Gay Youth and the Right to Education

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For gay students across the country, public high school often means ridicule from teachers, violent harassment from fellow students, and refusals from administrators to punish verbal and physical attacks upon them.¹ These and other homophobic² school practices undermine the ability of gay students to learn in school and frequently cause them to forfeit a high school education altogether. In New York City, the high drop-out rate among gay youth has prompted the founding of the first separate public school for gay students. This institution, the Harvey Milk School, symbolizes both the rejection of gay teenagers by mainstream schools and the commitment of these teenagers to obtaining education free from discrimination.

We propose a litigation strategy based on state constitutions to enforce gay students' right to an equal, integrated education.³ Ad-

1. The gay teenage population that concerns us here is significant. An estimated 150,000 gay and lesbian teenagers live in the New York City metropolitan area. A. Damien Martin, The Harvey Milk Off Site High School Program 3 (available from Institute for the Protection of Lesbian and Gay Youth, New York City). In the Philadelphia public high schools, there are approximately 10,000 lesbian and gay students. Telephone interview with Rita Addessa, Executive Director, Philadelphia Lesbian and Gay Task Force (Mar. 11, 1986). In the District of Columbia, approximately 24,000 teenagers are gay or lesbian. Telephone interview with Bart Church, Esq., Founder, Sexual Minority Youth Assistance League, Washington, D.C. (Mar. 11, 1986). Gay teenagers are found not only in urban centers, but also in school districts in rural parts of the country. See, e.g., Kantrowitz, infra note 40 (example of gay high school student in Indiana).

The Kinsey Institute for Sex Research reports that 9.13 percent of the United States population have had either extensive or more incidental homosexual experience. Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 HASTINGS L.J. 799, 800 n.4 (1979). Many of these gay persons hide their identity during their high school years; others cannot and thus suffer the most direct abuse, see infra notes 6-27 and accompanying text. Still other students, not gay, encounter interference with their right to education because they are thought to be gay.

We use "gay" rather than "homosexual" because gay persons prefer this less clinical, more affirmative designation. Although "gay and lesbian" would be the best adjective phrase to use throughout, we often use the word "gay" to designate both gay and lesbian teenagers. "Gay" is used as an adjective because teenagers, like adults, possess many personal characteristics and should not be defined solely by their sexuality.

2. "Homophobia" and "homophobic" are terms common to works concerned with gay rights, but absent from most dictionaries. "‘Homophobia’ refers to the characteristics of persons or cultures which reflect the complex inter-weavings of myths, stereotypes, history, fear, guilt, shame and ignorance, and which result in the heterosexual majority's discomfort with and oppression of the homosexual minority.” Warner, Homophobia, “Manifest Homosexuals” and Political Activity: A New Approach to Gay Rights and the “Issue” of Homosexuality, 11 GOLDEN GATE U.L. REV. 635, 638 (1981).

3. The Supreme Court's refusal in Bowers v. Hardwick, 54 U.S.L.W. 4919 (U.S. June 30, 1986) (No. 85-140), to treat gay persons as equal citizens underscores the increasing
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advocates for gay youth should sue, in state courts, school districts that abridge gay teenagers' educational opportunities. We urge judges to protect the right to education articulated in state constitutions by enjoining such discriminatory school practices as harassment of gay youth by teachers, the uneven enforcement of disciplinary rules, and censorship of texts or library books that show tolerance toward gay persons. In addition, judges should require school districts exhibiting pervasive discrimination to institute programs that will abate homophobia in the schools and repair the harm done by past discrimination.

We offer this litigation strategy to publicize the many ways schools discriminate against gay students, and to suggest new school practices that will uproot the homophobic prejudice underlying current discrimination. The high costs of homophobia in the public schools should motivate conscientious educators to take remedial action before they are threatened with litigation. Homophobia directly obstructs the education of approximately ten percent of the student population, the gay students. It also harms non-gay pupils by enforcing the subordination of all minority groups, perpetuating ignorance about human sexuality, and dictating sex-role conformity. Furthermore, school-sanctioned prejudice disrupts the broader functions of free public education: developing a productive workforce, a harmonious society, and a responsible democracy. Yet most school officials resist reforming school practices that discriminate against gay youth. The reluctance of school administrators, combined with a lack of support from parents and other adults outside the gay community, renders the courts in many instances the only means of securing an equal education for gay youth.

importance of state constitutions for vindicating the civil rights of gay people. There the Court, in an opinion void of reason, found Georgia's consensual sodomy statute as applied to gay persons constitutional, despite the federal Constitution's implicit right to privacy.

4. Even with strong lobbying efforts, progress in achieving change is slow. Rita Addessa reports an "extreme level of resistance" and concludes that taking homophobia out of public education now seems "a lifelong project." She and other concerned professionals began in February, 1984, to urge the Philadelphia public schools to provide substantive teacher training concerning issues important to gay youth and to develop a more inclusive curriculum — one that includes contributions by gay people, one that acknowledges homosexuality in sex education courses, etc. Philadelphia's Superintendent of Schools initially invited the group to draft solutions and to negotiate with school officials after a violent incident involving a gay male student came to her attention. (For a description of this incident, see infra text accompanying note 20.) The Superintendent's invitation to negotiate has not yet translated into change in the schools. Telephone interview with Rita Addessa, supra note 1.
I. The Schools' Obstruction of Gay Students' Public Education

[T]oday education has become the *sine qua non* of useful existence.

— California Supreme Court in *Serrano v. Priest*\(^5\)

Public school administrators and teachers prevent gay students from learning in many devastating ways.\(^6\) They harass, misinform, and unfairly punish gay students; almost always, they refuse to protect gay youth from peer violence. In many schools, the discriminatory atmosphere forces gay students to concentrate on survival rather than education and destroys gay teenagers' self-esteem during a crucial developmental period.\(^7\)

Teachers' attacks on gay students directly obstruct learning. Because teachers most often harass gay students to punish deviations from traditional sex roles, effeminate boys or girls with "masculine" traits inspire the cruelest and most frequent abuse.\(^8\)

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5. The court goes on to say, "In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education." *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 1257, 96 Cal. Rptr. 601 (1971) (*Serrano I*) (quoting *Manjares v. Newton*, 64 Cal. 2d 365, 375-76, 49 Cal. Rptr. 805, 812, 411 P.2d 901, 908 (1966)). The *Serrano* case dealt with inequalities in financing among school districts. For a discussion of school financing cases, see *infra* notes 72-88 and accompanying text.

6. Information about harassment of gay youth in schools is extremely difficult to find. We must rely on a small number of sources for our discussion below not because the problem is an isolated one, but because only a few social workers or activists have given the situation the attention it deserves. To facilitate change through negotiation or litigation, many more professionals should conduct research to lay bare the difficulties gay teenagers face in public schools.

7. One 18-year-old writes, "High school to me was a terrifying and intimidating place for a young gay male." Testimony by Young Adults and Teachers, Transcribed by *Philadelphia Lesbian and Gay Task Force* (1985) (available from *Philadelphia Lesbian and Gay Task Force*). A 24-year-old woman says, *Lesbianism was totally invalidated by the institution in the following ways:*
   1. Gay teachers invisible — closeted, did not feel safe to "come out."
   2. Curriculum completely heterosexist . . .
   3. Heterosexual assumptions by teachers, and administrators, in the classroom and all other settings. No validation whatsoever for the lesbian/gay student.
   4. Frequent instances of teachers or administrators demonstrating thru "jokes," stories, examples or innuendos their anti-gay bias.
   5. Harassment or intimidation by other students was *encouraged* by all of these official sanctions for homophobia . . .

I feel very strongly that I was cheated out of educational and social supports thru the public school system because of its institutionalized homophobia, and suffered mental and emotional trauma with no recourse.


