

3-1-1996

Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents

Patrick Henigan

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Patrick Henigan, *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 (1996).
Available at: <https://brooklynworks.brooklaw.edu/blr/vol62/iss3/10>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

IS PARENTAL AUTHORITY ABSOLUTE? PUBLIC HIGH SCHOOLS WHICH PROVIDE GAY AND LESBIAN YOUTH SERVICES DO NOT VIOLATE THE CONSTITUTIONAL CHILDREARING RIGHT OF PARENTS

INTRODUCTION

The following hypothetical story is a composite based on actual facts.¹ John Smith received three failing grades in his junior year in high school.² During that same year, he was involved in six different violent altercations with other students each requiring medical attention.³ He also tried to com-

¹ The student in this hypothetical and the facts of his situation represent the many experiences of gay and lesbian youth. See *infra* notes 2-11, 13-19. The lawsuit which might result from this hypothetical is the context in which the reader should understand the remainder of the analysis in this Note. The phrase "gay and lesbian youth" describes all youth who suffer from discrimination or bias based on their sexual orientation. This term also includes youth who identify themselves as bisexual and those who are perceived to be gay or lesbian. A "gay and lesbian youth service" refers to: (1) any assistance, support or counseling that a public high school guidance counselor provides to a gay or lesbian student in the confines of the school, including information or advice given regarding issues of self-esteem and self-identity surrounding the youth's sexual orientation; or (2) a service, support group or social event sponsored by the school to assist gay and lesbian youth.

Because state interference with the constitutional childrearing right of parents often occurs in public schools, this Note will focus exclusively on services provided in public school settings. The focus will remain on public high schools because it is there that schools across the country are sponsoring gay and lesbian youth services. See *infra* notes 5, 7.

² Other gay students have testified that their academic grades have suffered in part because they were alone in dealing with their sexual orientation. For example, Matthew Flynn, an eighteen-year old senior at a Massachusetts high school, testified that "during junior high school and in my freshman year, I was very depressed. Feeling alone and isolated from the rest of the world [because I am gay], I . . . fail[ed] three of my five [classes] that year." MASSACHUSETTS GOVERNOR'S COMM'N ON GAY AND LESBIAN YOUTH, MAKING SCHOOLS SAFE FOR GAY AND LESBIAN YOUTH 17 (1993) [hereinafter MASSACHUSETTS GOVERNOR'S COMM'N].

³ Other gay students have been the victims of violence in schools resulting from their sexual orientation. For example, Jamie Nabozny, a former student in a

mit suicide.⁴ These problems resulted from John's difficulty dealing with his sexual orientation.

At the beginning of his senior year in high school, John sought advice and assistance from his high school guidance counselor regarding his struggle to accept his homosexuality.⁵ The guidance counselor provided John with information about organizations outside school that help gay and lesbian youth.⁶ He also encouraged John to join a student support group for gay and lesbian teens sponsored by students at the high school.⁷ In addition, the counselor gave John the titles of three publications that dealt with self-acceptance and the "coming-out" process for individuals troubled about their sexual orienta-

Wisconsin high school, was both verbally and physically harassed by fellow students from the seventh grade through the end of high school because he is gay. The physical violence included being "knocked . . . to the restroom floor and urinated on . . ." Jamie also required abdominal surgery after "ten boys surrounded him in a hallway and began punching his abdomen . . ." Kurt Chandler, *Gay Teen's Suit Against School Seen as Pioneering*, STAR TRIB., Feb. 17, 1995, at A1. Reacting to the formation of a support group for gay and lesbian teens at Fountain Valley High School in California, Greg Tillman, age seventeen, stated that he "would hit a kid with a baseball bat [if] he is gay." Melissa Blaiman, *They Believe Intolerance Brings Peace*, ORANGE COUNTY REG., Nov. 22, 1993, at B1.

⁴ "[G]ay [and lesbian] youth are two to three times more likely to attempt suicide than other young people . . . [and] comprise up to 30% of youth suicides annually." Paul Gibson, *Gay Male and Lesbian Youth Suicide*, REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 3-110 (1989).

⁵ The Lesbian and Gay Teachers Association ("LGTA") of New York City trains counselors and other educators to assist gay and lesbian youth. The LGTA is currently assisting Walton High School in the Bronx with forming a support group for lesbian and gay students. Telephone Interview with Ron Madsen, Steering Committee Member of the Lesbian and Gay Teachers Association of New York City (Jan. 23, 1996).

⁶ There are numerous national publications that list organizations that assist gay and lesbian youth. See, e.g., THE HETRICK-MARTIN INSTITUTE, YOU ARE NOT ALONE: NATIONAL LESBIAN, GAY AND BISEXUAL YOUTH ORGANIZATION DIRECTORY (1993) (listing over 170 organizations in the United States and Canada that provide counseling, emergency shelter, medical care, support groups, social events and other services for gay and lesbian youth).

⁷ One example is the Fountain Valley High School Alliance, a support group for lesbian and gay students in Orange County, California. See Jennifer Brundin, *Students Protest Gay Group*, L.A. TIMES, Nov. 23, 1993, at B1.

tion.⁸ By the end of his senior year, John had maintained a 2.7 grade point average for that year and had not been involved in any further violent incidents at the school.⁹

Mr. and Mrs. Smith were extremely concerned about John's trouble at school during his junior year and repeatedly expressed their concern to him. However, John could not talk to his parents about the difficulty he had dealing with his sexual orientation because he feared they would misunderstand his situation and force him to leave home.¹⁰ Finally, before graduation, John revealed his homosexuality to his parents. He informed them that the improvement in his performance at school during his senior year was the result of his newly acquired ability to accept his homosexuality and feel good about himself. John admitted that his high school guidance counselor helped him in accepting his sexual orientation by offering him advice and encouraging him to become involved in the school-sponsored support group for gay and lesbian teens.

Although Mr. and Mrs. Smith loved their son, they did not believe that John's homosexuality was a moral or healthy lifestyle.¹¹ The Smiths believed that, as parents, they should

⁸ There are many autobiographies, novels and self-help books that might help students and adolescents deal with their sexual orientation. See, e.g., ROB EICHBERG, *COMING OUT: AN ACT OF LOVE* (1990) (a guide to help individuals accept their homosexuality in a positive manner and come out to family and friends); DAVID KOPAY & PERRY DEANE YOUNG, *THE DAVID KOPAY STORY* (1985) (an autobiography of how a former professional football player accepted his homosexuality and came out to his friends and family); *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* (Martin Duberman et al. eds., 1989) (essays on gay and lesbian historical figures).

⁹ Services provided to gay and lesbian students in New York City allow gay and lesbian students to "gather their strength elsewhere . . . [and] . . . handle other academic worries." See Telephone Interview with Ron Madsen, *supra* note 5. In other words, after receiving assistance, gay and lesbian students can focus on academics.

¹⁰ A study found that one-half of the gay and lesbian youth who acknowledged their sexual orientation to their parents were rejected as family members, and twenty-six percent of them were forced to leave home. See Gary Remafedi, *Male Homosexuality: The Adolescent's Perspective*, 79 *PEDIATRICS* 326 (1987). One example is a male high school student at Fairfax High School in Los Angeles who was "ejected from his home at age 14 for admitting that he was gay." See Virginia Uribe & Karen Harbeck, *Addressing the Needs of Lesbian, Gay, and Bisexual Youth: The Origin of Project 10 and School Based Intervention*, 66 *J. HOMOSEXUALITY* 9, 10 (1992).

¹¹ A group of parents made clear that they believe that homosexuality is a

have the sole responsibility of discussing homosexuality with their son. Believing that John's high school and its guidance counselor usurped their parental role by providing services to John regarding sexual orientation, John's parents filed suit against John's high school and guidance counselor claiming a violation of their substantive due process right to direct the upbringing of their child without state interference.¹²

There are a growing number of school districts and individual high schools around the country which provide gay and lesbian youth services;¹³ these services are likely to generate

deviant and immoral lifestyle in their complaint against the New York City Board of Education alleging that children are harmed by the board's policy to include safer sex education and gay and lesbian tolerance. See *Cole v. Board of Educ. of the City of New York*, No. 22349/93 (Sup. Ct. Queens County filed October 11, 1993). A parent of a student at Fountain Valley High School in California joined her daughter in protesting a support group for gay and lesbian students. The mother held a sign at a protest rally that read "Go Straight or Go Home," and voiced her opinion that a gay and lesbian "environment . . . is bad for her [daughter]." See Dennis A. Rios, *Students Protest Gay Group*, ORANGE COUNTY REG., Nov. 23, 1993, at B-1.

