points on various matters, schools cannot be value-neutral. MACGILLIVRAY, *supra* note 3, at 147-48. Indeed, the choice of a curriculum reflects values. Perhaps the best negotiation of this tension between the rule of viewpoint neutrality and the idea that any education comes from one perspective or another is that schools in a democratic society should base their curricula on democratic values. *Id.* at 148. For instance, schools should allow all students to have a voice. *Id.* at 147-48. At the same time, schools should respect students’ individuality and not force students to adopt particular perspectives.

64. *Rosenberger v. Univ. of Va.*, 515 U.S. 819, 829 (1995).

65. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the “College Hazelwood” Case*, 68 TENN. L. REV. 481, 507 (2001) (not mentioning the political aspect of hypothetical outside groups).

66. Gail Paulus Sorenson, *The “Public Forum Doctrine” and Its Application in School and College Cases*, 20 J.L. & EDUC. 445, 458 (1991)

67. Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1370 (2001).

68. BLACK’S LAW DICTIONARY 1243-44 (7th ed. 1999).

69. *Id.* at 1080.

70. *Id.* at 1244.

71. Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 169 (1996); Tenney, *supra* note 9, at 1636-37.

which leads to "a despotism over the mind."⁷² Because schools are in part supposed to prepare students to participate in a democratic society,⁷³ this phenomenon of governmental mind control interferes with the democratic process by failing to allow students to develop the ability of making reasonably autonomous choices for themselves.

On a related note, students have a right not to be forced to hold a particular belief. The U.S. Supreme Court has stated that students cannot "be confined to the expression of those sentiments that are officially approved"⁷⁴ and that the First Amendment prohibits "laws that cast a pall of orthodoxy over the classroom."⁷⁵ Public schools are not "enclaves of totalitarianism."⁷⁶ Indeed, schools are to respect the fundamental rights of students, including free speech rights.⁷⁷

Furthermore, the U.S. Supreme Court has spoken out in favor of "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"⁷⁸ The Supreme

72. Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309, 316 n.22 (1980) (quoting JOHN STUART MILL, ON LIBERTY 190-91 (1859)).

73. *Id.* at 316. The task of preparing students to function well in a democratic society is not an easy one for schools to accomplish. On one hand, schools need to instruct students in the principles of a democratic society, while on the other hand schools have to teach students how to question those principles. Stanley Ingber, *Socialization, Indoctrination, or The "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 94 (1987). This delicate balancing act recognizes both the collectivistic and individualistic impulses within U.S. society. *Id.* at 94-95.

74. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

75. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (academic freedom case involving loyalty oath for university faculty members). The Court here noted the importance of exposing students, the future leaders of the country, to the diverse ideas that teachers often present in class. *Id.* One way of thinking about the Court's term *pall of orthodoxy* is that a *pall* is a shroud or cover and *orthodoxy* is the approved way of thinking or doing. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 974, 955 (1991).

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

77. *Id.*

78. *Keyishian*, 385 U.S. at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)). Some contemporary understandings of truth are much more fluid than the traditional modernistic U.S. legal understanding of the concept, under which legal participants and others can discover an objective truth. See, e.g., BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 183-84 (1994) (viewing truth as a social construction); Dennis Patterson, *From Postmodernism to Law and Truth*, 26 HARV. J.L. & PUB. POL'Y 49, 61-64 (2003) (discussing truth as a linguistic creation).

Court has applied this perspective on speech to students.⁷⁹ In observing the Court's perspective on the speech rights of students, two commentators have noted the following: "The more the government regulates formation of beliefs so as to interfere with personal consciousness, the fewer people can conceive dissenting ideas or perceive contradictions between self-interest and government-sustained ideological orthodoxy."⁸⁰ In short, by also focusing on the rights of students not to be forced to hold particular beliefs and instead to have exposure to a wide range of ideas, the Court has placed limits on the speech rights of public schools.

2. The Law on Speech Rights of Schools and Students Applied to Sexual Education

This Article's proposals look more like school-sponsored speech than speech that simply occurs on campus. For example, this Article proposes that schools would hold support groups for sexual minority youth, the school district would provide diversity training for teachers, and the libraries would contain materials on sexual minority issues. Because the proposals would trigger the *Hazelwood* standard, the school district would need to show that its limits on speech were "reasonably related to legitimate pedagogical concerns."⁸¹

Perhaps the school's best argument against adopting these proposals is that the school does not wish to be forced to promote minority sexualities and that by offering education on sexual minority issues to students of different sexual orientations, the school is being forced to express views that favor minority sexualities.⁸² Under this reasoning, the allegedly legitimate ped-

79. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (flag-salute case in which the Court held that a school could not force a child to salute the flag).