8. Telephone interview with Bart Church, *supra* note 1; *see also* Testimony by A. Damien Martin before the New York State Task Force on Gay Issues 7 (Jan. 17, 1985)
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School gym teacher ridiculed for months a sixteen-year-old boy, known to be gay, and finally compelled him to attend girls' gym class. Although the student complained to his principal, no remedial action was taken. The boy consequently dropped out of school.9

Teachers also use harassment to show gay students and their classmates that gay persons are not welcome members of the community. In the District of Columbia, for example, several teachers repeatedly taunted an openly gay fifteen-year-old, calling him “faggot” and “fruit,” knowing that he was also being harassed and beaten by fellow students. When he complained to other teachers and the principal, they blamed the gay student for his mistreatment and recommended that he leave school.10 In Rhode Island, a high school principal expressed relief in his opening-day speech to the student body that the one openly gay student in the school would not be returning for his senior year. The principal neglected to mention that the boy quit school because teachers and students taunted him when he “came out” the previous year.11

Other high school authorities respond to gay students as if they were emotionally or mentally handicapped. Although gay students are often isolated, confused, and in need of advice, few schools permit constructive counseling that advises gay teenagers how to contend with taunting and violence and provides them with accurate information about their sexual orientation.12 Instead, administra-

10. Telephone interview with Bart Church, supra note 1.
11. See A. Fricke, Reflections of a Rock Lobster 55-56 (1981). Teachers often convey animosity toward gay persons through “jokes” or sarcastic remarks. For example, in an eighth-grade sex education class, the teacher responded to a student’s remark by saying, “Yeah, you let some faggot try to stick his thing up my butt, I’ll break his nose and then cut his joint off.” The class broke out in laughter; the gay boy in the class joined in “to hide my embarrassment and disgust with myself.” Testimony by Young Adults and Teachers, Transcribed by Philadelphia Lesbian and Gay Task Force (1984).
12. The San Francisco School Board recently enacted a resolution calling for each school to employ a person sensitive to gay youth issues. This person is to serve as a resource for students, teachers, and parents. Telephone interview with Greg Day, Chairman, Gay and Lesbian Youth Advocacy Council, San Francisco (Apr. 15, 1986). The resolution, a very progressive one compared with the positions of most school boards, has not yet been implemented. Id. In the New York City schools, when a gay student approaches a counselor for help, the student is often pressured to tell his par-
tors and teachers often label gay students "ill" and send them to counselors for a cure.13 Last year officials at a New York high school transferred a fifteen-year-old girl to a school for the mentally retarded simply because she had written a love note to her female teacher.14

School administrators also act in more subtle ways to deprive gay teenagers of public education's benefits. In some high schools, guidance counselors inform gay students that homosexuals cannot become professionals and must settle for less challenging occupations.15 School-board committees choose sex education textbooks that depict male homosexuals as depraved child molesters.16 School boards subject books that display tolerance toward homosexuality or are relevant to the experience of gay adolescents to an especially stringent process of review, making it impossible for these books to reach school libraries or classrooms.17

For gay teenagers, the failure of school officials to provide protection from peer harassment and violence stands out as the predominant feature of the discriminatory public school environment.18 When schools condone attacks on gay students, they endanger the students' safety and obstruct their ability to learn. Peer violence against gay youth is often severe. In the District of Columbia, for

13. See J. HARRY & W. DEVALL, THE SOCIAL ORGANIZATION OF GAY MALES 66 (1978) ("juveniles, if their [gay] sexual behavior or preferences have become known to parents, peers, police, or teachers are often referred to a variety of official 'treatments' and are labeled by institutions, such as schools, through their 'counseling' processes").

14. Interview with A. Damien Martin, Director, Institute for the Protection of Lesbian and Gay Youth, in New York City (Feb. 25, 1986) [hereinafter cited as Martin Interview II]. Dr. Martin is the foremost authority in the country on the problems of gay youth. In addition to being one of the founders and the current director of the Institute, he is Professor of Communications at New York University.


17. In Philadelphia, proposals for library purchase of texts that would interest gay youth are scrutinized more closely than all other purchase proposals. So far, no student library has purchased a book suggested by the Philadelphia group working to combat homophobia. Telephone interview with Rita Addessa, supra note 1.

18. The typical public school environment has been described as "enemy territory" for gay youth. The students cannot turn to teachers, counselors, or administrators for help because officials themselves harbor animosity toward gay youth. In addition, their home environment is often equally unsupportive. Telephone interview with Rita Addessa, supra note 1.
instance, gay students attend school aware that some gay students have been hospitalized after beatings by other students. Fear of such assaults leads many gay teenagers to drop out of school.  

In Philadelphia a gay teenager, illiterate, was finally driven out of high school by violent assaults from fellow students. Before he left school, beatings and verbal abuse in corridors and classrooms went unaddressed by teachers who witnessed the incidents.

School officials breach their duty to provide for the welfare of all students when they fail to safeguard gay students from verbal or physical harassment. The responsibility of administrators to provide a safe environment derives from the schools' power to compel attendance, and from the schools' position in loco parentis during the day. School authorities have tremendous, almost exclusive, control over the children legally entrusted to their care. If school administrators refuse to take action against overt homophobia — the harassment of gay pupils — these officials are inflicting cognizable injury through their inaction.

Moreover, education codes in most states make interference with another student's ability to function in school the most serious offense a student can commit. By choosing not to punish students who participate in gay-baiting or gay-bashing, school officials selectively enforce vital disciplinary rules. Gay students and,

19. Telephone interview with Bart Church, supra note 1. Church reports that in spite of the high incidence of physical violence against gay students in Washington, D.C., school officials generally refuse to protect these children, to punish their assailants, or to take steps to reduce the homophobia that causes the violence. Church terms the school system's conduct "child abuse and neglect." Id.


23. "Gay-baiting," verbal assaults on gay persons, and "gay-bashing," physical assaults, have become sport to groups of male teenagers, in schools as well as outside them. "[N]ame calling, taunting, hatred and violence" are "carried out by groups of fourteen- to nineteen-year-olds, and such violence is escalating sharply." Why CIBC is Dealing with Homophobia, supra note 8, at 3.

24. The steps schools take that result in injuries to gay youth should be distinguished from random instances of school officials harming, or allowing other students to harm, teenagers entrusted to the schools' care. Harassment and violence against gay students form a consistent, enduring pattern of injury to members of one minority group. Schools are aware of this pattern and have the power to change it. In addition, the experience of gay students in high schools differs from that of children who are teased because they have unusual personal characteristics (e.g., they are short, or red-
where they exist, advocates for gay youth frequently inform school authorities about the occurrence of harassment, only to see officials do nothing.25 Adding to injury, school officials sometimes punish the gay student who resists peer violence.26 In a Rhode Island school, the vice-principal refused to protect an openly gay student who asked him for help in stopping threats and assaults he received in gym class. When the student skipped class to avoid the abuse, the vice-principal disciplined him. Knowing that the student’s classmates abused him for being gay, the principal nonetheless punished him with an in-house suspension — the practical effect of which was three school days of being spit at and baited by the other students on suspension.27

Although homophobia most blatantly affects students who are known to be gay, it also inflicts injury on those students who conceal their homosexual orientation. Some teenagers hide their sexual orientation to avoid direct harassment;28 others do so because they have been taught to hate themselves for being gay.29 The prejudiced atmosphere of many public schools leads hidden gay stu-

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25. Martin Interview II, supra note 12.
26. Id.
27. A. FRICKE, supra note 11, at 57-58, 64-65. Later, frustrated by the prejudice of school officials, Fricke, the gay student, went to court in order to obtain the right to attend his senior prom with a male date. The principal had refused him permission. Judge Raymond Pettine found Fricke’s challenged activity to be protected speech and ordered the school to allow him to attend the dance. Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980).
28. See generally J. HARRY & W. DeVALL, supra note 13, at 66 (closetedness of teenagers “largely due to their immersion in a sea of heterosexual associates and their inability to escape that situation”).
29. As Martin states,

Accepting homosexuality as normal would be optimal since it would make it possible for the adolescent to reach that fusion of sexuality and emotionality described as gay identity. However, acceptance, if it is ever attained, usually occurs only after much struggle and pain. For most, hiding and attempts to change are the strategies used to cope with their stigmatized status. Society does all in its power to reinforce these two strategies and thus prevents self-acceptance.

Martin, Learning to Hide: The Socialization of the Gay Adolescent, 10 ANNALS OF AM. SOC’Y FOR ADOLESCENT PSYCHIATRY 52, 57 (1982). “For many . . . the conflicts and confusions experienced in the teenage closet take several years, perhaps a lifetime, to overcome.” J. HARRY & W. DEVALL, supra note 11, at 79.
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dents to develop feelings of isolation and despair, which, together with the fear of discovery, restrict their access to the benefits of public education.

Homophobic attitudes and actions occur in varying degrees within public schools. Some schools may demonstrate fairly enlightened attitudes toward the gay students in their midst. Surveys of gay youth and interviews with gay youth advocates, however, reveal that the teaching, curriculum, and administration of many schools reflect persistent homophobia. In these schools, the institutions — not isolated students or school employees — are responsible for the pervasive discrimination against gay students, and the institutions should act to correct the problem.

II. The Harvey Milk School — A Last Resort for Gay Youth

The intensity of prejudice in public schools leads many gay youth to leave school. These teenagers, some of whom are homeless, often become involved with drugs and may use prostitution to earn money. They cannot imagine that public schools will open opportunities because the schools they have attended signify abuse. In major cities, where the number of out-of-school gay teenagers is compounded by the migration of gay teenagers from rural areas, the situation has reached the dimension of a crisis.

30. See generally Martin, supra note 29, at 58-62 (discussing how hiding leads to isolation for gay adolescents).

31. Testimony of Young Adults and Teachers, Transcribed by Philadelphia Lesbian and Gay Task Force (1983-85); G. Robinson & A. Damien Martin, Needs Survey: Lesbian and Gay Youth: Problems and Issues in Service Delivery 5 (1984) (available from Institute for the Protection of Lesbian and Gay Youth, New York City) (trouble in school is one of the most frequent problems gay youth relate to social workers); Interview with Joyce Hunter, supra note 9; Martin Interview I, supra note 14; Martin Interview II, supra note 12; Telephone interview with Rita Addessa, supra note 1; Telephone interview with Bart Church, supra note 1; Telephone interview with Greg Day, supra note 12; Telephone interview with Gabe Cruks, Youth Outreach Program, Gay and Lesbian Community Services Center, Los Angeles (Apr. 7, 1986). Indeed, every expert (expert because of frequent contact with gay youth) that we interviewed expressed the belief that schools must change significantly before they will provide equal opportunities for gay students.