¹² Parents possess a constitutional childrearing right to direct the upbringing of their children without unnecessary state interference. See *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27, *reh'g denied*, 453 U.S. 927 (1981); see also *infra* notes 23-41 and accompanying text. Aspects of childrearing protected from unnecessary state interference include the functions of providing education, instilling morals and culture, and teaching religion. See *Moore v. East Cleveland*, 431 U.S. 494, 503-04 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972); see also *infra* notes 46-58 and accompanying text. Issues concerning sex are also areas of protected childrearing. See *Bellotti v. Baird*, 443 U.S. 622, 635 (finding that the sexual issues surrounding abortion qualify them as an aspect of protected childrearing), *reh'g denied*, 444 U.S. 887 (1979); see also *infra* notes 59-84 and accompanying text. The Smiths would argue that since homosexuality is an issue that is related to morals, religion and sex, it is logical to include gay and lesbian services as falling under an aspect of childrearing protected by the Constitution. The Smiths believed that youth services provided to a gay or lesbian student are associated with sex. See Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1611-12 (1995) (noting that helping gay youth is falsely associated with sex). Because they feel the services are associated with sex, the Smiths believed that the school-sponsored services interfered with their childrearing right.

¹³ See LGTA, *supra* note 5; Brundin, *supra* note 7. Governor William Weld has recommended that all Massachusetts schools enact school policies that protect gay and lesbian students from harassment, train teachers and counselors to assist gay and lesbian students, include books on gay and lesbian issues in school libraries, include curricula which consist of gay and lesbian issues, and create school-based support groups for lesbian and gay students. See MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at 2.

a tremendous amount of controversy¹⁴ and potential lawsuits.¹⁵ The possibility of this type of lawsuit forces many counselors and educators in public high schools to withhold services from gay and lesbian youth.¹⁶ If a teacher helps a student understand sexuality and increase his or her self-esteem, the teacher is often labeled either a threat to children¹⁷ or an undesirable role model.¹⁸ Educators and counselors are often afraid to help gay and lesbian youth because they fear recrimination and liability from their employer,¹⁹ from the community, or from parents.

¹⁴ The mere existence of the Fountain Valley High School Alliance, a support group for gay and lesbian students, discussed *supra* note 7, created controversy among children, parents, school officials, fundamentalist Christian groups and civil rights activists. This controversy was played out in emotional school board meetings, in newspapers and on television. See Dana Parsons, *Gay Students Need Support, Not a Jury of Their Peers*, ORANGE COUNTY REG., Nov. 24, 1993, at B-1; Ann Pepper, *It's Official: Not All Clubs Are*, ORANGE COUNTY REG., Nov. 19, 1993, at B1.

¹⁵ A current lawsuit in Massachusetts provides parallels to a possible litigation involving gay and lesbian youth services. See *Brown v. Hot, Sexy and Safer Prods., Inc.*, No. 93-11842 (D. Mass. Jan. 19, 1995) (order granting motions to dismiss). In *Brown*, a group of parents sued a public school claiming that, inter alia, the school interfered with their fundamental right to direct the upbringing of their children in matters related to sexuality and morality because the school provided an HIV/AIDS awareness program to students. The parents claim that this AIDS prevention service substantially hindered the parent-child relationship because issues dealing with sexuality are within the parental domain. *Id.* at 6-7. The Court of Appeals for the First Circuit affirmed the lower court's dismissal, stating that "the rights of parents . . . do not encompass a broad-based right to restrict the flow of information in the public schools." *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995). Some parents have suggested that curriculum related to AIDS awareness and gay and lesbian tolerance is related to pedophilia, and thus hinders the parent-child relationship. See *Verified Complaint* at 7, 9-10, *Cole* (No. 22349/93).

¹⁶ Educators are often reluctant to speak to students about homosexuality and sometimes unwilling even to stop harassment or rebut homophobic remarks. See Gibson, *supra* note 4, at 3-110. For example, some counselors and teachers in New York City do not provide assistance to gay and lesbian youth because of their "concern . . . with parents . . . and liability." See Telephone Interview with Ron Madsen, *supra* note 5.

¹⁷ This label stems from the erroneous stereotype that adult gay men and lesbians are a sexual threat to children. See Tenney, *supra* note 12, at 1611.

¹⁸ See Gibson, *supra* note 4, at 3-128.

¹⁹ See, e.g., *Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985) (upholding a dismissal of a school teacher for being homosexual).

This Note examines the viability of such a lawsuit.²⁰ Part I examines the cases in which the Supreme Court articulated the fundamental childrearing right of parents to raise their children without unnecessary state interference. Part II argues that parental authority over children is limited by definition and by external factors. The Fourteenth Amendment protects only a handful of childrearing functions, and the parental childrearing right is violated only when the alleged interference in the parent-child relationship has a coercive effect on the parents' rights.²¹ Moreover, under the doctrine of *parens patriae*, the state can usurp the childrearing right of parents in order to protect the health, safety and welfare of children. The recent expansion of children's rights also limits parental authority because the rights of children sometimes outweigh the rights of parents.²² Part III concludes that the childrearing right of parents are not violated by public high schools which provide gay and lesbian youth services in light of the limits inherent in the definition of the childrearing right and the external forces which also limit the right.

²⁰ While this Note addresses legal challenges to state sponsored gay and lesbian youth services based on the Fourteenth Amendment, parents might also claim a violation of their First Amendment right to the free exercise of religion. However, this claim will likely be unsuccessful because courts have held that mere exposure to ideas which are offensive to parents' religions is not sufficient to find a free exercise violation. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063-65 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970); *Hopkins v. Hamden Bd. of Educ.*, 289 A.2d 914, 923 (Conn. 1971), *appeal dismissed*, 305 A.2d 536 (1973). Therefore, mere exposure to ideas surrounding homosexuality would not be a basis for a free exercise violation.

There is also a possibility that a parent could sue a private provider of gay and lesbian youth services based on tort or criminal law. See DAVID BUCKEL, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. MEMORANDUM: A LEGAL SKETCH OF THE ISSUES OF PARENTAL CONSENT AND RELATED TORT LIABILITY IN THE CONTEXT OF YOUTH SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED YOUTH (Sept. 14, 1995); SHANNON MINTER, NATIONAL CENTER FOR LESBIAN RIGHTS MEMORANDUM: CRIMINAL LIABILITY ISSUES FOR ADVOCATES & SERVICE PROVIDERS WHO WORK WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED YOUTH (Sept. 12, 1995).

²¹ See *infra* Sections II.A, II.B.

²² See *infra* Section II.D.

I. THE CHILDREARING RIGHT OF PARENTS

Parents have possessed considerable control over their children throughout United States legal history.²³ The Supreme Court has stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."²⁴ In the eighteenth century, parents possessed absolute control over their children based on theories of law imported from England which treated children as chattels.²⁵ However, the idea of absolute control over children was diminished in the early nineteenth century. During this time, the United States embraced the *parens patriae* doctrine, which allows the state to usurp parental control whenever there is a compelling reason to protect the child.²⁶ Because of the urban chaos and poverty created by the industrial revolution, social reformers urged the state to limit parental control when this control endangered the well-being of the child.²⁷

Yet, at the close of the nineteenth century, the idea that parents possessed considerable control over their children once again took hold with the rise of natural rights.²⁸ The notion that parents have natural rights to control their children was strengthened by the Supreme Court in the early twentieth century when it began to examine issues involving state regulation of the parent-child relationship.

In *Meyer v. Nebraska*,²⁹ the Supreme Court first recognized that parents have a substantive due process right, under the Fourteenth Amendment, to direct the upbringing of their children.³⁰ The Court struck down a statute which prohibited

²³ The Supreme Court has "consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

²⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

²⁵ LEGAL RIGHTS OF CHILDREN § 1.02, at 10 (Donald T. Kramer ed., 2d ed. 1994).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 975-76 (1988).

²⁹ 262 U.S. 390 (1923).

³⁰ *Id.* at 399. For a thorough review of the creation of the childrearing right of parents, see generally Robert B. Keiter, *Privacy, Children, and Their Parents: Reflections On and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459

the teaching of foreign languages at an elementary school and reasoned that parents have a right to control the education of their children because educational choices are fundamental to the sphere of the family.³¹ The Court began to recognize an area of privacy around the family into which the state cannot intrude.³²

Two years later in *Pierce v. Society of Sisters*,³³ the Court strengthened the barrier around the family when it invalidated an Oregon statute requiring parents to send their children to public school. By mandating that all children attend public school, the Court found that the State of Oregon interfered "with the liberty of parents . . . to direct the upbringing and education of children under their control."³⁴ The Court inferred that the state cannot compel parents to educate their children in a specific manner.