80. Arons & Lawrence, *supra* note 72, at 312.

81. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

82. *See, e.g.*, Memorandum from Steven C. Baldwin, Member of the California Assembly, to California Assembly Members 7-8 (May 29, 1997). Baldwin's document came in reply to the Memorandum from Sheila James Kuehl, Member of the California Assembly, to California Assembly (May 20, 1997). During the 1997-98 term, Baldwin and Kuehl clashed over Assembly Bill 101, which proposed to expand existing non-discrimination statutes applicable to public educational institutions to include sexual orientation. On June 3, 1997, the Assembly refused passage of the bill by a vote of thirty-six to forty. LEGIS. COUNSEL, COMPLETE BILL HISTORY FOR ASSEMBLY. B. 101, 1997-98 Legislative Session, available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0101-0150/ab_101_bill_19970604_history.html (last visited Jan. 31, 2005) (on file with UCLA Women's Law Journal). As of winter 2005, Assembly Bill 101 had been inactive since June 4, 1997. *Id.*

agogical concern would be the fear of promoting sexual minority views, and not offering such views would be reasonably related to addressing that concern.

Several problems exist with this position. To begin with, offering information on sexual minority issues through sexual education classes is not the equivalent of adopting a position that favors sexual minority perspectives on such issues. Rather, the school is only offering additional perspectives on issues relevant to students and teachers. The practice is essentially no different from the school's offering heterosexual perspectives on sexuality, except that under the proposals this Article makes, the school would be broadening the discussion of the subject matter in order to be more equitable. Such an approach gives a voice to a variety of perspectives rather than merely to the perspectives that are firmly entrenched in a heteronormative society. By way of an analogy, if public schools choose to teach about religion, constitutionally they cannot adopt one particular religious perspective. Along the same lines, if public schools choose to teach about human sexuality, constitutionally they cannot endorse one particular perspective on sexual orientation.⁸³

In the same vein, the fear of allegedly presenting perspectives in favor of sexual minorities is not a legitimate pedagogical concern. Material that contains minority sexualities is not any more in favor of sexual minorities than material that contains heterosexuality is in favor of heterosexual individuals. Students receive exposure to additional perspectives in the realm of sexuality, which is an area of great interest and relevance to high school students. Over time, reading about the life experiences of sexual minorities in literature or history should have a comparable impact to reading about the experiences of heterosexuals, except that initially many students may be less informed about the material on sexual minorities. An end goal is to make students more knowledgeable of and respectful toward a wide variety of human beings, even if students choose to disagree with the perspectives that others hold.⁸⁴ Thus, since the school does not have a legitimate pedagogical concern, it is immaterial whether the means taken to address that proffered concern are reasonably related to the concern.

83. MACGILLIVRAY *supra* note 3, at 160-61.

84. MOSES, *supra* note 46, at 86, 91 (addressing multicultural education and its merits).

Additionally, as agents of the government, public schools are not allowed to engage in viewpoint discrimination.⁸⁵ Thus, schools may not choose to promote heterosexual perspectives and suppress sexual minority perspectives because such action amounts to discrimination based on viewpoint and is constitutionally impermissible.⁸⁶ If public schools opt to teach sexual education, they have a constitutional obligation to offer a variety of perspectives, including those of sexual minorities, on the topic.

Beyond the constitutional violation, several harms result from this type of viewpoint discrimination by public high schools. As noted earlier, part of the purpose of education is to open students' minds to different ideas and to facilitate the process of critical inquiry; exposure to controversy helps to achieve these ends.⁸⁷ Ignoring sexual minority perspectives hampers the educational purposes of teaching open-mindedness and critical inquiry. Consequently, since a broad education that encompasses a variety of perspectives can help students from all backgrounds learn to think critically,⁸⁸ the lack of such an education for heterosexual and sexual minority students provides a far less enriching experience. All students lose out on an important dimension of their education.

Another harm that comes from viewpoint discrimination against sexual minority perspectives is that sexual minority students do not have the opportunity to become as empowered through their high school studies as they might otherwise become. When public high schools present only the ideas that support and legitimize a heteronormative culture, such as in sexual education classes and in other classes like English and history, sexual minority students may never learn about the heteronormative hegemony that frequently marginalizes them or how to overcome that oppression.⁸⁹ This result does nothing to remedy many of the problems, especially suicide, that sexual minor-

85. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

86. It is important to note that the converse is also impermissible. Schools are not allowed to promote sexual minority viewpoints and stifle heterosexual viewpoints.