32. For a description of remedies available to the schools, see infra notes 114-29 and accompanying text.

33. Drug abuse and suicide are especially common among gay youth. The Youth Outreach Program in Los Angeles is using this fact to persuade schools that they need programs discussing homosexuality. Student workshops aimed at reducing homophobia and dispelling ignorance in high schools will help prevent despair among gay students. Telephone interview with Gabe Cruks, supra note 31.

34. Martin Interview II, supra note 12. See also Testimony by A. Damien Martin, supra note 8, at 7 (gay youth who leave school to avoid abuse "are at high risk for juvenile prostitution, involvement in drugs, pornography, and other unsavory and dangerous activities").

35. In San Francisco, the drop-out rate in public high schools is as high as 40 per-
In New York City, the need to get gay youth off the streets and give them an education led the city to authorize the founding of a separate school for gay teenagers.\textsuperscript{36} The Institute for the Protection of Lesbian and Gay Youth (IPLGY), a small agency that serves the 150,000 gay and lesbian teenagers in the metropolitan New York area, organized and continues to supervise the Harvey Milk School.\textsuperscript{37} Twenty-two students, from fourteen to nineteen years old, now attend Harvey Milk.\textsuperscript{38} They are young people who cannot hide their sexual orientation and, consequently, cannot learn alongside their heterosexual peers. The alternative for them is not attending school at all.\textsuperscript{39} Since the Harvey Milk School opened in April 1985, the number of students has doubled. Requests for admission outnumber available spaces ten to one.\textsuperscript{40} The strong demand for Harvey Milk shows that even though gay teenagers may quit school to escape hostility, many of them are still eager for an education.\textsuperscript{41}
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Although the Harvey Milk School offers some education for gay teenagers who have been ostracized and abused in mainstream schools, enrollment of gay students in this separate school sets a dangerous precedent. Courts have recognized that segregation of children on the basis of characteristics that the dominant group regards as inferior inflicts serious, possibly irreparable injury on the segregated children. In Brown v. Board of Education, the Supreme Court concluded that the separation of black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." More recently, Congress condemned the stigma of separate treatment in the Education for All Handicapped Children Act, the central objective of which is mainstreaming — the integration of disabled children into classrooms with the non-disabled. Consistent with this past commitment to integration, courts and elected officials should reform public schools so that gay youth are not forced to resort to segregated education.

The Harvey Milk School also presents an unacceptable solution for the education of gay youth because it does not have the resources to provide gay students with the quality of education that heterosexual students receive in regular schools. Harvey Milk is essentially a one-room schoolhouse, staffed only by one full-time and one part-time teacher. The New York City Board of Education pays their salaries, but all other expenses of the school — rent, furniture, and supplies — must be paid for with money that IPLGY raises. Thus gay students must forfeit the benefits of the specialized teachers, diverse facilities, and well-stocked libraries of mainstream schools to gain a safe, tolerant place in which to learn.

Sensitive to the problems that accompany segregation, the Institute for the Protection of Lesbian and Gay Youth attempts to keep its clients in regular schools. The Institute tries to counter the effects of discrimination by tutoring gay students, counseling them

45. Martin Interview II, supra note 12.
46. Id.
47. A. Damien Martin, supra note 1, at 3. Five hundred clients visit the Institute regularly for counseling and job placement services. Kantrowitz, supra note 36, at 27. Of the 10,000 inquiries made to IPLGY each year, id., 75 percent concern educational problems. A. Damien Martin, supra note 1, at 3.
on how to contend with prejudice, forming social groups among gay teenagers, and advocating the rights of gay youth to school officials. With the extensive support that IPLGY provides, most of its clients do stay in mainstream schools. But, like the Harvey Milk School, the support services IPLGY offers are only a partial, inadequate solution. Students remain in school only with the help of extensive outside counseling and still suffer mistreatment while attending school.

For the students most hurt by the pervasive hostility and harassment in New York's high schools, the Harvey Milk School offers an alternative to quitting school. Yet, as its founders readily acknowledge, a segregated school evades — and may even exacerbate — the fundamental problem facing gay youth: the homophobic environment in public schools. In school districts without an alternative high school or a gay youth support organization (most American school districts) the outlook for gay teenagers is bleak. Until all school boards eliminate homophobia within the public schools and until all school officials stop punishing gay teenagers for being different, gay students will continue to be denied the benefits of equal opportunity and integrated education.

III. Using State Constitutions to Guarantee Gay Students Equal Access to Public Education

A. The Background for Invoking State Protections

Public education clauses in state constitutions provide a means for enforcing gay students' right to education. State constitutions stand as valuable independent sources of civil rights. The principles of federalism suggest that an American citizen's ultimate recourse for legal protection is the state rather than the federal government.
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As the Supreme Court backs away from granting federal rights in important areas of personal freedom, scholars,\(^5\) litigators,\(^4\) and state courts\(^5\) are focusing greater attention on state constitutional provisions to ensure the liberty of all citizens.\(^5\) Vigorous state constitutional jurisprudence is now emerging, including cases establishing a state right to education.

Constitutions in forty-eight states explicitly require a system of public education for their children and teenagers.\(^5\) The constitu-

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In the area of fundamental civil liberties . . . we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due.

Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 371 (1977). See also Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970) (state supreme court has duty to go beyond national standards to protect rights found "to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage").


56. As one observer notes,

The motivating force behind this trend is, no doubt, the retrenchment by the Burger Court in the area of individual rights protections. There are, however, other practical reasons for a divergence from the federal law. These include the arguments that flaws in the federal doctrine should not be infused into state law, that institutional differences cannot be overlooked, and that state-specific factors often simply compel a divergence.

Comment, \textit{supra note 53}, at 463 n.3. Two Supreme Court Justices, William Brennan and John Paul Stevens, strongly support the "renaissance" of state protection of individual rights. \textit{See Pear, supra note 55}.

57. For a compilation of state constitutional language on education from all states, see L. Kotin & W. Aikman, \textit{supra note 21}, at 420-33. Mere inclusion in the state constitution does not elevate a state objective to a right. The state constitutions are more than simply limitations on the state governments, although limitation is their primary function. \textit{See Williams, supra note 58}, at 178-79. The appropriate analysis to determine
tional provisions range from a simple declaration that the state shall provide for free elementary and secondary schools to language that strongly commits the state to public education of the highest quality. Courts in ten states, interpreting both simple and more detailed state education clauses, have already declared education to be a state-bestowed right. These state decisions came in response to *San Antonio Independent School District v. Rodriguez*, a 1973 public school financing case in which the United States Supreme Court declined to name education a fundamental right under the federal Constitution.

Several factors justify the activism of state courts in enforcing a right to education. Explicit references to education in state constitutions and the absence of any counterpart in the federal Constitution render state courts logical forums for protecting a right to education. A state-based right to education also follows the tradition of education as a state responsibility. A major consideration in the Supreme Court's unwillingness to declare education a fundamental right under the U.S. Constitution was deference to this history of state control over education. The Court had earlier stated that "[p]roviding public schools ranks at the very apex of the function of a State." Moreover, the states themselves have found the

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58. See, e.g., **ALASKA CONST. art. VII, § 1** ("The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions.").

59. The Idaho Constitution, for example, states, "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho to establish and maintain a general, uniform and thorough system of public, free common schools." **IDAHO CONST. art. IX, § 1.** Many of the state provisions stress that public education must be "thorough" or "ample." See, e.g., **N.J. CONST. art. VIII, § 4; WASH. CONST. art. IX, § 1.**

60. See infra note 72 and accompanying text.


62. "[T]he most clear-cut and least controversial rationale" for state activism in protecting civil rights "is the presence of a right in the state constitution that does not have a counterpart in the Federal Constitution." Galie, supra note 53, at 734.

63. *Rodriguez,* 411 U.S. at 40-44.

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provision of education to be one of their most important tasks. In addition to constitutional language and the history of state responsibility, the importance of education in the scheme of personal liberties justifies state courts in protecting this right. The central right to education promotes vital state interests that are tied to an educated citizenry.

B. Realizing Gay Students' State Right to Education

To allow gay students equal access to public education, class action suits should be brought in state courts. Advocates for gay youth should argue, relying on the equal protection and education clauses of state constitutions, that the right to education is one of primary importance in state constitutional law. Once a court agrees that education is a primary right, the state court must examine any infringement of that right with the closest scrutiny. Only a significant, narrowly tailored state purpose can survive such exam-

65. For example, the Washington Constitution states, "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders . . . ." WASH. CONST. art. IX, § 1. The West Virginia Supreme Court has held, "Our Constitution manifests, throughout, the people's clear mandate to the Legislature, that public education is a prime function of our State government." Pauley v. Kelly, 255 S.E.2d 859, 884 (W. Va. 1979) (emphasis in original).