This developing childrearing right of parents was reaffirmed almost twenty years later in *Prince v. Massachusetts*.³⁵ In *Prince*, while holding that a Massachusetts state law restricting child-labor was valid, the Court remarked that important decisions regarding the life of the child must primarily rest with the parent: "[I]t is cardinal with us that the custody, care and nurture of the child reside first [with] the parents."³⁶ The idea that parents possessed a childrearing right was again

(1982).

³¹ The Court stated that "[w]ithout doubt, [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the [parent] to . . . bring up children." *Meyer*, 262 U.S. at 399.

³² See *Id.* The *Meyer* Court "had the occasion to recognize the primacy of the family as an explicit part of our constitutional scheme . . . [and] embraced the view that the Constitution contains certain implicit understandings about the relationship of family and government, despite the absence of direct textual references to the family." David M. Smolin, 75 MARQ. L. REV. 975, 1051-52 (1991). Indeed, the *Meyer* Court signalled the beginning of a series of cases which "focused on the right of parents to make important decisions regarding their children's upbringing." Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 48-49 (1985).

³³ 268 U.S. 510 (1925).

³⁴ *Id.* at 534-35. The Court found that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

³⁵ 321 U.S. 158, *reh'g denied*, 321 U.S. 804 (1944).

³⁶ *Id.* at 166.

articulated in the 1972 case of *Wisconsin v. Yoder*.³⁷ There, based primarily on free exercise of religion grounds, the Supreme Court held that Wisconsin's compulsory education law, which mandated that all children attend school until the age of sixteen, did not apply to a group of Amish children.³⁸ In its decision, the Court explicitly recognized that the "role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."³⁹

As the above cases demonstrate, the Supreme Court has firmly established a right of parents to direct the upbringing of their children even though such a right is not explicitly mentioned in the Constitution.⁴⁰ The right is now so entrenched in American jurisprudence that the Court recently took note that it is "far more precious than any property right."⁴¹

II. PARENTAL AUTHORITY IS NOT ABSOLUTE: THE DEFINITIONAL AND EXTERNAL LIMITS ON THE CHILDREARING RIGHT OF PARENTS

Although the childrearing right of parents is today firmly grounded in American jurisprudence, the Supreme Court has not endorsed a return to a chattel theory of parental rights, which gives parents absolute control over their children. Instead, the Supreme Court has defined a childrearing right that is limited. For example, aspects of parenting protected by the Constitution are limited to only a handful of childrearing functions, and the parents' constitutional right is violated only when the alleged state interference has a coercive effect on the parents' right.⁴² Furthermore, there are factors which are external to the legal definition of the childrearing right which

³⁷ 406 U.S. 205 (1972).

³⁸ *Id.* at 205.

³⁹ *Id.* at 232.

⁴⁰ "A parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Department of Social Servs. of Durham County, N.C.*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); see also *McCarthy, supra* note 28, at 985-93 (explaining the development of the fundamental childrearing right and its establishment in American jurisprudence).

⁴¹ *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982).

⁴² See *infra* Sections II.A, II.B.

also limit parental authority. The state is able to interfere with parental control whenever there is a compelling reason to protect children, and parental authority is diminished in an effort to recognize the constitutional rights of children.⁴³

A. Definitional Limit on Parental Authority: Protected Childrearing Is Limited to Four Subjects

There are four areas of parenting currently protected under the Fourteenth Amendment from unnecessary state interference: (1) educational choices; (2) religious matters; (3) citizenship, including morals; and (4) issues concerning sex. The first three categories are drawn from the holdings of the Supreme Court cases that define the childrearing right.⁴⁴ The fourth category, parenting related to issues of sex, has only recently become a protected area of parenting and is an outgrowth of the first three categories.⁴⁵

Foremost, the Fourteenth Amendment protects the right of parents to make decisions related to the education of their children.⁴⁶ The manner in which parents educate their children cannot be mandated by the state. For example, the state cannot compel parents to educate their children in a specific language,⁴⁷ and parents have a right to control whether the education of their children will be public or private.⁴⁸

⁴³ See *infra* Sections II.C, II.D.

⁴⁴ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (educational choices); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (religious matters); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (citizenship, including morals).

⁴⁵ See *Bellotti v. Baird*, 443 U.S. 622 (1979); *Brown v. Hot, Sexy and Safer Prods., Inc.*, No. 93-11842 (D. Mass. Jan. 19, 1995); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 30-31, 124 Cal. Rptr. 68, 90-91 (Cal. 1st Dist. Ct. App. 1975); *Curtis v. School Comm'n of Falmouth*, 652 N.E.2d 580 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996); *Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 258 (2d Dep't 1993); *Parents United for Better Sch. Inc. v. Philadelphia Bd. of Educ.*, 646 A.2d 689 (Pa. 1994); *Cole v. Board of Educ. of the City of New York*, No. 22349/93 (Sup. Ct. Queens County filed Oct. 11, 1993).

⁴⁶ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁴⁷ See *Meyer*, 262 U.S. at 628; see also *supra* notes 30-32 and accompanying text.

⁴⁸ See *Pierce v. Society of Sisters*, 268 U.S. 510, 573 (1925); see also *supra* notes 33-34 and accompanying text.

Parental involvement in religious matters is the second area of protected childrearing defined by the Supreme Court. In *Prince v. Massachusetts*, the Supreme Court indicated that when parenting and religion intersect, the childrearing right deserves additional protection because of the importance the Constitution places on religion.⁴⁹ Thirty years later in *Wisconsin v. Yoder*,⁵⁰ the Court once again articulated that parental control over religious matters related to children is protected by the Constitution. There, the Court found that the childrearing right of parents was constitutionally significant only because it was attached to a claimed violation of the free exercise of religion.⁵¹ The importance that was placed on religious freedom and childrearing in *Yoder* suggests that the Court holds aspects of religious parenting as especially deserving of constitutional protection.⁵²

The third category of childrearing protected under the Fourteenth Amendment as defined by the Court is parenting which involves citizenship and morality. In *Meyer*, the Court characterized parental control broadly. Theoretically, any activity that falls within the idea of "bring[ing] up children" is constitutionally protected.⁵³ However, in later cases the Court tried to limit this characterization of parental control by attempting to define the scope of the childrearing right. For example, in *Pierce* the Court began to specify the areas of childrearing that deserve protection, stating that parents "have the right, coupled with the high duty, to recognize and prepare [children] for additional obligations."⁵⁴ The Court further limited the scope of the childrearing right in *Prince* by noting that the Constitution also protects parenting related to the "custody, care and nurture" of children.⁵⁵ These cases demonstrate

⁴⁹ See *Prince*, 321 U.S. at 165. In its opinion, the Court stated that "[t]he parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters." *Id.* The Court also explicitly recognized that parents have a protected interest in teaching their children religious beliefs. *Id.*

⁵⁰ 406 U.S. 205 (1972).

⁵¹ *Id.* at 215-16.

⁵² See *id.*

⁵³ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁵⁴ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

⁵⁵ *Prince v. Massachusetts*, 321 U.S. 158, 166, *reh'g denied*, 321 U.S. 804 (1944).

that parents have a protected interest in more than just education and religion as defined by *Meyer* in 1923. However, at that time the Court had yet to define precisely what areas of parenting are connected to "additional obligations" and the "custody, care and nurture" of children.

The Supreme Court finally addressed the meaning of these phrases in *Yoder*, stating that "[additional obligations] must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship."⁵⁶ Parenting surrounding these "additional obligations" was the basis for the Supreme Court's decision in *Moore v. City of East Cleveland*.⁵⁷ In that case, the Court reasoned that extended family members are often the persons who instill moral beliefs in children and teach them citizenship. The Court held that the childrearing right extended to whomever was responsible for preparing the child for these "additional obligations" of being a citizen.⁵⁸

Finally, the Fourteenth Amendment protects parenting related to sexual issues. Unlike the first three categories of parenting, this category does not spring from the texts of the Supreme Court cases initially defining the childrearing right. Over the last twenty-five years, however, parents have repeatedly argued that because sex involves religion and morals—two issues that fall under protected childrearing—it is logical to include sex as a category of parenting protected from state interference.⁵⁹ Today parental control over sexual issues is often considered an aspect of parenting protected by the Constitution.⁶⁰

⁵⁶ *Yoder*, 406 U.S. at 223.

⁵⁷ 431 U.S. 494, 503-05 (1977).

⁵⁸ *Id.* at 504-06.

