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# WHY SEGREGATED SCHOOLS FOR GAY STUDENTS MAY PASS A 'SEPARATE BUT EQUAL' ANALYSIS BUT FAIL OTHER ISSUES AND CONCERNS

LOUIS P. NAPPEN\*

*"All of us do not have equal talent, but all of us  
should have an equal opportunity to develop our  
talents."*

—John F. Kennedy<sup>1</sup>

## INTRODUCTION

Until the mid-1950s, most American school systems provided separate facilities for blacks and whites. As a result, however, of *Brown v. Board of Education*,<sup>2</sup> "separate but equal" facilities were declared unconstitutional in the field of public education in that communities were not meeting their obligations to eliminate discrimination.<sup>3</sup> Perhaps then surprisingly, school systems have again started separating students, this time not based on racial profiling but on sexual orientation.

Regardless of classification, the principal issue with which school systems (and judiciaries) struggle, is what is the most effective legal remedy of overcoming bias against (or low academic success rates of) particularly stigmatized groups of students? Educators tend to approach the problem with two correctional rationales. They either segregate the potentially victimized students to allow for less-threatening learning environments or integrate the potentially victimized students and encourage tolerance from the rest of the student population. Educators favoring the former approach argue that it provides safe learning environments and

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1. President John F. Kennedy, Commencement Address at San Diego State College (June 6, 1963).

2. 347 U.S. 483 (1954) (holding that "to separate [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").

3. *Id.* at 492-95.

facilitates educational achievement.<sup>4</sup> Educators favoring the latter argue that all schools should prevent, discourage, and combat harassment so that students can be mainstreamed and accepted as individuals.<sup>5</sup> Proponents of each approach are not cleanly divided by religion, race, sex, sexual orientation, or party affiliation; this often makes for strange bedfellows.<sup>6</sup>

Providing a separate public school for homosexual students may initially appear to be a reversion to the *Plessy v. Ferguson*<sup>7</sup> rationale allowing “separate but equal” facilities and a direct violation of *Brown*. The legal comparison between racial segregation and sexual-orientation segregation is, however, an imperfect analogy. Part I introduces developments regarding separate schools for homosexuals and briefly compares sex-based and race-based educational civil rights. Part II evaluates the law’s treatment of sexuality in education with the law’s treatment of other scrutinized groups, such as educational segregation based on gender, disability, or race. Part II also examines the legal standards afforded to varying education systems, such as private, charter, and magnet schools. Part III examines concerns beyond “separate but equal.” Part IV raises alternatives to separate schools for gay students and concludes the analysis.

## I. BACKGROUND AND CURRENT DEVELOPMENTS

### A. *The New York City Model*

The most well-known high school for lesbian, gay, bisexual, transgender,<sup>8</sup> and questioning<sup>9</sup> (LGBTQ) youth<sup>10</sup> is New York City’s Harvey Milk High School (HMHS).<sup>11</sup> Since its founding in 1985,

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4. See Steve Adcock, *Public Gay High School Opens in New York*, SMALLGOVTIMES.COM, July 28, 2003, <http://www.smallgovtimes.com/story/03jul28/gay.high>.

5. See, e.g., Randy Hedlund, *Segregation by any Other Name: Harvey Milk High School*, 33 J.L. & EDUC. 425, 429 (2004) (arguing that “[s]eparating homosexual students from heterosexual students deprives them of invaluable qualities of schooling [and] fails to prepare [them] for a homogenous society that awaits them after graduation”).

6. See *infra* Part III.I.

7. 163 U.S. 537 (1896).

8. For purposes of this article, transsexuals, transvestites, and cross-dressers are included in this category.

9. For purposes of this article this category includes individuals who are undeclared, uncertain of, or questioning their sexuality.

10. There are currently four LGBTQ schools in the United States. Three public schools are located in Los Angeles, and the privately funded Walt Whitman High is located in Dallas. A Long Island LGBTQ school was proposed but cancelled. Sarah Baxter, *Spread of Gay Schools Sparks Segregation*, SUNDAY TIMES (London), Aug. 3, 2003, at 25.

11. For background on HMHS see Elizabeth Armstrong, *First School for Gay Students*

HMHS has become a *cause célèbre*.<sup>12</sup> Were public high schools for LGBTQ students to be established more broadly, it has been claimed that HMHS would “be a model for the country and possibly the world.”<sup>13</sup> In light of the opposing views and criticisms<sup>14</sup> directed at HMHS, as well as the legal issues associated with any form of segregation, it is worth asking why New York City’s Department of Education (DOE) would promote such a school.

HMHS is housed within the Hetrick-Martin Institute (HMI), the oldest, and largest, non-profit agency created to serve LGBTQ youth.<sup>15</sup> The Institute and its flagship school are located in New York’s Greenwich Village and “just a few blocks away from Stonewall Plaza, the site of the 1969 riots recognised as the birthplace of the modern gay rights movement.”<sup>16</sup> The school itself is named after Harvey Milk, an openly-gay San Francisco supervisor, who was

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*Draws Dollars and Criticism*, THE CHRISTIAN SCI. MON., Aug. 5, 2003; Bruce Lambert, *Gay School? What Gay School? On Long Island, an Abrupt Reversal*, N.Y. TIMES, Apr. 24, 1998, at B1.

12. In February 2003, Senator Hillary Rodham-Clinton visited the school. Three months later, actress Susan Sarandon became “principal for a day.” Hilary Swank attended the 2003 graduation ceremony. Swank is acclaimed for her Academy Award winning performance as a transsexual in the 1999 film *Boys Don’t Cry*. Michael Glitz, *Hilary’s Journey*, THE ADVOC., Mar. 28, 2000, at 34.