66. That is, education allows individuals to exercise other rights such as the right to free speech and the right to vote. The Washington Supreme Court has said, Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding. Seattle School Dist. No. One v. State, 90 Wash. 2d 359, 585 P.2d 71, 94 (1978) (citation omitted); see also McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156, 165 (1981) (minimally adequate education must provide skills necessary to enjoy free speech and full participation in political process).

67. See infra notes 130-46 and accompanying text (equal education crucial to individual well-being, society's productivity, and continued democracy). The education provisions in state constitutions clearly support declaration of a primary right according to proper state constitutional analysis. The right to education meets both requirements of the two-part test outlined in note 57. Education ranks as an essential state right because it is explicitly included in state constitutions and because it is centrally important to the liberty of the state's citizens and the continued prosperity of the state.

68. Ideally, the first litigation of this type will rest on especially strong evidence of interference with gay students' education so that a favorable precedent for other suits will emerge, and so that the worst schools will remedy their homophobia first.

69. See infra notes 72-88 and accompanying text. We usually refer to the education right as "primary" rather than "fundamental" because state courts should employ terminology and analysis independent of federal constitutional law. Justice Stevens has said, "State constitutions preceded the Federal Constitution and were obviously intended to have independent significance. Whether the national minimum set by the Federal Constitution is high or low, state constitutions have their own unique origins, history, language and structure, all of which warrant independent attention." Pear, supra note 55.
No sufficient state purpose exists, however, to justify interference with gay teenagers' right to education. When presented with evidence of the discriminatory acts and omissions by school officials that now systematically obstruct gay students' public education, courts should recognize education's importance and render judgments to remedy this destructive treatment of gay students.

1. A Primary State Right

School financing cases provide most of the analysis to date of state public school provisions. In a majority of these cases, courts have interpreted state constitutional language as granting a right to education, and have viewed this right as one of primary importance. The Supreme Court of Washington, for example, has held

70. See infra notes 89-90 and accompanying text.
71. See infra notes 91-104 and accompanying text.
72. Compare Robinson v. Cahill, 62 N.J. 475, 303 A.2d 273, 294 (1973) (education provision in state constitution itself embodies equality notion: "an equal educational opportunity for children was precisely in mind"); Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590, 592 (1973) (Arizona constitution "does establish education as a fundamental right"); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 951, 135 Cal. Rptr. 345 (1976) (Serrano II) ("education is a fundamental interest"); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141, 149 (1976) ("equal opportunity for education . . . is a fundamental right"); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359, 378 (1976) (right to education "basic and fundamental"); Seattle School Dist. No. One v. State, 90 Wash. 2d 476, 585 P.2d 71, 91 (1978) (right to education is "paramount"); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) ("education is a fundamental constitutional right in this State"); Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) ("education for the children of Wyoming is a matter of fundamental interest"); Dupree v. Alma School Dist. No. 30, 279 Ark. 340, 651 S.W.2d 90, 93 (1983) ("right to equal educational opportunity is basic"); with Thompson v. Engeling, 96 Idaho 793, 537 P.2d 635, 647 (1975) ("we refuse to classify the right to education as a fundamental right which compels the State, for the purpose of financing, to wipe out local entities and finance on the basis of revenues raised by some sort of statewide system"); McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156, 167 (1981) ("education per se is not a 'fundamental right'"); Bd. of Educ., Levittown v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 366 (1982) (fundamental right and strict scrutiny triggered by "intentional discrimination against a class of persons grouped together by reason of personal characteristics, the use of which call[s] into question the propriety of the particular classifications;" no such discrimination against discrete group found in this unequal financing case); Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 (Colo. 1982) ("We refuse . . . to venture into the realm of social policy under the guise that there is a fundamental right to education which calls upon us to find that equal educational opportunity requires equal expenditures for each school child."); Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 548 A.2d 758, 766 (1988) ("education is not a fundamental right"). Several of the school financing cases do not directly address the question of whether there is a right to education under the relevant state constitution. See Milliken v. Green, 390 Mich. 389, 222 N.W.2d 711, 713 (1973) (no claims of specified educational inadequacies pleaded; such claims will be addressed when raised — "we are not abandoning the school children of this State to legislative whim in derogation of any judicially enforceable right to an education they may have under our Constitution"); Olsen v. State, 276 Or. 9, 554 P.2d 139, 145 (1976) (employs balancing test of detriment to education

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that "all children within the borders of the State possess a 'right,' arising from the constitutionally imposed 'duty' of the State, to have the State make ample provision for their education." The court went on to say that "since the 'duty' is characterized as paramount the correlative 'right' has equal stature." 78

The highest courts in six states have called education a "fundamental" right or interest in their analysis of education clauses in unequal financing cases. 74 The California Supreme Court, for example, has termed education a "fundamental right" under the California Constitution, relying on constitutional language relating to education and education's place as one of the "individual rights and liberties which lie at the core of our free and representative form of government." 75 Interpreting the most skeletal type of constitutional provision — "[t]here shall always be free public elementary and secondary schools in the state" 76 — the Connecticut Supreme Court concluded that "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." 77

In addition to these seven states that recognize education as a "paramount" or "fundamental" right, 78 supreme courts in three other states interpret state constitutional language to grant a right

against justifications for financing scheme; does not address issue of importance of education interest in abstract); Danson v. Casey, 484 Pa. 415, 399 A.2d 360, 365 (1979) (no allegation that any public school student has suffered injury from financing scheme; affirms dismissal of action); Bd. of Educ. of City School Dist. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 818, 819 (1979) (inappropriate case for strict scrutiny; "case more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way in which Ohio educates its children"), cert. denied, 444 U.S. 1015 (1980). In addition to the nine school financing cases cited in which courts found a right of education, an Alaska court addressing the issue of the right to attend school near the student's home found a right to education under the Alaska Constitution. See Hootch v. Alaska State-Operated School System, 536 P.2d 793, 799 (Alaska 1975) (state constitution guarantees "Alaska school age children a right to education").

73. Seattle School Dist. No. One, 585 P.2d at 91 (emphasis in original). In Seattle School District, a school financing program was held unconstitutional because it produced insufficient funds to permit school districts to carry out the state's broad educational mandate.

74. See cases cited supra note 72 (Hollins, Serrano II, Buse, Horton, Pauley, Herschler).

75. Serrano II, 557 P.2d at 952. Because California's financing system determined educational opportunity by wealth of the particular school district, the California Supreme Court found an equal protection violation.

76. Conn. Const. art. VIII, § 1.

77. Horton, 376 A.2d at 373. The Horton court found that the state's system of financing, based primarily on property taxes and without state equalizing funding, violated the state constitution because it failed to allow equal enjoyment of the right to education.

78. The seven states are Arizona, California, Wisconsin, Connecticut, Washington, West Virginia, and Wyoming. See supra note 72.
to education.\textsuperscript{79} The judicial rhetoric emphasizes the importance of this right. \textquotedblright The right to equal education,	extquotedblright according to one court, \textquotedblright is basic to our society . . . . Education becomes the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights.\textquotedblright\textsuperscript{80}

The right to education discussed in state case law is a right of access to a meaningful education, not merely a right of access to a school building.\textsuperscript{81} The West Virginia Supreme Court, for example, interprets the constitutional mandate to be a \textquotedblright command that the education system be absolutely complete, attentive to every detail, extending beyond ordinary parameters.\textquotedblright\textsuperscript{82} In New Jersey the highest court has held that the \textquotedblright Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market.\textquotedblright\textsuperscript{83} The contents of the right to education change with time, for they are determined by the skills that are necessary for a productive life in contemporary society.\textsuperscript{84}

The state education right, coupled with state equal protection doctrine, guarantees all children an equal and real opportunity for public education.\textsuperscript{85}

In states that have not yet interpreted their constitutions to establish education as a primary right, actions on behalf of gay high school students must urge the courts to declare an education right. Presented with claims of unequal school financing among districts, five state courts found education not to be a fundamental right under their state constitutions.\textsuperscript{86} In each case this determination was heavily influenced by the type of claim: fiscal inequalities among schools in different locations.\textsuperscript{87} A claim by gay students

\begin{itemize}
\item \textsuperscript{79} See cases cited supra note 72 (Robinson, Dupree, Hootch).
\item \textsuperscript{80} Dupree, 651 S.W.2d at 93.
\item \textsuperscript{81} As the highest court in Washington found, "the State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as marketplace of ideas." Seattle School Dist. No. One, 585 P.2d at 94.
\item \textsuperscript{82} Pauley, 255 S.E.2d at 874.
\item \textsuperscript{83} Robinson, 303 A.2d at 295.
\item \textsuperscript{84} See Seattle School Dist. No. One, 585 P.2d at 94 ("to recognize changing times is not to change the constitution . . . . We must interpret the constitution in accordance with the demands of modern society . . . .") (emphasis in original).
\item \textsuperscript{85} "Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action." Dupree, 651 S.W.2d at 93 (quoting with approval San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting)). See also Horton, 376 A.2d at 373 (quoting same language with approval).
\item \textsuperscript{86} See cases cited supra note 72 (Thompson, McDaniell, Nyquist, Lujan, Hornbeck).
\item \textsuperscript{87} The school financing cases cast the state court against the legislature in a fight over state budgeting, an area where courts seldom assert themselves. See McDaniell, 285
\end{itemize}