⁵⁹ See *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 30-31, 124 Cal. Rptr. 68, 90-91 (Cal. 1st Dist. Ct. App. 1975), *appeal dismissed*, 425 U.S. 908 (1976); *Brown v. Hot, Sexy and Safer Prods., Inc.*, No. 93-11842 (D. Mass. Jan. 19, 1995); *Curtis v. School Comm'n of Falmouth*, 652 N.E.2d 58 (Mass. 1995), *cert. denied*, 116 S. Ct. 753 (1996); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974); *Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (2d Dep't 1993); *Cole v. Board of Educ. of the City of New York*, No. 22349/93 (Sup. Ct. Queens County filed Oct. 11, 1993); *Parents United for Better Sch., Inc. v. Philadelphia Bd. of Educ.*, 646 A.2d 689 (Pa. 1994).

⁶⁰ See *Bellotti v. Baird*, 443 U.S. 622 (1979); *Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (2d Dep't 1993).

The Supreme Court, in *Bellotti v. Baird*,⁶¹ hinted that sex is an aspect of parenting protected by the Fourteenth Amendment. In *Bellotti*, an unmarried minor challenged a Massachusetts statute which required parental consent before a minor received an abortion.⁶² Although the minor's parents did not bring suit or claim a violation of parental liberties in this case, the Court based much of its decision on the childrearing right of parents as established by *Pierce*, *Prince* and *Yoder*.⁶³ Even though the statute was held unconstitutional based on a minor's right to choose an abortion, the Court recognized the childrearing right of parents to guide their children's decision in a matter that fell within the established categories of protected childrearing—such as morality and religion.⁶⁴ Because the issue of abortion undeniably relates to morality and religion, the Court mandated "the guiding role of parents" in matters related to a child's decision to have an abortion.⁶⁵ The opinion tacitly infers that issues surrounding abortion are connected to issues surrounding sex.⁶⁶ Therefore, the Court suggests that, in addition to abortion, sex is a category of parenting deserving constitutional protection.

Lower courts have also implicitly assumed the subtle argument in *Bellotti*—that sex is a protected area of parenting.⁶⁷ The result has been an increasing number of legal challenges to state sponsored entities which provide some sort of service tangentially related to issues concerning sex.⁶⁸ For example, the issue of contraception is presumed to be linked to the issue

⁶¹ 443 U.S. 622, 635-40 (1979).

⁶² *Id.* at 625-26.

⁶³ *Id.* at 637-38.

⁶⁴ *Id.*

⁶⁵ *Id.* at 637.

⁶⁶ *Bellotti*, 443 U.S. at 637.

⁶⁷ See *Curtis v. School Comm'n of Falmouth*, 652 N.E.2d 580 (Mass. 1995) (parents sued a local school board in Massachusetts for injunctive relief, alleging that, among other things, a condom availability program infringed upon their childrearing right protected under the Fourteenth Amendment), *cert. denied*, 116 S. Ct. 753 (1996); *Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (2d Dep't 1993) (parents of high school students in New York City challenged a voluntary condom distribution program as violating, among other things, their childrearing right).

⁶⁸ See *Brown v. Hot, Sexy and Safer Prods., Inc.*, No. 93-11842 (D. Mass. Jan. 19, 1995) (parents bringing suit against school for subjecting their children to AIDS education).

of sex and is, therefore, presumptively an area of protected childrearing.⁶⁹ In *Doe v. Irwin*, a class action on behalf of all Michigan parents of minor children was brought against a publicly operated family planning center in Michigan.⁷⁰ The suit alleged that the center's program of making contraception available to minors violated the childrearing right of parents.⁷¹ The district court concluded that parental control over contraceptives is an aspect of childrearing worthy of protection under the Fourteenth Amendment.⁷² This conclusion was based, in part, on the district court's findings that the availability of contraceptives is a "decision . . . to initiate sexual activity."⁷³ The circuit court, while ultimately finding that the Michigan parents did not have a right to be notified by the family planning clinic of the availability of contraceptives to children because of the voluntary nature of the program, inferred that the issue of contraception—and therefore sex—is an area of parenting presumptively protected by the Constitution.⁷⁴

Two recent state cases also characterize the availability of contraceptives as an area of protected childrearing, *Curtis v. School Commission of Falmouth*⁷⁵ and *Alfonso v. Fernandez*.⁷⁶ These cases evaluated claims of interference with the childrearing right of parents in the context of school condom availability programs. Like the Sixth Circuit in *Irwin*, the Supreme Judicial Court of Massachusetts in *Curtis* never explicitly stated that parenting involving issues of sex is an aspect of constitutionally protected childrearing. Rather, the court assumed that sexual issues are linked to condom availability programs.⁷⁷ As a result, the school sponsored program

⁶⁹ *Alfonso*, 195 A.D.2d at 57, 606 N.Y.S.2d at 206. It is important to note that there is only a presumption that parenting involving issues related to contraception is protected because the interference on the childrearing right must have a coercive effect on the parents' rights in order for the childrearing activity to be constitutionally protected. See *infra* notes 85-96 and accompanying text.

⁷⁰ 615 F.2d 1162, 1163-65 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980).

⁷¹ *Id.*

⁷² *Id.* at 1165.

⁷³ *Id.*

⁷⁴ *Id.* at 1169.

⁷⁵ 652 N.E.2d 580 (Mass. 1995).

⁷⁶ 195 A.D.2d 46, 606 N.Y.S.2d 259 (2d Dep't 1993).

⁷⁷ *Curtis*, 652 N.E.2d at 585. The Supreme Court of Massachusetts cites *Meyer*, *Pierce*, *Prince* and *Yoder* as the proper framework in which to analyze the issue of

to make condoms available to students had the potential to violate the childrearing right of parents.⁷⁸ However, the court ultimately held that the condom availability program did not violate the childrearing right because the program was voluntary.⁷⁹

In *Alfonso*, a New York appellate court explicitly stated that the issue of sex is an aspect of childrearing protected by the Constitution.⁸⁰ The *Alfonso* court reached this conclusion because it believed that the tools to engage in sex were provided to minors when condoms were made available to students.⁸¹ The courts in *Curtis* and *Alfonso* both agree that parental control over issues related to sex is presumptively an aspect of protected childrearing.⁸² They also agree that in order for there to be a violation of the childrearing right of parents, the alleged state interference must have a coercive or compulsory effect⁸³ on the right of parents.⁸⁴

B. *Definitional Limit on Parental Authority: The Alleged State Interference Must Have a Coercive Effect on the Childrearing Right of Parents*

A violation of the childrearing right of parents is not recognized each time the state impacts upon the parent-child relationship. Instead, it is a question of the extent of state interfer-

condom distribution. *Id.*

⁷⁸ *Id.* The opinion states that parents do indeed "possess . . . protected interests" in decisions related to condom distribution programs if the program is compulsory. *Id.*

⁷⁹ *Id.* at 580, 585.

⁸⁰ *Alfonso*, 195 A.D.2d at 57-58, 606 N.Y.S.2d at 266; see also *Parents United for Better Schs., Inc. v. Philadelphia Bd. of Educ.*, 646 A.2d 689, 691-92 (Pa. 1994) (ruling that parents have a recognized interest in consenting to certain activities, including the decision to use contraceptives).

⁸¹ *Alfonso*, 195 A.D.2d at 57, 606 N.Y.S.2d at 266.

⁸² *Curtis*, 652 N.E.2d at 585; *Alfonso*, 195 A.D.2d at 57, 606 N.Y.S.2d at 266.

⁸³ In other words, the effect on the childrearing right of the parents must be automatic. For example, if the child participates in a mandatory school program which automatically infringes upon the rights of parents, this would constitute a "coercive effect." "Coercion [on the childrearing right] exists where the governmental action is mandatory and provides no outlet for the parents, such as where refusal to participate in a program results in a sanction or expulsion." *Curtis*, 652 N.E.2d at 586.

⁸⁴ See *id.* at 580, 585-86; *Alfonso*, 195 A.D.2d at 57, 606 N.Y.S.2d at 266.

ence.⁸⁵ A violation occurs only when the alleged state interference in parenting has a coercive effect on the childrearing right of parents.⁸⁶ For example, state action violates the childrearing right when the state "prohibits" the teaching of foreign languages to students,⁸⁷ "requires" that all students between the ages of eight and sixteen attend public school,⁸⁸ or "mandates" certain types of school attendance.⁸⁹

Modern courts have repeatedly made the distinction between coercive and voluntary state interference when evaluating whether there is a violation of the childrearing right of parents. For example, the Sixth Circuit in *Doe v. Irwin* made this threshold determination before deciding whether alleged state interference violated the childrearing right of parents.⁹⁰ The Sixth Circuit reversed the district court's holding that a public clinic that made contraceptives available to minors without parental consent violated the childrearing right of parents.⁹¹ Instead, the circuit court found that the childrearing right of parents was not violated because the state did not require or prohibit an activity which had a coercive or compulsory effect on the parents' right.⁹² In reaching its conclusion, the court stated:

The State of Michigan . . . has imposed no compulsory requirements or prohibitions which affect [the] right[s] of [parents]. It has merely

⁸⁵ *Doe v. Irwin*, 615 F.2d 1162, 1168 (1980).