87. Heins, *supra* note 71, at 169; Tenney, *supra* note 9, at 1636-37.

88. MOSES, *supra* note 46, at 86.

89. Arons & Lawrence, *supra* note 72, at 322-23. The notion of heteronormative hegemony addresses power and its use. MACGILLIVRAY, *supra* note 3, at 112-13. When heteronormativity "becomes the official position" in education, the educational power structure perpetuates normalizing discourse that reinforces such a position and also excludes "other ways of being." *Id.* at 113. Teachers and students pick up on this normalizing discourse, and many teachers, assuming that all of their

ity students face. The current educational system may silence the voices of sexual minority youth before those voices even have an opportunity to speak. Under this result, democracy clearly fails to live up to its potential.

In response to the argument that many public high schools engage in viewpoint discrimination against sexual minority perspectives, one might claim that, in adopting a broader perspective on sexual education, public high schools will be violating the speech rights of students opposed to minority sexualities. However, schools will not be banning the views of students opposed to minority sexualities. Students still can meet in groups after school to express their positions. Also, as positions against minority sexualities arise in the classroom, students can consider in an appropriate way those positions as existing social or personal views. For example, the teacher in a literature class may discuss a particular lesbian protagonist in a novel and then point out that not everyone accepts the protagonist's sexuality. Discussion may ensue. Similarly, in a sexual education class the teacher may address attraction among sexual minorities along with addressing attraction among heterosexual individuals; the teacher then can point out that some people find certain types of sexual attraction unacceptable. Again, discussion may ensue.⁹⁰ Regardless, students are entitled to adopt or reject such views as the students so choose. Hence, schools would not cast a new "pall of a orthodoxy" over the classroom.

Another argument that one might make against the adoption of a broader perspective of sexual education by public high schools is that when the state adopts the perspective of tolerance as opposed to intolerance in its sexual education programs, the state is engaging in impermissible viewpoint discrimination.⁹¹ To the contrary, precedent exists for the state's adopting policies of tolerance over policies of intolerance without the presence of impermissible viewpoint discrimination. For example, Title VII of the 1964 Civil Rights Act adopts the position that discrimination in employment based on race, color, sex, religion, or national ori-

students are heterosexual, fail to present other possibilities regarding sexual orientation. *Id.* Accordingly, the power structure perpetuates heteronormativity. *Id.*

90. School administrators might even want to host public debates on these issues by inviting speakers to speak for and against minority sexualities. However, school administrators also may want to consider the potential for heated and potentially damaging rhetoric that might occur in this context.

91. Likely, not too many groups would want to make themselves known for outright advocacy of intolerance, but some groups may want to do so.

gin is unacceptable.⁹² Also, the California Fair Employment and Housing Act (CFEHA) adopts the position that employment discrimination based on “race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation” is unacceptable.⁹³ Both Title VII and CFEHA mandate that the government adopt tolerance over intolerance, and the U.S. Supreme Court has not found either statute to qualify as impermissible viewpoint discrimination.⁹⁴ A rationale for this governmental stance against intolerance is that in many arenas, including employment and education, the government needs to prevent discrimination against members of outsider groups because equality is such an important component of a democratic society.⁹⁵ Thus, based on Title VII, CFEHA, and similar statutes, public schools legally need to adopt policies of tolerance over intolerance in their curricula and provide for diversity in their sexual education programs.

Related to the rule against viewpoint discrimination are the U.S. Supreme Court’s rules that students cannot be confined to the expression of officially approved sentiments⁹⁶ and that the First Amendment bans “laws that cast a pall of orthodoxy over the classroom.”⁹⁷ A school district’s adoption of a heterosexual perspective confines students to officially approved sentiments and casts a pall of orthodoxy over the classroom since adoption of that view ignores the views of sexual minorities and forces the school’s view on the students. Such action is impermissible under the First Amendment.

Of importance is the point that in avoiding the pall of orthodoxy, schools cannot possibly cover all views on all subjects because time at school is limited. Accordingly, schools should cover views on topics likely to impact students’ lives.⁹⁸ Naturally, both heterosexual and sexual minority students will want infor-

92. 42 U.S.C. § 2000e-2(a) (1972 & Supp. 2004).