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would present a different issue: direct interference with the education of a well-defined minority group. This claim of more specific, more flagrant discrimination should motivate judges to give the gay youth situation more careful scrutiny. When courts learn that current school actions often force gay students to drop out of school, and that schools severely hamper the basic education of gay students who remain enrolled, the courts are likely to find that this discrimination, remediable at low cost, curtails a primary state interest.88

2. Close Judicial Examination of Infringement

Because the education right is so important, state courts must employ their most stringent equal protection analysis to decide whether a school district’s proffered justification provides a sound and necessary reason for the obstruction of gay students’ rights. Although courts differ in their terminology, they universally agree that if a right of vital importance is at issue, the state’s burden in

S.E.2d at 167 (noting court’s lack of expertise with respect to raising and distribution of public revenues); Nyquist, 439 N.E.2d at 369 (“decisions as to how public funds will be allocated . . . are matters peculiarly appropriate for formulation by the legislative body”). Moreover, dollars-per-pupil equality is not necessarily equality in educational opportunity; courts further hesitate because the injury and the requested remedy are speculative and imprecise. See Lujan, 649 P.2d at 1018 (court refuses to take side in “fundamental disagreement . . . concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education”). The courts also decline to interfere in school financing cases to maintain local control over school districts. State funding to equalize expenditures could, they hypothesize, lead to comprehensive state control over the schools’ operation. See Nyquist, 439 N.E.2d at 366 (“the preservation and promotion of local control of education . . . is both a legitimate State interest and one to which the present financing system is reasonably related”).

88. The courts are more likely to recognize the right to education in gay youth cases, as opposed to school financing cases, because no large redistribution of funds is at issue, the connection between current school practices and interference with gay students’ education can be clearly established, and judicial correction of direct discrimination against a minority group will not rob individual school districts of their general authority over local schools. The state courts that so far have found no fundamental right to education indicated that they would look differently on a case of direct interference with students’ basic education. See Thompson, 537 P.2d at 648 (state constitution created a “duty to establish and maintain a uniform and thorough statewide system of education. It did not . . . give to individuals a fundamental right to completely equal educational expenditures.”); McDaniel, 285 S.E.2d at 165 (found constitutional requirement of “adequate” education, which was fulfilled despite unequal financing); Nyquist, 439 N.E.2d at 363 (constitutional minimum standard of educational quality and quantity exists, but claim in this financing case relates to unevenness above the minimum). The Connecticut Supreme Court correctly states:

[Education equalization cases are “in significant aspects sui generis” and not subject to analysis by accepted conventional tests or the application of mechanical standards. The wealth discrimination found among school districts differs materially from the usual equal protection case where a fairly defined indigent class suffers discrimination to its peculiar disadvantage. Horton, 376 A.2d at 373.
justifying discriminatory action against that right increases.\textsuperscript{89} In a public school financing case, the Wyoming Supreme Court summarized the judicial task in dealing with inequality and the right to education: "When a fundamental interest is affected . . . then the [action] must be subjected to strict scrutiny to determine if it is necessary to achieve a compelling state interest. In addition, this test requires that the state establish that there is no less onerous alternative by which its objective may be achieved."\textsuperscript{90}

3. \textit{No Justification for Discrimination Against Gay Youth}

Obstruction of gay high school students' right to education should not survive close judicial scrutiny because the schools will not be able to justify discrimination with a countervailing state interest. There are four arguments schools might use to support current discrimination against gay youth: (1) that discriminatory treatment prevents students from acquiring an antisocial and immoral sexual orientation (hereinafter the \textit{identity} argument); (2) that such treatment discourages antisocial and immoral conduct; (3) that such treatment discourages criminal \textit{conduct}; and (4) that such treatment discourages \textit{conduct} related to a public health problem, Acquired Immune Deficiency Syndrome (AIDS).\textsuperscript{91} In advancing these arguments as justification, the schools will need to show that actual harm to the state interest will result from abandoning the discriminatory actions against gay students.\textsuperscript{92} Even if the schools can show actual harm, to withstand close scrutiny they must also establish that current practices are the least restrictive means for preventing harm.\textsuperscript{98}

\textsuperscript{89}. \textit{See, e.g.,} Horton, \textit{376 A.2d} at 370-73 (discussion of federal and Connecticut equal protection analysis; more substantial state interest required if fundamental right impinged); Lujan, \textit{649 P.2d} at 1014-15 ("[a]s in other jurisdictions, we have come to recognize that the equal protection guarantee insures that all individuals be treated fairly in their exercise of fundamental rights;" three standards of review within Colorado equal protection analysis); Robinson, \textit{303 A.2d} at 282 (instead of ranking rights in the abstract, New Jersey undertakes balancing test that factors in weight of right at issue in case).

\textsuperscript{90}. Herschler, \textit{606 P.2d} at 333.

\textsuperscript{91}. Remedying schools' interference with gay students' right to education will not involve large reallocations of funds, in contrast to the school financing cases, and thus no fiscal justification is possible. Likewise, remedies here will not significantly interfere with local control over education. \textit{See infra notes} 109-29 and accompanying text.

\textsuperscript{92}. Pornography cases present good examples of the actual harm requirement — when the right to free speech is involved, anti-pornography statutes cannot stand absent proof of actual harm from the pornography prohibited. Courts similarly require actual harm when the equal availability of a primary right, such as education, is at issue. \textit{See Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, \textit{98 Harv. L. Rev.} 1285, 1308-09 (1985)}. Recognition of a suspect classification or a fundamental right "steers the debate . . . into the realm of hard data about actual harm." \textit{Id.} at 1309.

\textsuperscript{93}. \textit{See, e.g., supra} text accompanying note 90; Lujan, \textit{649 P.2d} at 1015 (when fundamental right affected, state must show "the act is necessarily related to a compelling go-
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Unless a judge ignores legal rules and relies solely on his own view that homosexuality is immoral or antisocial, the schools will have great difficulty meeting this burden of proof. Establishing that accurate information about sexuality and tolerance of gay students will lead to an increase in gay sex will pose a problem for school districts. Moreover, significant interference with gay students' basic education seems patently overinclusive as a means for accomplishing any valid state interest.

Because most studies indicate that sexual orientation is fixed well before a student reaches high school, a court should not accept the identity argument — the argument that discrimination against gay youth will decrease the number of homosexuals. On the basis of extensive research at the Kinsey Institute, Bell, Weinberg, and Hammersmith have concluded that "[b]y the time boys and girls reach adolescence, their sexual preference is likely to be already determined, even though they may not yet have become sexually very active." They go on to warn against ignoring this integral part of a teenager's identity. Although scientists lack consensus about the process of establishing sexual orientation, most agree that it is established before puberty. Many believe sexual orientation is fixed by the age of six.

Thus the schools should not be able to prove that discrimination can prevent students from acquiring gay identities; at most, they can hope to establish that discrimination serves to keep gay people from

94. Unfortunately, many judges would allow their personal beliefs to influence the outcome of a gay youth case. See Comment, Dronenberg v. Zech: Judicial Restraint or Judicial Prejudice?, 3 YALE L. & POL'Y REV. 245 (1984) (explaining how Judge Bork violated concept of neutral principles by relying on inaccurate stereotypes in case concerning homosexuality). For a discussion of numerous cases where judges have ignored the merits and ruled against gay persons, see Rivera, supra note 1.

96. Bell, Weinberg, and Hammersmith write:
Many individuals refuse to acknowledge the significance of teenage sexuality, tending instead to think of sexuality as something that only emerges in adulthood. The result is a view of sexuality that overlooks how deeply an individual's sexual patterns seem to be ingrained and how much a part of a person's identity they may be, long before they are translated into specifically sexual contact.

Id.
97. See Maylon, The Homosexual Adolescent: Developmental Issues and Social Bias, 60 CHILD WELFARE 321, 322 (1981) (bulk of evidence supports conclusion that fundamentals of sexual preference in place before puberty, but how this happens awaits elucidation); Warren, Homosexuality and Stigma, in HOMOSEXUAL BEHAVIOR 123, 125-26 (J. Marmor ed. 1980) ("homosexual predispositions are not a matter of choice . . . but are established in very early childhood").
engaging in homosexual conduct. The latter three arguments put
the schools in the position of attempting to restrain gay individuals
from having sex with other members of their gender. It should be
stressed, however, that gay teenagers are suffering discrimination
without any proof that they have had gay sex; they are receiving an
inferior education only because they have been identified as gay.