⁸⁶ *Id.*

⁸⁷ *Meyer v. Nebraska*, 262 U.S. 390 (1923); see *supra* notes 29-32 and accompanying text.

⁸⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); see *supra* notes 33-34 and accompanying text.

⁸⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see *supra* notes 37-39 and accompanying text.

⁹⁰ 615 F.2d 1162, 1168 (1980).

⁹¹ *Id.* at 1169.

⁹² See *id.* at 1168. Relying on the examples of coercive state interference in *Meyer*, *Pierce*, *Prince* and *Yoder*, the Supreme Judicial Court of Massachusetts also concluded that in order for parents to support a claim of a violation of the childrearing right, the state interference must be "that which causes a coercive or compulsory effect on the claimant's [childrearing] right[s]." *Curtis v. School Comm'n of Falmouth*, 652 N.E.2d 580, 585 (Mass. 1995). In *Curtis*, because the court concluded that the condom availability program had "no coercive burden on the plaintiffs' parental liberties," there was no violation of the childrearing right of parents. *Id.* at 586. The court pointed out that the parents failed to demonstrate how their childrearing right was burdened by the condom program "to an extent which would constitute an unconstitutional interference by the state." *Id.* at 585.

established a voluntary birth control clinic. There is no requirement that . . . children . . . avail themselves of the services offered by the Center and no prohibition against the [parents] participating in decisions of their minor children on issues of sexual activity and birth control.⁸³

The court concluded that when state interference does not have a coercive effect on parental control, but instead is voluntary in nature, parents "remain free to exercise their traditional care, custody and control over their . . . children."⁸⁴ If parents still have any type of opportunity to exercise control over their children's education, religion, morals and sexual life, there is no violation of the Fourteenth Amendment.⁸⁵ The co-

⁸³ *Irwin*, 615 F.2d at 1168. A similar result was reached when a Massachusetts state court analyzed whether a condom availability program violated the childrearing right of parents. In its opinion, the court stated:

We discern no coercive burden on . . . parental liberties in this case. No classroom participation is required of students The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. In other words, the students are free to decline to participate in the program. No penalty or disciplinary action ensues if a student does not participate in the program.

Curtis, 652 N.E.2d at 586. Even if the alleged interference offends some parents' sensibilities, mere exposure to the alleged state interference at school is also not enough to violate the childrearing right of parents because there is no compulsory aspect to the program. *See id.* at 586-87. Absent some harm to the mental, physical or emotional health of a minor, a mere personal difference of opinion as to the quality or content of the alleged interference does not give rise to a constitutional violation. *See Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal. App. 3d 1, 30-31, 124 Cal. Rptr. 68, 90-91 (Cal. 1st Dist. Ct. App. 1975) (finding that the Constitution does not vest in objectors, under the guise that the objector's liberty, or parental authority, is jeopardized or somehow impaired, the right to preclude other students from partaking in an activity voluntarily); *see also Medeiros v. Kiyosaki*, 478 P.2d 314 (Haw. 1970). A New York judge agreed with the assessment that mere exposure to an offensive state activity is not a violation of the childrearing right of parents: "Although placing a health resource room in each high school where condoms and educational information about their use are available may make condoms more readily accessible to teenagers, the fact that students are in closer proximity to a potential source of contraceptive devices does not change the fundamentally voluntary nature of the program." *Alfonso v. Fernandez*, 195 A.D.2d 46, 68, 606 N.Y.S.2d 259, 273 (2d Dep't 1993) (Eiber, J., dissenting).

⁸⁴ *Irwin*, 615 F.2d at 1168.

⁸⁵ Two recent state cases which analyzed condom distribution programs are illustrative of this premise. The Supreme Court of Massachusetts writes with regard to a voluntary condom availability program: "[P]arents are free to instruct their children not to participate. The program does not supplant the parents' role as advisor in the moral and religious development of their children." *Curtis*, 652

ercive nature of the alleged state interference is a threshold factor. So, there is not a violation of the constitutional childrearing right of parents unless the interference has a coercive effect on that right.⁹⁶

C. *External Limit on Parental Authority: The State Has a Parens Patriae Interest in the Well-being of Children*

Regardless of whether the alleged interference on the childrearing right of parents is coercive or voluntary, the state can affect the parent-child relationship if there is a compelling reason to do so, thus limiting parental control even further. The concept of parens patriae⁹⁷ allows the state to burden the constitutional rights of either a parent or a child in order to protect children.⁹⁸

Parens patriae became widely accepted in the nineteenth century as the United States industrialized.⁹⁹ The poverty, urban growth and child labor that emerged with new industries often endangered the physical, mental or emotional health and safety of children.¹⁰⁰ Because of this danger, nineteenth century American courts routinely exercised parens

N.E.2d at 586. A New York State appellate court has stated that with a voluntary condom availability program, "[t]he [parents] are free to impart their religious and moral values to their children in the privacy of their own homes, and to instruct their children not to participate in the condom distribution program." *Alfonso*, 195 A.D.2d at 67, 606 N.Y.S.2d at 272 (Eiber, J., dissenting).

⁹⁶ See *Irwin*, 615 F.2d at 1168; *Curtis*, 652 N.E.2d at 583.

⁹⁷ The term parens patriae "refers traditionally to [the] role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane It is the principle that the state must care for those who cannot take care of themselves such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

⁹⁸ The American Bar Association writes that the parens patriae power of the state "is the inherent government authority to protect persons, including children, who are incapable of self-protection." CENTER ON CHILDREN AND THE LAW, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 90 (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

⁹⁹ KRAMER, *supra* note 25, § 1.02, at 10.

¹⁰⁰ KRAMER, *supra* note 25, § 1.02, at 10.

patriae authority over children to protect them.¹⁰¹ The state entrusted a parent with a child only so long as the parent acted in the child's best interest.¹⁰²

The role of the state in the life of children began to decrease in the later part of the nineteenth century due to the increasing acceptance of the idea that parents have natural rights over their children.¹⁰³ In the twentieth century, the Supreme Court continued to strengthen the notion of parents' natural rights to control their children by recognizing that the state cannot interfere in the substantive due process right of parents to direct the upbringing of their children.¹⁰⁴ As a result, there has been a decisive shift in the balance of power to control childrearing from the state back to the parent in the twentieth century. There is currently a presumption that parents always act in the best interest of their child because a parent presumably "possess[es] what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."¹⁰⁵

Yet even with this shift in power, the modern state still has a significant interest in safeguarding the physical or men-

¹⁰¹ For a general discussion of the historical development of the *parens patriae* power, see Susan B. Hershkowitz, *Due Process and the Termination of Parental Rights*, 19 FAM. L.Q. 245, 254-55 (1985).

¹⁰² See Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1216 (1994).

¹⁰³ See McCarthy, *supra* note 28, at 975-76. In this article, McCarthy compared two cases in different eras of the nineteenth century in order to analyze the respective treatment of parental rights. An 1839 opinion of the Pennsylvania Supreme Court emphasized the virtues of *parens patriae* in limiting parents' rights. *Ex Parte Crouse*, 4 Whart. 9, 11 (1839). An 1870 opinion of the Illinois Supreme Court stressed the natural right of parents to raise their children. *O'Connell v. Turner*, 5 Ill. 280 (1870); McCarthy, *supra* note 28, at 975-77. This comparison illustrates the growth of the concept that parents possessed natural rights over their children during the second half of the nineteenth century.

¹⁰⁴ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158, *reh'g denied*, 321 U.S. 804 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) *see also supra* Part I.