93. CAL. GOV’T CODE § 12940(a) (West Supp. 2004).

94. Enforced anti-discrimination legislation like Title VII has existed since the 1960s. The Supreme Court has had ample time to hear a case and find that Title VII leads to impermissible viewpoint discrimination but to date has not done so.

95. MACGILLIVRAY, *supra* note 3, at 148-50 (discussing this concept in the education arena).

96. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

97. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

98. Tenney, *supra* note 9, at 1639 (discussing this idea with regard to topics but not viewpoints).

mation regarding their own sexualities. Also, students may be interested in learning about the sexualities of individuals with sexual orientations that differ from their own. Thus, schools ought to present multiple perspectives on sexual orientation.

In summary, suppression of a broader perspective on sexual education at public high schools is not reasonably related to any legitimate pedagogical concern since schools would present, not promote, sexual minority perspectives. Moreover, suppression of sexual minority perspectives leads to unconstitutional viewpoint discrimination and damages the education of both heterosexual and sexual minority students. Furthermore, this Article in no way proposes to silence campus speech against minority sexualities because students who oppose minority sexualities remain free to speak out and participate in the discourse on human sexuality. Therefore, this Article's proposals are constitutional under the First Amendment, and public high schools that teach sexual education should adopt proposals of this nature.

B. *Parental Rights*

1. The Law on Parental Rights

Just as the rights of public high schools and students require consideration, the rights of parents also call for consideration. This point is especially accurate in the case of high school students because they generally are still under the legal guidance of their parents. Traditionally, the U.S. Supreme Court has given great weight to parental rights. In the 1920s, the Court first observed that parents have a Fourteenth Amendment substantive due process liberty right to decide how to raise their children.⁹⁹ Two decades later, the Court noted, "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹⁰⁰ More recently, the Court explained that "the primary role of the par-

99. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (law against teaching foreign languages to students held to violate parents' substantive due process liberty right to raise their children).

100. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (statute designed to protect children from the harms of child labor upheld over objection of guardian who wanted her minor ward to hand out religious literature).

ents in the upbringing of their children is now established beyond debate as an enduring American tradition.”¹⁰¹

Despite the great esteem in which the Supreme Court has held the right of parents to raise their children, limits to this right exist. In summarizing the limits of the Supreme Court’s child-rearing jurisprudence, the Sixth Circuit Court of Appeals has noted that for there to be a violation of parents’ rights, the alleged state interference must require or prohibit some activity of the children.¹⁰² According to the Supreme Court, examples of requiring or prohibiting some activity would include requiring that students of a certain age attend public schools rather than private schools¹⁰³ and prohibiting teaching students a foreign language.¹⁰⁴ The inquiry of whether the activity is required or prohibited is a threshold test for determining whether government action is constitutional.¹⁰⁵

Regardless of whether state action requires or prohibits some activity, the government may still burden the rights of parents in order to protect children under the doctrine of *parens patriae*. The doctrine of *parens patriae* refers to “the state in its capacity as provider of protection to those unable to care for themselves.”¹⁰⁶ This doctrine allows coercive intervention by the government into the lives of children and the family,¹⁰⁷ permitting “the government to become the custodian of a child, and to assume the child-rearing duties normally assumed by the child’s

101. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that compulsory school attendance would violate Amish parents’ right to religious upbringing of their children).

102. *Doe v. Irwin*, 615 F.2d 1162, 1168-69 (6th Cir. 1980) (holding that publicly-operated family planning center which distributed contraceptives to unemancipated minors without parental notice did not violate constitutional rights of parents).

103. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

104. *Meyer*, 262 U.S. at 400.

105. Patrick Henigan, Note, *Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents*, 62 BROOK. L. REV. 1261, 1277-78 (1996) (using the language “coercive nature of the alleged state interference” when addressing the issue of a threshold test).

106. BLACK’S LAW DICTIONARY, *supra* note 68, at 1137. The term *parens patriae* literally means “parents of the country.” Claude Noriega, Note & Comment, *Stick a Fork in It: Is Juvenile Justice Done?*, 16 N.Y.L. SCH. J. HUM. RTS. 669, 673 (2000). This old doctrine stems from the English common law. Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).