The schools will argue that their practices discourage antisocial
and immoral conduct. They will attempt to show that maligning gay
students discourages homosexual conduct, which in turn helps pre-
serve society's morals and society's institutions, such as the family.
The antisocial justification carries little weight because homosexu-
ality does not destroy the social fabric; in modern American society,
many gay people form families and support other social institu-
tions. At the core of the antisocial argument, however, is a moral
objection to homosexuality. According to the American version
of democracy, government institutions such as schools can seek to
inculcate the majority's morality. The questions here are: (1)
whether homosexual conduct is immoral; (2) whether eliminating
discrimination in schools will increase the incidence of gay sex; and,
most important, (3) whether school-sanctioned harassment and mis-
information are proper means for advancing the alleged morality.

The first two questions are open to debate. We would deny that
gay sex is immoral; it hurts neither individuals nor society. Second,
we would assert that individuals act on sexual desires despite social
proscription. "Deterrence attempts" fail to influence the incidence
of gay sex; they only interfere with education and increase anxiety
when gay sex does occur.

The third question, however, has only one answer. The schools
may teach moral lessons (however debatable their truth or worth), but they cannot do so by abusing students physically and

99. See Note, supra note 92, at 1307 ("homosexuality poses a threat only to the for-
mal definitions of marriage and family, not necessarily to the values of caring and
responsibility that lie behind them. Perhaps a broader conception of family is necessary
to preserve the intimacy and sharing that are the central objects of the state's
concern.").

100. Social injury arguments lack merit in the gay youth context in the same way that
they fail adequately to support states' denial of marriage licenses to gay couples: "When
the camouflage of centuries of religious and 'moral' taboos and teaching is swept aside,
and the alleged bases for the restrictions are exposed to the full light of modern knowl-
edge and lifestyles, the state may find justification for its restrictions difficult or impos-
ible." Ingram, A Constitutional Critique of Restrictions on the Right to Marry — Why Can't Fred
Marry George — Or Mary and Alice at the Same Time?, 10 J. CONTEMP. L. 33, 40 (1984).

101. Discussion of the morality or immorality of homosexuality should occur only
within a curriculum that reflects current data about homosexuality and that acknowl-
edges the achievements of gay people. Public schools should adopt this type of curricu-
um. See infra note 120 and accompanying text (inclusive curriculum remedy).
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emotionally and thereby infringing upon their right to education. As one commentator puts it, "[M]oral relativism — the recognition that the desire to avert perceived moral harm does not justify discriminatory treatment — . . . is mandated [in equal protection cases] when the protection of fundamental rights or specially protected groups is at issue."\(^{102}\)

Furthermore, courts should reject the criminal conduct and the AIDS justifications as overbroad. In the 24 states that maintain sodomy laws, schools may inform students of the law in discussions about homosexuality.\(^{103}\) Interfering with students’ education in an attempt to deter conduct that violates largely dormant laws, however, is vastly overinclusive. Similarly, schools can help prevent the spread of AIDS by including information about the disease and about safe sex in sex education courses,\(^{104}\) but obstructing the right to education is too broad and too far removed a tactic for schools to use in fighting the disease.

The schools’ possible justifications for discriminatory treatment of gay youth either do not constitute a compelling state interest or they employ an overly restrictive approach. Even if courts accept that homosexuality violates common notions of morality, equal protection analysis requires the fundamental right of education to override the state’s interest in promoting a particular concept of decency. Nor should courts sanction the use of harassment and intimidation of gay students as a legitimate means of deterring gay sex, even in those instances where such behavior is itself constitutionally unprotected or interferes with a state public health interest.

IV. Remedies

In recent decades, many civil rights suits have invoked the equity jurisdiction of courts to reform public institutions that abridge constitutional rights.\(^{105}\) Federal and state courts have broad, flexible

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102. See Note, supra note 92, at 1308.
103. Again, this information should be included only in open, well-informed class discussions about homosexuality. Students should discuss the law and form their own opinions about whether consensual sodomy statutes should be repealed. See infra note 120 and accompanying text (inclusive curriculum remedy).
104. In San Francisco schools, AIDS education programs will become part of the curriculum by the end of the ’85-’86 school year. According to school officials, classes will not treat AIDS as an exclusively "gay disease." In addition to basic facts and safe sex information, the classes will discuss treating persons with AIDS with kindness. Telephone interview with Greg Day, supra note 12. Other school systems should follow this model.

[W]e may point to the extensive experience of the past quarter century with so-
powers of equity to fashion and implement remedies for constitutional violations. Federalist principles restrain federal courts from extensive involvement in the administration of state institutions. State courts, however, can exercise the full potential of their equity powers in devising remedies for state institutions that do not conform to state constitutional standards.

Courts determine the nature of the remedy by examining the scope of the constitutional violation. When a violation takes the form of a discrete, isolated act, courts usually order a preventive injunction designed to stop that conduct. Where a public institution fosters widespread and systematic violations, however, the plaintiffs need more extensive relief. In such a case, the court may issue a reparative injunction, which corrects the past harm done to plaintiffs, or a structural injunction, which restructures the institution.

Upon finding that a school district has interfered with the education right of gay youth, the court should order a remedy strong enough to guarantee gay students an equal education in that school district. At a minimum this requires a preventive injunction, requiring the schools to stop specific practices that discriminate unfairly between gay and non-gay students. In some school districts, the scope of the injuries may mandate broader relief aimed at ridding the schools of a pervasively homophobic atmosphere and at helping gay youth cope with their minority status.

called "institutional remedial litigation" (sometimes called "extended impact litigation"), starting with the desegregation of public schools. At the center of this entire movement has been the injunctive remedial process directed to officials who have failed to abide by legal standards, commanding them to take affirmative action, often over a wide and sensitive range.


107. See, e.g., Rizzo v. Goode, 423 U.S. 362, 378 (1976) (arguing that federal courts "must be constantly mindful of the 'special delicacy of the adjustment to be preserved between [federal] equitable power and State administration of its own law'").

108. Most precedents for the exercise of broad equity power in civil rights suits arise out of federal courts. Almost all civil rights litigation has taken place in these courts, because, during the era of the Warren Court, the federal courts were considered more receptive than state courts to civil rights claims. Increasingly, however, civil rights activists are turning to state constitutions and state courts for protection. See supra notes 53-56 and accompanying text.


111. Id. at 7. See also Note, The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change, 84 YALE L.J. 1338, 1340-47 (1975) (discussing the limits of preventive injunctions to correct abuses on an institutional scale).
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Courts should force schools to commit themselves to the tolerance of gay persons and the dissemination of accurate information about homosexuality. The remedies we advocate do not demand that school districts promote homosexuality — only that they accept a large group of teenagers as equal citizens, citizens who have as much right to learn as other students. Even injunctions requiring affirmative counseling programs and curriculum changes on the part of a school district will not severely intrude upon local control of education. These affirmative remedies will constitute small changes in the overall education program of a locality, but they will repair large injustices.

As courts fashion remedies and as school districts act to give gay students equal opportunities, they should examine proposals by groups that are familiar with the educational problems of gay youth. These organizations have drafted useful plans for protecting gay students and eradicating homophobia in the schools, but so far have had little success in convincing schools to implement the measures. Their expertise should contribute to the character of the relief provided through litigation.

A. Relief to Prevent Continued Acts of Direct Discrimination

Most urgently, courts should prevent schools from continuing to enforce disciplinary codes in a way that condones taunting and violence against gay youth. Schools should discipline teachers and students who verbally or physically harass gay students, just as school districts discipline them for other conduct that interferes with the educational function of the schools. An anti-slur resolution recently adopted in San Francisco can serve as an example and a starting point for schools implementing a judicial order of nondiscrimina-

112. Courts usually ask institutions defaulting on their constitutional obligations to devise their own remedies and to submit them for judicial review. In evaluating the adequacy of the proposed remedies, courts frequently employ experts in the field. At this stage, courts should exploit the experience of gay youth advocates. Where the institution proves recalcitrant, the court can use experts to devise a remedial plan and then compel the institution to implement the prescribed remedies. See generally Special Project, The Remedial Process in Institutional Reform Litigation, 78 COLUM. L. REV. 784, 826-37 (1978).

113. In San Francisco, advocates for gay youth have succeeded in gaining passage of numerous resolutions by the school board, thus starting the process of eradicating homophobia. These resolutions — for supportive counseling, for punishment of verbal abuse, for AIDS education, and for other projects — have yet to be implemented, however, and may not be for some time. Telephone interview with Greg Day, supra note 12. In Philadelphia, advocates for change have put together detailed proposals to help rid the schools of homophobic prejudice, but their negotiations with school officials are proceeding slowly. See supra note 4.
tion in discipline. The San Francisco resolution, yet to be implemented, orders various types of reprimands for teachers or students who utter slurs against members of minority groups, including slurs based on sexual orientation.114 Because gay teenagers face other forms of harassment, an adequate policy of equal discipline should also address physical attacks.