¹⁰⁵ *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Since parents are presumed to act in the best interests of their children, one commentator argues, "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents." See O'Brien, *supra* note 102, at 1218 (quoting *Schall v. Martin*, 467 U.S. 253, 265 (1984)). The concept of *parens patriae* assumes that children are not able to understand and consent to certain decisions. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 72 (1976).

tal health, safety or welfare of its youth.¹⁰⁶ *Parens patriae* regulations of children, therefore, have not disappeared. Among other things, the state acts in its *parens patriae* role when it requires children to attend school,¹⁰⁷ mandates that children participate in certain medical treatment,¹⁰⁸ prohibits children from engaging in certain types of labor,¹⁰⁹ denies children the right to marry,¹¹⁰ and prohibits the sale of pornographic material to them.¹¹¹

State regulations affecting parents are also commonplace. For example, the Supreme Court has recognized that the state can burden the childrearing right of parents in order to protect the physical, mental and emotional health of children.¹¹² In *Prince v. Massachusetts*, the Court upheld the conviction of a parent who permitted her niece to sell copies of a religious publication in violation of Massachusetts labor laws.¹¹³ In reaching its conclusion, the Court noted that

[i]t is the interest of . . . the whole community [] that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens . . . [and because of this] the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.¹¹⁴

Because the childrearing right is recognized under the Fourteenth Amendment, the state must have a compelling reason to infringe upon that right before it may do so. A state's interest in protecting the welfare of children sometimes outweighs the childrearing right of parents when there is evidence that

¹⁰⁶ See Michael J. Florio, *An Abused Child's Right to Life, Liberty, and Property in the Home: Constitutional Approval of State Inaction*, 92 W. VA. L. REV. 175, 178 (1989).

¹⁰⁷ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁰⁸ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹⁰⁹ See *Prince v. Massachusetts*, 321 U.S. 158, 166, *reh'g denied*, 321 U.S. 804 (1944).

¹¹⁰ See *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981), *aff'd*, 669 F.2d 67 (2d Cir.), *cert. denied*, 459 U.S. 827 (1982) (sustaining New York's requirement of parental consent for marriages of persons between the ages of fourteen and eighteen).

¹¹¹ See *Ginsberg v. New York*, 390 U.S. 629 (1968).

¹¹² *Prince*, 321 U.S. at 165-66.

¹¹³ *Id.* at 171.

¹¹⁴ *Id.* at 165, 167. The Court further notes that at the core of democracy is the interest of society to protect the welfare of children, and because of this the "rights of parenthood are [not] beyond limitation." *Id.* at 165-66.

the state needs to protect children.¹¹⁵ In *Wisconsin v. Yoder*, the Court made clear that "the power of the parent . . . may be subject to limitation . . . if [there is evidence] that parental decisions will jeopardize the health or safety of the child."¹¹⁶

However, when there is insufficient evidence supporting the state's right to interfere in the parent-child relationship in order to protect children, the Court will conclude that the parents' rights outweigh the state's interest.¹¹⁷ In *Yoder*, there was insufficient evidence for the state to act in its *parens patriae* role, and therefore the state did not interfere with the parent's constitutional rights of religious freedom or childrearing.¹¹⁸

The state "is entitled to adjust its legal system to account for children's vulnerability."¹¹⁹ While parents possess considerable control over their child, the increasing complexity of American society demands that the state assume a *parens patriae* role over children when there is a compelling reason to do so.

¹¹⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972).

¹¹⁶ *Id.*; see Lynn D. Wardle, *Parents' Rights v. Minors' Rights Regarding the Provision of Contraceptives to Teenagers*, 68 NEB. L. REV. 216, 229 (1989) (arguing that children have the right to be free from parental decisions that pose risks to their health or lives).

¹¹⁷ *Yoder*, 406 U.S. at 234.

¹¹⁸ See *id.* at 232.

¹¹⁹ *Bellotti v. Baird*, 443 U.S. 622, 635 (1979). The state can burden the childrearing right of parents in order to protect the health of a minor and ensure that the youth makes good decisions. *Id.* at 633-37; see also *Doe v. Irvin*, 615 F.2d 1162, 1167 (6th Cir.), *cert. denied*, 449 U.S. 829 (1980) (finding that because Michigan has an interest in protecting minors from the physical and emotional hazards of unwanted pregnancies, it can burden the childrearing right of parents by distributing contraception); *Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) (holding that parental input into a minor's decision to have an abortion can be excluded by the state as long as the exclusion is in the best interest of the child); *Davis v. Page*, 385 F. Supp. 395, 399-400 (D.N.H. 1974) (finding that because New Hampshire had an interest in properly educating children, it could burden the childrearing right of parents by establishing a sex education curriculum).

D. *External Limit on Parental Authority: The Recent Growth of the Constitutional Rights of Children*

There has been a dramatic growth in the constitutional rights of children in the last thirty years.¹²⁰ As a result, parental control over children is becoming more limited because the childrearing right of parents is sometimes subordinated in an effort to recognize the rights of children. Until the second half of the twentieth century, American children did not have independent legal rights.¹²¹ From the seventeenth century to the early nineteenth century children were considered legal chattel of their parents and thus had no legal rights or protections.¹²² Children finally gained legal protections in the nineteenth century as the United States industrialized.¹²³ However, children still did not gain any independent constitutional rights. Because there were many social ills that accompanied the industrial revolution, the state became a benevolent actor and attempted to protect children with such devices as reform schools and child welfare laws.¹²⁴ From the late nineteenth century to 1967, "the notion that children had independent rights still did not exist."¹²⁵ Instead, during the first half of the twentieth century, the state continued to be a benevolent actor toward children.¹²⁶

Children were finally granted some constitutional rights in the 1960s when they demanded the same constitutional guarantees already reserved for adults.¹²⁷ In the 1967 case *In Re Gault*,¹²⁸ the Supreme Court extended constitutional due pro-

¹²⁰ KRAMER, *supra* note 25, § 1.04, at 15-16.

¹²¹ KRAMER, *supra* note 25, § 1.04, at 15-16.

¹²² KRAMER, *supra* note 25, § 1.04, at 15-16.

¹²³ KRAMER, *supra* note 25, § 1.04, at 15-16.

¹²⁴ KRAMER, *supra* note 25, § 1.04, at 15-16.

¹²⁵ KRAMER, *supra* note 25, § 1.04, at 11.

¹²⁶ KRAMER, *supra* note 25, § 1.02, at 11-12. The benevolent character of the state during the first half of the twentieth century was one reason for the creation of a juvenile court system across the nation. KRAMER, *supra* note 25, § 1.02, at 11-12.

¹²⁷ See Susan G. Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92*, 27 FAM. L.Q. 307, 309 (1993) (arguing that children were granted rights after "the Court was forced to reconcile the principle of parental [rights] with the child's constitutional right[s]").

¹²⁸ 387 U.S. 1 (1967) (children possess due process rights in juvenile courts); see also *Goss v. Lopez*, 419 U.S. 565, 581 (1979) (children possess due process rights

cess rights to children in the context of juvenile court proceedings. The Court held that children are individual persons within the terms of the Fourteenth Amendment, stating that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹²⁹

Since 1967, in addition to the right to due process, the Supreme Court has granted children the right to equal protection,¹³⁰ the right to privacy¹³¹ and the first amendment right to freedom of expression.¹³² In addition, the federal government has provided legitimacy to children's rights. In the last ten years, Congress has passed a number of laws that address the rights of children.¹³³

While the Supreme Court has extended many constitutional rights to children, it has not assumed that they are the same as the rights of adults.¹³⁴ Sometimes children do not receive the same constitutional protection as adults because of

in public education); *In Re Winship*, 397 U.S. 358 (1970) (children possess due process rights in a criminal context).

¹²⁹ *In re Gault*, 387 U.S. at 13. Two years later, the Court strengthened children's rights when it decided that children "are 'persons' under our Constitution" for first amendment purposes. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511 (1969). Seven years later, the Court made clear this principle when it remarked that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors . . . are protected by the Constitution." *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976).

¹³⁰ See *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

¹³¹ See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Danforth*, 428 U.S. at 74.

¹³² See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 509, 511 (1969).

¹³³ KRAMER, *supra* note 25, § 1.04, at 16. Examples include the Adoption Assistance and Child Welfare Act, Child Victims' and Child Witnesses' Rights Act of 1990, Education for All Handicapped Children Act, Family Education and Privacy Rights Act, and Runaway and Homeless Youth Act. KRAMER, *supra* note 25, § 1.04, at 17; see also McCarthy, *supra* note 28, at 1011.