107. Sacha M. Coupet, Comment, *What to Do with the Sheep in Wolf’s Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1309 (2000).

parents."¹⁰⁸ The authority for the doctrine comes from the state's inherent power to protect its citizens from harm.¹⁰⁹

When the state acts under *parens patriae*, there must be sufficient evidence that "parental decisions will jeopardize the health or safety of the child."¹¹⁰ For instance, the state can act under *parens patriae* when it mandates that children attend school, although not necessarily public school,¹¹¹ and when the state proscribes certain types of child labor.¹¹² Once the government lawfully acts under *parens patriae*, the government has the same discretion in raising the child as the child's parents would have had.¹¹³

In certain cases, the state may even use the doctrine of *parens patriae* to remove a child from the child's parents. To remove a child from the parents, the state needs to make its case by showing the existence of at least one of the following factors: abandonment of the child,¹¹⁴ extreme disinterest in the child,¹¹⁵ parental incapacity to care for the child,¹¹⁶ extreme or repeated child abuse or neglect,¹¹⁷ deterioration of the parent-child relationship,¹¹⁸ parental drug addiction,¹¹⁹ parental incarceration or criminal record,¹²⁰ or parental failure to provide education or medical treatment.¹²¹ In the context of medical treatment, the

108. Noriega, *supra* note 106, at 673.

109. DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 4 (1994).

110. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

111. *Id.* at 213.

112. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

113. Noriega, *supra* note 106, at 673.

114. KRAMER, *supra* note 109, at 15. The term *abandonment* refers to "a parent's intentional withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for display of parental affection for the child." *Id.* An example of abandonment would be a parent's repeatedly and needlessly leaving a child with other adults for long periods of time. *Id.* at 18.

115. *Id.* at 15. An example of parental disinterest would arise in the case of a man who abandons the mother of his unborn child during the mother's pregnancy. *Id.* at 19.

116. *Id.* at 24. An example of incapacity would be when a parent's mental or physical problem becomes severe enough to prevent care for the child. *Id.*

117. *Id.* at 27. An example of abuse or neglect would be intentionally inflicted physical or mental abuse. *Id.*

118. *Id.* at 34.

119. *Id.* at 37.

120. *Id.* at 41. Incarceration by itself is often not enough to terminate parental rights. *Id.* at 41-42.

121. *Id.* at 40. For removal of the child from home based on parental failure to provide for a child's education, the parental failure must be of a severe nature. *Id.* For removal based on parental failure to provide medical treatment, the state must

state can act under *parens patriae* if parents object on religious grounds to protecting their children; the Supreme Court has stated that while “[p]arents may be free to become martyrs themselves,” parents are not free “to make martyrs of their children before [the children] have reached the age of full and legal discretion when they can make that choice for themselves.”¹²²

2. The Law on Parental Rights Applied to Sexual Education

To demonstrate a violation of their child-rearing rights, parents would need to show that the alleged state interference required or prohibited some activity of their children.¹²³ Under normal circumstances, this Article’s proposals would not lead to requiring or prohibiting some activity of children at school. Proposals such as offering sexual minority support groups for students who want such groups and discussing sexual minority issues in certain classes would not require or prohibit some activity. Under normal circumstances, such as in the absence of risk of suicide, students would not be forced to attend support groups. Also, parents would be free to have their children excused from activities of which the parents did not approve. For example, if two parents did not wish to have their child participate in part of a class that dealt with sexual education, the parents could withdraw their child from that specific part of the class, much as parents can now withdraw their children from traditional sexual education classes.¹²⁴ The issue should be no different whether

make the case that the parent failed to exercise care which an ordinarily prudent and loving parent concerned for the well-being of his or her child would exercise. *Id.* at 40-41. The state’s burden becomes less when a medical emergency is at hand. *Id.* at 41.

122. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

123. *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980).

124. *See, e.g.*, CAL. EDUC. CODE § 51939(a) (West Supp. 2004) (providing the option for parents, upon written request, to opt their children out of sexual education classes at school). At least thirty-three states have adopted sexual education statutes similar to California’s. Camille Waters, Note, *A, B, C’s and Condoms for Free: A Legislative Solution to Parents’ Rights and Condom Distribution in Public Schools*, 31 VAL. U. L. REV. 787, 824 n.244 (1997).

On a related note, the highest court in at least one state has held that the placement of condom distribution machines in public high schools does not burden the right of parents to raise their children. *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 516 U.S. 1067 (1996). In *Curtis*, the Supreme Judicial Court of Massachusetts stated that mere placement of condom distribution machines in public high schools does not offend parents’ rights if the program is not required. *Id.* at 586. *But see* *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (1993) (parental opt-out provision required for voluntary condom distribution program in public high school to comport with right of parents to raise their children).

the discussion addresses minority sexualities or heterosexuality; parental withdrawal would be permissible in either case. Thus, because the school's actions normally would not lead to required or prohibited activities, there would be no violation of the parental right to child-rearing.