Courts, in addition, should enjoin schools from giving misinformation and from censoring accurate information on homosexuality. A preventive injunction should forbid counseling that steers gay students away from certain career opportunities, and should forbid counseling that labels gay youth “ill”. Similarly, textbooks that reinforce false stereotypes about gay people should be prohibited. The court should also proscribe use of a special, higher standard of review for texts and library books that contain information about gay persons or that show tolerance toward homosexuality. These prohibitions will prevent schools from engaging in the most direct means of stigmatizing and discouraging gay students.

B. Relief to Counteract Prejudice and Compensate Gay Youth for Past Injuries

Courts may need to order broader relief in some cases. Desegregation decisions provide helpful precedents. The Supreme Court has realized that mere numerical balancing of the races cannot cure the sweeping constitutional violation brought on by segregation, and therefore has approved the intervention of lower courts in educational programming.115 Trial courts in desegregation cases may issue injunctions that require school boards to restructure school policy and the curriculum as a means of attacking racism and compensating the victims of segregation. In Berry v. School District of Benton Harbor,116 for instance, a court ordered the school board not only to integrate its student body but also its teaching and counseling staff. The court also required the school district to institute mandatory workshops for faculty, staff, and students to acquaint them with the problems of racism and to help them overcome their fears and prejudices. The court ordered the school district to form clear disciplinary rules and enforce them without racial bias, and to use textbooks that discuss the contributions of minority-group members. In addition, the court required the district’s schools to

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mitigate the effects of discrimination on black students by providing them with special counseling and by developing programs to improve their self-esteem, motivation, social skills, and knowledge about career possibilities.\textsuperscript{117}

Similarly, judicial intervention into educational programming can disentrench homophobia. Courts should consider the following remedies:

\textit{Faculty workshops.} Gay youth support organizations particularly favor workshops for faculty and staff to educate them about homosexuality and the problems that confront gay students.\textsuperscript{118} Workshops for teachers about homosexuality and gay youth issues will produce a more tolerant atmosphere in classrooms; programs that reach administrators and counselors will lead them to treat gay students with more understanding.

\textit{Student workshops.} Workshops for students themselves are another promising remedy. Discussing homosexuality and gay teenagers' concerns with an expert from outside the school allows all students to ask questions they may be reluctant to ask in a regular course. These special sessions have been conducted on a limited scale in the Los Angeles public schools by the Gay and Lesbian Community Services Center.\textsuperscript{119}

\textit{A more inclusive curriculum.} An important, effective method of countering homophobia is a curriculum that acknowledges the presence and contributions of gay people. For example, sex education classes should contain discussions that air student fears and prejudices against gay persons, dispel popular myths, and convey basic facts about homosexuality. These classes should also convey information about AIDS and safe sex. In addition, courts should require schools to use texts that discuss the long-standing persecution of gay persons, and that include the contributions of gay persons to history and to the arts.\textsuperscript{120}

\textit{Special rules.} Transcending equal enforcement requirements, courts can order schools to adopt rules specifically forbidding the harassment of gay students and punishing intolerance and violence toward them. A separate policy prohibiting abuse of gay teenagers will highlight their needs in the minds of school officials and other students.

\textsuperscript{117} Berry, 515 F. Supp. at 369-79.

\textsuperscript{118} Telephone interview with Rita Addessa, supra note 1. In Philadelphia, a pilot program for the training of counselors and principals has reached a small group of educators through workshops on homosexuality and homophobia. \textit{Id.} Lack of knowledge of or sensitivity to homophobia currently characterizes the position of most educators. \textit{See} Newton & Risch, \textit{Homosexuality and Education: A Review of the Issue}, \textit{HIGH SCHOOL J.}, Feb., 1981, at 191.

\textsuperscript{119} The Youth Outreach Program occasionally is invited into schools for presentations on homosexuality to groups of students. These workshops happen at the discretion of individual principals. Telephone interview with Gabe Cruks, supra note 31.

\textsuperscript{120} The inclusive curriculum proposal is a central aspect of the changes advocated in Philadelphia. \textit{See} supra note 4.
An oversight panel. Courts can appoint an oversight panel to monitor the implementation of remedies and to hear complaints about school authorities' handling of gay student issues.\textsuperscript{121} A knowledgeable and committed panel will ensure effective changes in the schools.

In cases where gay students have suffered severe discrimination, courts also should order reparative remedies. As one court noted about the experience of black children in segregated schools: "If these children have learned to believe that their situation in school or in life is hopeless, [schools] should try to teach them that there are opportunities for them and to believe in themselves as capable of operating effectively in new experiences."\textsuperscript{122} To erase gay students' sense of isolation and inferiority, schools should make available information on sexual orientation, accounts of the lives of lesbians and gay men, and literature on the experience of other gay adolescents. Sufficient relief should also require schools to provide counselors trained in reversing the damage that prejudice inflicts on the social, psychological, and academic development of gay teenagers. These counselors should help gay adolescents cope with prejudice, gain self-confidence in academic pursuits, and form career goals.\textsuperscript{123}

C. The Role of Gay Teachers in Securing Equal Education for Gay Youth

To reinforce the remedies discussed earlier, courts should prohibit school boards from discharging or refusing to hire teachers solely because they are gay. Under current law, school boards can dismiss teachers upon discovery of their sexual orientation or the acknowledgement by teachers that they are gay.\textsuperscript{124} This practice has

\begin{itemize}
\item \textsuperscript{121} In prior institutional litigation, several courts have appointed an individual or panel to monitor the institution's compliance with constitutional standards. See, e.g., Miller v. Carson, 401 F. Supp. 895, 898-99 (M.D. Fla. 1975), \emph{aff'd in part and modified in part}, 563 F.2d 741 (5th Cir. 1977) (decree provided for appointment of an independent government official to hear grievances from inmates); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) (independent committee of concerned citizens established to oversee mental health facilities).
\item \textsuperscript{122} Berry, 515 F. Supp. at 370.
\item \textsuperscript{123} The need for supportive counseling of gay youth is underscored by the fact that all organizations that advocate the equal rights of gay students have as their primary function the operation of hotlines, rap groups, or other forms of emergency emotional support for gay teenagers.
\end{itemize}

James Gaylord, a high school teacher in Tacoma, Washington, had an outstanding record and was a popular and talented teacher. Nonetheless, the Supreme Court of Washington upheld his dismissal for admitting to the high school principal that he was gay. The court's reasoning reveals the extent of institutional and judicial prejudice.
been criticized elsewhere as a violation of the teachers' freedom of speech\textsuperscript{125} and right to due process.\textsuperscript{126} The necessity of enforcing the right to education for gay youth establishes a third, independent basis on which courts should bar discrimination against gay teachers.

The discharge of teachers who are gay directly contributes to the stigmatization of gay students. Gay students are made to feel inferior when they know that gay teachers must lie about their identities or that teachers have been removed from classrooms because of their sexual orientation. In addition, firing gay teachers often keeps valuable support hidden from students. Teachers conceal their identity even from gay students, fearing discovery and retaliation by school authorities. These teachers cannot provide gay role models and much-needed counseling for gay youth. Gay teachers' fear of losing their jobs because they aid gay students is well-founded. One court has held that the mere possibility of creating an atmosphere of support and security for gay youth is sufficient justification for firing gay teachers.\textsuperscript{127} Suits by gay youth should persuade judges that the removal of gay teachers interferes with gay students' right to a safe,
equal public education. 128

Prohibiting the refusal to hire or the dismissal of gay teachers will not involve a program of affirmative action. Many gay people already teach in schools, but they pretend to be heterosexual to keep their jobs. By forbidding a school district that discriminates against gay students to dismiss gay teachers, a court can eliminate one of the significant ways schools stigmatize gay students. In this way, the court can also allow gay students to receive the protection and support that they deserve. On a broader scale, the public presence of gay persons as productive members of a school's teaching, counseling, or administrative staff will increase the school community's awareness of and tolerance for all gay persons. 129

V. The Societal Costs of Homophobia in Public Education

The significant, immediate harm to gay teenagers' education reflects only a portion of the harm caused by hatred of gay persons in the schools. When courts and educators ponder the problems of gay youth, they also should consider the ways in which homophobia hinders the development of heterosexual schoolchildren and obstructs the functions of education for society as a whole. Although

128. It is useful to reevaluate an Oklahoma law, only recently invalidated on First Amendment grounds, in terms of this type of law's impact on gay students. The statute allowed the termination of a teacher who engaged in public homosexual conduct, defining public homosexual conduct as "advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees." OKLA. STAT. tit. 70, § 6-103.15(A)(2) (Supp. 1978). Although the Supreme Court affirmed the Tenth Circuit's holding that the law violated the first amendment, Board of Educ. of Oklahoma City v. National Gay Task Force, 105 S.Ct. 1858 (1985), this type of statute also should receive strict scrutiny because it impinges on the right to education of gay students. Such a law could be used to punish teachers who, outside the classroom, advocate repeal of sodomy statutes and argue for non-discrimination against gay persons. The law could also be used against teachers who urge support and tolerance for students known to be gay or who provide educational information about homosexuality in classes where it is relevant. One should contemplate the impact on female students or children of color of a comparable law allowing the termination of teachers who advocated equal rights for women or civil rights for racial minorities.