¹³⁴ The Supreme Court has stated that "children have a very special place in life which [the] law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). The Court has extended only a limited number of rights to children and has made it clear that they do not possess rights equal to those of adults. See LAURENCE D. HOULGATE, *THE CHILD AND THE STATE: A NORMATIVE THEORY OF JUVENILE RIGHTS* 42 (1980).

their inability to make critical decisions.¹³⁵ However, when the rights of children are significant, they often outweigh the childrearing right of parents.¹³⁶

III. PUBLIC HIGH SCHOOLS WHICH PROVIDE GAY AND LESBIAN YOUTH SERVICES DO NOT VIOLATE THE CHILDBREARING RIGHT OF PARENTS

In the hypothetical discussed in the introduction of this Note, a guidance counselor provided gay and lesbian youth services to John Smith. The counselor helped John with issues surrounding his sexual orientation after he attempted suicide, failed three courses and was the victim of gay-bashing. John's guidance counselor took time to talk with him and investigate his problems. The guidance counselor provided John with information about groups that could help him, gave John the titles to self-help books, and encouraged him to join a support group where he could talk to other students. Because of this help given to their son, Mr. and Mrs. Smith sued the high school and guidance counselor claiming a violation of their Fourteenth Amendment childrearing right.

The hypothetical Smith parents do possess a protected childrearing right under the Fourteenth Amendment, but it is very limited. For example, the services offered to John are not within the narrow scope of the childrearing right as defined by the Supreme Court. Instead, the services are similar to other mental health programs routinely administered to children at public high schools. The services are voluntary and did not have a compulsory effect on the childrearing right of John's

¹³⁵ See *Bellotti v. Baird*, 443 U.S. 622, 635-36 (1979) (noting that constitutional principles should be applied flexibly to children because they are often not capable of making critical decisions); see also *Ginsberg v. New York*, 390 U.S. 629, 649 (1968) (Stewart, J., concurring) (finding that the right to marry or the right to vote, for example, are instances where a child might not possess the capacity for individual choice, and therefore constitutional deprivations are tolerable).

¹³⁶ For example, because children have a constitutional right to privacy relating to areas of procreation and sexual autonomy, the state cannot substantially interfere with the right of the child even though the parent has a childrearing interest in the decision. See *Bellotti*, 443 U.S. at 642 (recognizing that the constitutional right of a child to receive an abortion is equally as important as the childrearing right of parents); see also *Davis v. Page*, 385 F. Supp. 395, 399-400 (D.N.H. 1974) (finding that a child's interest in receiving an education, including sex education, does not violate the childrearing right of parents).

parents. Mr. and Mrs. Smith have other opportunities to exercise parental input over the issue of sexual orientation. Lastly, John's right to receive such services outweighs the childrearing right of Mr. and Mrs. Smith.

A. Gay and Lesbian Youth Services Are Not Aspects of Protected Childrearing

The Constitution protects the childrearing right of parents in the categories of education, religion, citizenship and morals, and sex.¹³⁷ Gay and lesbian youth services fall outside each of these categories. They are designed to build self-esteem, strengthen self-identity, create bonds of friendship and family, prevent suicide and improve academic grades, as well as address other emotional and mental health issues.¹³⁸ Services targeted to gay and lesbian youth, such as those provided to John Smith by his guidance counselor, do not mandate the manner in which John is educated.¹³⁹ The services do not

¹³⁷ *Bellotti*, 443 U.S. 622 (1979) (sex); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (citizenship and morals); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (religion); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (education); see *supra* Section II.A.

¹³⁸ Virginia Uribe and Karen Harbeck, creators of Project 10, a gay and lesbian student support program in the Los Angeles Unified School District, write that gay and lesbian youth services, inter alia, "provid[e] emotional support, information, resources, and referrals to [gay and lesbian students]." Uribe & Harbeck, *supra* note 10, at 11. The National Commission on Children recommends that in order to combat the problems that children face today, the country needs a concerted effort to create youth services which "offer a range of . . . programs to respond to the multiple needs and interests of young people, including . . . life options, counseling and other . . . mental health services." NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 236 (1991). This commission was made up of thirty-four leaders in government and experts on children, including President Bill Clinton, then Governor of Arkansas, and Senator John D. Rockefeller. Gay and lesbian youth services are a part of this concerted effort to respond to the needs of children. See Uribe & Harbeck, *supra* note 10, at 11; see generally WARREN J. BLUMENFELD & LAURIE LINDOP, GAY-STRAIGHT ALLIANCES AND OTHER MODELS OF SUPPORT GROUPS (1996) (an overview of gay and lesbian youth services that have as their goals the following: limit homophobia, eliminate anti-gay violence, end discrimination, and increase self-esteem).

¹³⁹ The role of courts with respect to the administration of public education is limited. Public education is entrusted to the control, management and discretion of state and local authorities. Therefore, as a general rule, courts only interfere in the day to day operation of schools when a conflict "directly and sharply implicate[s] basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (citation omitted). Further, courts must use care and restraint to protect all consti-

have anything to do with religion or morality and do not advocate, espouse, deny or sympathize with any philosophy, religion or moral code.¹⁴⁰ Nor are the services about sex.¹⁴¹ Instead, the services are designed to rescue teens from academic failure, protect kids from violence, prevent students from taking drugs, and most importantly, save high school students' lives.¹⁴²

Many state and federal laws mandate mental health programs and crisis-intervention services to assist high school youth.¹⁴³ The services provided to John Smith by his guidance counselor are similar in purpose to such state and federal programs. These already existing state and federal programs are specifically designed to improve the mental health of children and address the many problems faced by youth.¹⁴⁴ For example, many state laws require state agencies to appropriate funds to help children in danger of academic failure, mandate schools to begin violence prevention and mediation programs, direct schools to establish counseling to improve mental health, and authorize schools to create coordinated "youth-at-risk" programs.¹⁴⁵

The fact that crisis-intervention services required by law are directed at gay and lesbian students should not be a factor in the decision to implement the programs. A Wisconsin statute makes this clear by prohibiting the denial "of pupil services . . . because of the [student's] . . . sexual orientation."¹⁴⁶ In 1993, Governor William Weld of Massachusetts signed an executive order creating the Commission on Gay and Lesbian Youth to "investigate the utilization of resources from both the public and private sectors to enhance and improve the ability of state agencies to provide services to gay and lesbian

tutional values before they intervene in educational programs to make changes. *Id.*

¹⁴⁰ See Uribe & Harbeck, *supra* note 10, at 11.

¹⁴¹ See Uribe & Harbeck, *supra* note 10, at 11.

¹⁴² See Uribe & Harbeck, *supra* note 10, at 11.

¹⁴³ See NATIONAL CONFERENCE OF STATE LEGISLATURES, 1994 STATE LEGISLATIVE SUMMARY: CHILDREN, YOUTH AND FAMILY ISSUES 131-42 (1994) (listing state laws which assist children, categorized under such titles as "Violence Prevention," "Teenage Pregnancy," "School Drop-Out," "Missing, Runaway and Homeless Children," and "Youth-at-Risk").

¹⁴⁴ *Id.* at Foreword.

¹⁴⁵ *Id.* at 131-42.

¹⁴⁶ WIS. STAT. § 118.13 (1993); see Logue, *infra* note 152.

youth¹⁴⁷ The Commission recommended that all Massachusetts schools create gay and lesbian youth services in order to prevent teen suicide, end violence and other forms of harassment directed toward gay and lesbian youth, and increase academic performance of gay and lesbian students.¹⁴⁸ If John's high school were in Massachusetts, the services provided to John by the guidance counselor would be required by the state.

B. Gay and Lesbian Youth Services Are Voluntary and Do Not Have a Coercive Effect on the Childrearing Right of Parents

A violation of the childrearing right of parents occurs when parents are forced to raise their child in a particular manner.¹⁴⁹ Coercion on the childrearing right of parents exists when state action is mandatory and does not allow the parents to exercise parental control in any manner.¹⁵⁰ In the hypothetical, John volunteered to participate in gay and lesbian youth service programs; the high school did not mandate his participation or that of any other student. Accordingly, these services did not have a compulsory effect on Mr. and Mrs. Smith's childrearing right, because John's parents were still free to exercise parental control involving the issue of sexual orientation outside of John's high school.

C. There Is a Parens Patriae Interest in Providing Gay and Lesbian Youth Services in Public High Schools

The state can impair the rights of parents to protect the welfare of minors.¹⁵¹ John Smith's welfare was endangered by his struggle with his sexual orientation. For example, he at-

¹⁴⁷ See MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at App. C.

¹⁴⁸ See MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at 1-3.

¹⁴⁹ The Supreme Court recognizes a violation on the childrearing right when the alleged state interference "requires" or "prohibits" some activity within an aspect of protected parenting. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); see *infra* Section II.B.

¹⁵⁰ *Curtis v. School Comm'n of Falmouth*, 652 N.E.2d 580, 586 (Mass. 1995); see *supra* Section II.B.