In extreme circumstances, however, the state may have to require student activity and would need to rely on the doctrine of *parens patriae* in order to act constitutionally. When the state acts under *parens patriae*, there must be sufficient evidence that "parental decisions will jeopardize the health or safety of the child."¹²⁵

For example, parents might refuse to allow their gay child, who may be at risk for suicide, to attend a sexual minority support group.¹²⁶ The worse the assessment of the child's mental health from the school psychologist is, the greater the need to protect the youth's health and safety would be. If the student had been withdrawn for long periods of time, verbally or physically attacked by classmates, and missing while having run away from home, school officials would have a very good case for showing that the parental decision of keeping the young gay student away from the sexual minority counseling group would jeopardize the health or safety of the youth. Accordingly, the state would be able to mandate that the gay youth attend the counseling group.

Furthermore, the case might be potentially serious enough to warrant removing the child from his parents due to parental failure to provide education or medical treatment.¹²⁷ For removal of the child from the parents based on parental failure to provide for a child's education, the parental failure to provide

The decision of the Supreme Judicial Court of Massachusetts in *Curtis* might suggest that, regardless of parental approval, broader sexual education would not violate parental rights so long as the program is voluntary. A critical distinction between the Massachusetts condom case and the case of broader sexual education is that the latter would call for students to study material actively rather than passively experience the presence of condom distribution machines. Accordingly, the potential harm to the parental right of raising children could be much greater where students are actively studying material on sexual orientation.

125. *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

126. The key difference between this hypothetical situation with an at-risk child and a hypothetical situation in which parents refuse to allow their not-at-risk child access to sexual education is the health of the child. The more drastic the situation is, the better the state's case for acting under *parens patriae* would be.

127. KRAMER, *supra* note 109, at 40.

education must be of a severe nature.¹²⁸ For removal based on parental failure to provide medical treatment, the state must make the case that the parents failed to exercise care which ordinarily prudent and loving parents concerned for the well-being of their child would exercise.¹²⁹

In the above hypothetical situation, the state would be able to assume responsibility for the at-risk gay youth's upbringing. Failing to allow a gay child to learn about his sexuality is severe parental behavior because of the various potential health risks to the child. As noted above, suicide is one such risk. In this type of extreme situation, other concerns like how to raise a child become irrelevant until the child is no longer at risk for suicide. Also, such parental behavior demonstrates the failure to exercise care which ordinarily prudent and loving parents concerned for the well-being of their child would exercise since the parents could be denying their child the opportunity to have counseling for the challenges he faces.¹³⁰

In summary, for the most part, broader sexual education in public high schools would not require or prohibit activities of students, so parents' rights normally would not suffer. Nevertheless, in a case where a student's health was seriously at risk, the state would have a legitimate reason to act under the doctrine of *parens patriae* in order to compel action or remove the student from the custody of his or her parents. Therefore, the proposals that this Article makes are constitutional under the Fourteenth Amendment, and public high schools that opt to teach sexual education should adopt proposals of this nature.

V. CONCLUSION

Public high schools that ignore the various sexualities of their students should realize that such schools are contributing to the plight of numerous sexual minority students who do not fit comfortably into a heteronormative culture. To help sexual minority students, these schools need to take several measures, including the following: providing sexual minority youth with support groups, ensuring that class discussions include of a wide variety of sexualities when appropriate, providing diversity train-

128. *Id.*

129. *Id.* at 40-41.

130. This understanding of the term *medical treatment* is broad enough to include treatment for the mind, such as counseling that may grow out of information received at school.

ing for teachers that includes sexual orientation, and adopting non-discrimination policies that address sexual orientation. These proposals do not offend the First Amendment, which, in cases of schools that offer sexual education, calls for discourse among students regarding different sexual orientations, nor do the proposals offend the Fourteenth Amendment, which, while securing the substantive due process liberty right of parents to raise their children, also provides for the needs of children.

Ultimately, sexual minority high school students like the fifteen-year-old gay youth from Jackson, Mississippi, who wrote to the Indiana Youth Group with a desperate cry for help, should not have to feel coerced into committing suicide because of their sexualities. For years, public high schools have addressed the sexuality of heterosexual students, and with a few key changes the same public high schools can begin to address the sexualities of sexual minority students as well. The time to embrace both further diversity and also the well-being of all public high school students has long since arrived.