129. As one expert states,

The only effect that exposure to homosexual teachers can have on heterosexual children (assuming the teachers' sexual orientations become known) is to create more tolerance and understanding toward homosexuals as people, and to dispel the wide-spread prejudicial myths about them, thus reducing potential homophobia. As for that small percentage of children who for prior developmental reasons are already struggling with homosexual feelings, with all the guilt and self-hatred attendant upon such feelings in our culture, a role-model with whom they can identify in a positive way can only help them to feel better about themselves and thus contribute to their mental health. In both instances, the basic effect is a positive one rather than a negative one.

Marmor, supra note 98, at 20.
equal treatment of gay students will offend some people’s sense of morality, this offense pales against the myriad costs of homophobia in education.

Homophobic prejudice in public schools hurts all students. First, schools’ acceptance of prejudice against gay students bolsters the authority of privileged groups, legitimating prejudice and discrimination against any child who is a member of a racial, ethnic, or religious minority.130 Second, homophobia reinforces rigid sex-role behavior, and thereby restricts each child’s creativity and personal growth. So long as calling a boy “fag” can deter him from displaying sensitivity and calling a girl “dyke” can keep her from showing strength, all students are hurt and inhibited by homophobia. Third, the prejudice of school officials against gay persons keeps children ignorant. The refusal to speak of homosexuality in any but negative terms denies students accurate information about sexuality and fosters misinformation.131

Moreover, homophobia in schools defeats the broader social functions of education. One purpose of education is to provide the economy with an intelligent, productive labor force.132 Where discrimination causes gay students to learn less effectively or to drop out, their ability to contribute to the economy declines. Students

130. The interconnections between homophobia and various societal oppressions have been articulated most forcefully during the 1970’s and ’80’s by political lesbians of color. Audre Lorde has written:

It is not accidental that the Family Protection Act, which is virulently anti-woman and anti-Black, is also anti-gay. As a Black person, I know who my enemies are, and when the Ku Klux Klan goes to court in Detroit to try and force the Board of Education to remove books the Klan believes “hint at homosexuality,” then I know I cannot afford the luxury of fighting one form of oppression only. I cannot afford to believe that freedom from intolerance is the right of only one particular group.

Lorde, There Is No Hierarchy of Oppressions, 14 INTERRACIAL BOOKS FOR CHILDREN BULL. 9, 9 (1983). The Combahee River Collective, a Black feminism organization, writes,

The most general statement of our politics at this present time would be that we are actively committed to struggling against racial, sexual, heterosexuality, and class oppression and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking.


131. Accurate information on sexuality would include, for example, the fact that homosexuality is a common form of affectional/sexual expression. Inaccurate information would include statements that all gay men are effeminate, that all gay men are child molesters, or that all gay persons lead unproductive lives.

132. See Ratner, supra note 57, at 783 n.12 (“State and local governments gradually assumed the task of providing compulsory, tax-supported school systems to meet the demand for an educated workforce.”); see also, Serrano I, 487 P.2d at 1258-59 (“education is essential in maintaining what several commentators have termed ‘free enterprise democracy’ — that is, preserving an individual’s opportunity to compete successfully in the economic marketplace”).
who do not acquire basic skills are more likely to need government assistance, becoming a drain on the economy rather than valuable participants in it.133

Another important function of free, compulsory education is to create harmony and cohesion among the members of an increasingly pluralistic society.134 Public schools are designed, in theory, to teach children of different racial and cultural groups the social skills necessary to "live together in harmony and respect."135 Public schools today, however, teach intolerance of gay persons, contributing to widespread violence against gay men and lesbians.136 The homophobic atmosphere in schools is antithetical to the goal of harmony and tolerance in the adult world. If a more accepting atmosphere comes to prevail in schools, senseless violence will diminish.

Most importantly, schools function as a training ground for the exercise of citizenship.137 This purpose led one court to conclude that schools must foster "those habits of open-mindedness and critical inquiry which alone make for responsible citizens."138 Unfortunately, schools that encourage prejudice against members of minorities, relying on fear and ignorance,139 provide poor lessons in citizenship. As a result of these lessons, many future political decisions may be based on irrational fear rather than on careful analysis.

133. See Ratner, supra note 57, at 784 (on social costs of failure to educate students effectively in basic skills).

134. See Serrano I, 487 P.2d at 1258 ("The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values.").


136. Studies of violence against gay people show that at least 10-23 percent have been punched, hit, kicked, or beaten in anti-gay violence; 25-38 percent have been chased or followed; 31-45 percent have received threats of violence; and an overwhelming majority have been subject to verbal abuse. Aurand, Addessa, & Bush, Violence and Discrimination Against Philadelphia Lesbian and Gay People 31 (Dec. 1985) (available from Philadelphia Lesbian and Gay Task Force) (citing studies by Philadelphia Lesbian and Gay Task Force, National Gay Task Force, Wisconsin Governor's Council on Lesbian and Gay Issues, and Maine Lesbian/Gay Political Alliance). Homophobic teenagers are responsible for much of this violence. See supra note 23.

137. See Brown, 347 U.S. at 403 (education "is the very foundation of good citizenship"); Pauley, 255 S.E.2d at 877 (schools must "[develop] in every child to his or her capacity . . . knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his [or her] own governance").


139. See Rowland v. Mad River Local School Dist., 84 L. Ed. 2d 392, 396 (1985) (Brennan and Marshall, JJ., dissenting from denial of certiorari) ("homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is 'likely to . . . reflect deep-seated prejudice rather than . . . rationality' ") (ellipses in Rowland).
Gay Right to Education

Conversely, if schools discourage students from acting out of fear and misinformation, they teach students an important lesson in the responsible decisionmaking required of citizens.

Homophobia in schools oppresses not only individual gay students, but also contributes to the continued oppression of gay people as a group. Today homophobia in education inhibits gay youth from obtaining the emotional and intellectual tools they need to challenge the widespread discrimination and political disfranchisement that all gay persons face. Yet one of the first American advocates of free public education, Thomas Jefferson, argued that the most important function of education was that of "rendering the people the safe, as they are the ultimate, guardians of their own liberty." Education is "the essential prerequisite" for disadvantaged groups to resist unfair treatment. The schools pervert their role in the democracy when they demean a class of students, rendering the students unwilling or incapable of combating their oppression.

The subordinate position of gay persons in society argues for special treatment of gay youth, not inadequate treatment. Gay students, like members of other disadvantaged groups who face pervasive discrimination, need protection and support from school authorities. In some respects, they require more support than schoolchildren who belong to other minority groups. As one association of progressive educators has pointed out:

Other targets of societal oppression, such as children of color or children with disabilities, can count on support from their family and community. Few gay children have any support or guidance. While gay teachers could offer guidance and serve as reassuring role models for those youngsters, most gay teachers cannot risk "coming out" for fear of losing their jobs. It is the responsibility of non-gay teachers to help

140. See Arons & Lawrence, The Manipulation of Consciousness: A First Amendment Critique of Schooling, 15 HARV. C.R.-C.L. L. REV. 309, 323 (1980) ("effective political participation requires a positive self-identity, a sense of self-worth enabling one to believe that one deserves fair treatment and that one is capable of doing something about unfair treatment").
141. See Hartzell, 679 P.2d at 40-41 ("Education stimulates an interest in the political process and provides the intellectual and practical tools necessary for political action.").
142. Gay persons routinely are denied jobs, housing, custody of their children, and the right to marry solely because they are gay. See generally, Rivera, supra note 1 (compilation of cases involving gay litigants); Rivera, supra note 127 (same).
144. Dupree, 651 S.W.2d at 93; see also Rowland, 84 L. Ed. 2d at 396 (Brennan and Marshall, JJ., dissenting from denial of certiorari) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena.").
gay students — and to help their gay colleagues — by working to counteract heterosexism\textsuperscript{145} in their school.\textsuperscript{146}

Lobbying efforts and state court litigation should persuade school districts to renounce discriminatory and destructive treatment of gay youth. The remedies we propose will cost schools little time and money, but they will require administrators, teachers, and students to set aside their prejudices. The reversal of homophobic attitudes and policies will enable gay students to gain their rightful share of public education. With equal status in the schools, gay students will acquire the skills and the self-respect necessary to achieve equal standing in society.

—Donna I. Dennis
Ruth E. Harlow

\textsuperscript{145} Heterosexism is "a belief in the inherent superiority of one form of loving over all others and thereby its right to dominance." Lorde, supra note 130, at 9.

\textsuperscript{146} Why CIBC is Dealing With Homophobia, supra note 8, at 3.