¹⁵¹ See *supra* Section II.C.

tempted suicide, failed several classes and suffered physical abuse because of his struggle. All of the threats to John's welfare were manifested in his public high school. John's high school acted in a *parens patriae* role to ensure John's health and welfare by helping him with his struggle. Indeed, under the *parens patriae* doctrine, John's high school may even have been obligated to provide these or similar services, or face liability if it did not do so.¹⁵²

Many high school students face hurdles similar to those faced by John Smith. Research indicates that gay and lesbian youth face a wide array of problems linked to the issues surrounding their sexual orientation.¹⁵³ These problems are encountered in public schools everyday.¹⁵⁴ Gay and lesbian youth internalize the hatred they witness toward homosexuals, especially at school, and as a result many suffer from low self-esteem.¹⁵⁵ This cycle of self-hate can result in serious, and even life-threatening problems, such as poor academic performance or dropping out of school,¹⁵⁶ homelessness,¹⁵⁷ prostitution,¹⁵⁸ violence¹⁵⁹ and suicide.¹⁶⁰

In order to help gay and lesbian students with problems associated with low self-esteem and homophobia, these youth need support and assistance in understanding their personal identities.¹⁶¹ Most gay and lesbian teens choose not to turn to

¹⁵² After a unanimous jury verdict found that the Wisconsin high school attended by Jamie Nabozny, mentioned *supra* note 3, failed to provide gay and lesbian services to Jamie and protect him from sexual orientation harassment, the parties reached a \$1,000,000 settlement. Patricia Logue, *Near \$1 Million Settlement Raises Standard for Protection of Gay Youth*, LAMBDA UPDATE, Winter 1997, at 1, 8.

¹⁵³ Uribe & Harbeck, *supra* note 10, at 11.

¹⁵⁴ See MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at 8-11.

¹⁵⁵ Deborah Zara, *Coming of Age in a Heterosexist World: The Development of Gay and Lesbian Adolescents*, 27 ADOLESCENCE 849, 851 (1992).

¹⁵⁶ Forty percent of gay youth report that academic performance is negatively affected by issues related to sexual orientation, and twenty-eight percent of gay youth drop out of school. GAY LESBIAN STRAIGHT TEACHERS NETWORK, HOMOPHOBIA 101: ANTI-HOMOPHOBIA TRAINING FOR SCHOOL STAFF AND STUDENTS 5 (1996) [hereinafter "GLSTN"]; see MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at 17-19.

¹⁵⁷ See Gibson, *supra* note 4, at 3-114.

¹⁵⁸ Leo Treadway & John Yoakam, *Creating a Safer School Environment for Lesbian and Gay Students*, 62 J. SCH. HEALTH 352, 352 (1992); see also Uribe & Harbeck, *supra* note 10, at 11.

¹⁵⁹ See Chandler, *supra* note 3, at A1.

¹⁶⁰ See Gibson, *supra* note 4, at 3-110.

¹⁶¹ See MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at 1-3 (arguing that

their parents for guidance regarding their sexual orientation.¹⁶² Further, they cannot turn to their peers, who are often the source of the hate and humiliation they face daily.¹⁶³ This results in an absence of the support and assistance most needed by gay and lesbian youth. The most logical source to fill this void is the entity that, aside from parents and peers, most directly impacts youths—the public school.¹⁶⁴

the numerous problems faced by gay and lesbian youth can be overcome by creating services such as counseling and support groups). Because there has been much anti-gay violence and several attempted suicides by gay and lesbian students in New York City schools, one teacher recommends the creation of support groups and counseling for gay and lesbian students. See Interview with Ron Madsen, *supra* note 5.

¹⁶² Most adolescents try to conceal their homosexuality because of the fear that their family would reject, punish or expel them from the family. Gay and lesbian teens are often forced out of their homes because they share this information with their parents and are rejected. See Remafedi, *supra* note 10; see also Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. INTERPERSONAL VIOLENCE 295, 297 & n.45 (1990) (families account for 61% of the violence toward gay youth). Some psychologists recommend that a gay or lesbian youth think very carefully before coming out to his or her parents because sometimes "a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street." Emery S. Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. HOMOSEXUALITY 25, 35 (1987).

¹⁶³ See Gibson, *supra* note 4, at 3-117 to 3-118.

¹⁶⁴ The National Education Association adopted Resolution C-11 (sexual orientation) on July 7, 1988: "All persons, regardless of sexual orientation should be afforded equal opportunity within the public education system [and] every school district should provide counseling for students who are struggling with their sexual/gender orientation." Some states have begun to respond to the problems faced by gay and lesbian youth by encouraging the formation of support groups and counseling services aimed at these students. See MASSACHUSETTS GOVERNOR'S COMM'N, *supra* note 2, at 29-37. Individual school districts also have begun to respond to the needs of gay and lesbian youth by providing alternative schools for gay and lesbian youth and educational curricula involving tolerance. In 1984, the Los Angeles Unified School District implemented Project 10, a school-based counseling program which focuses on sexual orientation education, reduction of anti-gay abuse, suicide prevention, and keeping kids in school and off drugs. See PROJECT 10 HANDBOOK, A RESOURCE DIRECTORY FOR TEACHERS, GUIDANCE COUNSELORS, PARENTS, AND SCHOOL-BASED ADOLESCENT CARE PROVIDERS (1991). Moreover, national organizations such as Gay Lesbian Straight Teachers Network ("GLSTN") publish manuals on how to start gay and lesbian support groups and provide resources to educators. See GLSTN, *supra* note 156.

D. *The Right of Children to Receive Gay and Lesbian Youth Services Outweighs the Childrearing Right of Parents*

The growth of children's rights in the last thirty years forces courts to balance the childrearing right of parents with the rights of children. When the rights of a child are significant, the court may burden the childrearing right of parents in an effort to recognize the child's interest.¹⁶⁵ The information flowing to students cannot be restricted in an effort to accommodate the rights of parents, or in order to protect the students from a particular viewpoint.¹⁶⁶ If a high school does not provide gay and lesbian support services to students because it chooses to suppress the message of tolerance and self-acceptance that accompanies the services, then the state is denying youth the right to receive accurate information.¹⁶⁷

CONCLUSION

In determining whether the state has violated the childrearing right of parents, a court balances the rights of the parent with those of the child and the *parens patriae* interest of the state.¹⁶⁸ The childrearing rights of John Smith's parents in the hypothetical are not violated by the high school or

¹⁶⁵ See *Bellotti v. Baird*, 443 U.S. 622, 635-36 (1979).

¹⁶⁶ *Board of Educ. v. Pico*, 457 U.S. 853 (1982) (holding that a school cannot bar access to controversial ideas based on the imposition of a particular philosophy—in this case, the philosophy of a conservative parents group); *Wisconsin v. Yoder*, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting) (parents should not be able to restrict children's access to new ideas and information); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (recognizing that students should not be placed in an artificial academic environment that functions solely to protect children); *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525, 534 (1st Cir. 1995); *Pratt v. Independent Sch. Dist.*, 670 F.2d 771 (8th Cir. 1982) (parental objections to film on basis of family's religious and moral values not adequate to overcome student's right to receive information); see Lynn H. Frank, Comment, *Behind the Schoolhouse Gate: The Academic Rights of American Students*, 35 LOY. L. REV. 143, 184-86 (1989).

¹⁶⁷ One commentator goes further and argues that the state is denying gay and lesbian youth their right to an education by not addressing their problems. See Ruth Harlowe, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446 (1986).

¹⁶⁸ McCarthy, *supra* note 28, at 1011-12 (arguing that "[b]y balancing these three interests, one can arrive at the appropriate weight to be given to claims of parental rights").

the guidance counselor when services directed at gay and lesbian youth were provided to John because: (1) gay and lesbian youth services fall outside the categories of protected childrearing; (2) the services are voluntary; (3) there is a *parens patriae* interest for the state to interfere in the parent-child relationship and provide services; and (4) John has valid constitutional rights to receive the services.

In order for a high school to avoid a lawsuit similar to the one initiated by Mr. and Mrs. Smith in the hypothetical, legal counsel for a school district should keep the following in mind when creating gay and lesbian youth services. First, the subject matter of the services must not include an aspect of protected childrearing, such as a parental decision relating to the manner in which a child is educated, religion, morality or an issue concerning sex. The services will not violate the childrearing right of parents if they address issues such as self-esteem, academic performance, violence or suicide. Second, the services must be voluntary and cannot compel participation of students in any manner. As long as parents have opportunities to exercise parental control in other contexts, then there is not a coercive effect on their childrearing right. Finally, the problems faced by gay and lesbian youth should be recognized or documented in some manner in order to demonstrate a serious reason for the high school to act in a *parens patriae* role and provide such services.

Patrick Henigan