13. Carl Campanile, *‘Sour’ Milk HS*, N.Y. POST, Feb. 5, 2004, at 29. See also Dorothy Gilliam, *Gay School of Thought*, N.Y. TIMES, June 24, 1985, at C3 (applauding “NYC’s test case [as] a daring first step”); Justin Hall, *Young Women’s Leadership Charter School*, <http://www.links.net/vita/fam/mom/ywlc.html> (acknowledging that Chicago’s Young Women’s Leadership Charter School was “modeled after New York’s Young Women’s Leadership School in east Harlem — a single-sex math and science focused school for disadvantaged young ladies”). Cf. C. Spencer Beggs, *Experts Question Legality of High School for Gays*, FOXNEWS.COM, Aug. 19, 2003, <http://www.foxnews.com/story/0,2933,95074,00.html>. (Despite expressing reservations on the paucity of research that has been done to justify HMHS, Jonathan Plucker, Director of the Indiana Education Policy Center at Indiana University claimed that “if research shows that the program successfully addresses problems in providing an education to gay, lesbian, bisexual, transgendered, and questioning students, it should be expanded.”). Contra Mathew Staver, Liberty Counsel News Release, *Lawsuit Challenges Nation’s First Homosexual Public School as Unlawful* (Aug. 13, 2003) (“Rather than providing a ‘model’ to the nation, New York City officials have provided a blueprint of what not to do.”) (on file with author) [hereinafter *Liberty Press Release*].

14. See, e.g., David M. Herszenhorn, *Lawsuit Opposes Expansion of School for Gay Students*, N.Y. TIMES, Aug. 16, 2003 (detailing efforts undertaken by State Senator Ruben Diaz, Sr., of the Bronx to block expansion of HMMS, claiming that “the school discriminates against heterosexual students” and “the money should be better used to protect all children”).

15. According to its website, HMI “believes all young people, regardless of sexual orientation or identity, deserve a safe and supportive environment in which to achieve their full potential. HMI creates this environment for lesbian, gay, bisexual, transgender and questioning youth between the ages of [twelve] and [twenty-one] and their families.” The Hetrick-Martin Institute, *Home*, <http://www.hmi.org>.

16. Anna Cock, *High School for Gays to Begin Classes*, THE ADVERTISER, July 30, 2003, at 38.

murdered by a disgruntled former city official in 1978.<sup>17</sup> According to its homepage, HMHS strives “to offer an alternative education program for youth that often find it difficult or impossible to attend their home schools due to continuous threats and experiences of physical violence and verbal harassment.”<sup>18</sup> Since its inception in 1985, HMHS has been a city-accredited program under the auspices of the New York City DOE’s Career Education Center.<sup>19</sup> HMHS follows DOE guidelines for a high school curriculum that includes mandatory State Regent’s exams.<sup>20</sup> Before attending HMHS, a student must be a New York City resident who has matriculated from the eighth grade. Students under eighteen years of age must have the approval of their parent or legal guardian in order to attend.<sup>21</sup>

In 2002, New York City School Chancellor Harold Levy approved funding for a \$3.2 million<sup>22</sup> expansion of the school,<sup>23</sup> whereby HMHS grew from two to eight classrooms and almost doubled its potential enrollment to 170 students.<sup>24</sup> The newly-expanded school began the 2003 academic year “with about 100 students attending classes, about 200 supporters rallying outside and a small band of protesters demonstrating against it.”<sup>25</sup>

17. Kathleen Brady, *New York City; A Place to Be Somebody; At Harvey Milk School, Gays and Lesbians Are the Norm*, TIME MAG., Nov. 13, 1989, at 21. For further background on the extraordinary life of Harvey Milk, see the Academy Award Winning documentary THE TIMES OF HARVEY MILK (New Yorker Films 1984). San Francisco Mayor George Moscone also was killed in the incident. The killer, Dan White, was a retired police officer. White argued that his rampage was caused by junk food and White’s “Twinkie defense” helped gain him a manslaughter conviction. *Id.*

18. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

19. The Hetrick-Martin Institute, *F.A.Q.s*, <http://www.hmi.org>.

20. *Id.*

21. *Id.*

22. Tracy Dell’Angela, *Gay High School Charts New Territory*, CHI. TRIB. Sept. 8, 2003, at 1 (explaining that the \$3.2 million grant came out of a \$43 billion New York City school system budget).

23. *Hetrick-Martin; Fewer Sites, More Space*, N.Y. TIMES, June 20, 1993, at 10-1 (noting that this is HMHS’s second major expansion, and in 1993, proceeds from a \$2.5 million fund-drive doubled the school’s Astor space). Katherine Zoepf, *Protests Mar Opening of Expanded Harvey Milk School*, N.Y. TIMES, Sept. 9, 2003, at B3 (noting that IBM also donated seventy-five laptop computers).

24. Dell’Angela, *supra* note 22 (noting that the Board of Education committed seven teachers and one principal to staff the school).

25. Rose Arce, *Classes Open at Gay High School*, at <http://edition.cnn.com/2003/EDUCATION/09/08/gay.school> (last visited Jan. 13, 2005) (“About 10 protesters, led by stridently anti-gay Kansas minister Fred Phelps, demonstrated across the street . . . and screamed at supporters to repent from their ‘sodomite behavior.’ Phelps is best known for picketing the funerals of gay men, including the service for Matthew Shepard, a gay Wyoming college student beaten to death.”).

*B. Sex-Based and Race-Based Educational Civil Rights — A Brief Comparison*

Government subsidizing of separate schools for LGBTQ students is one of several current developments expanding the rights and visibility of homosexuals. "The status accorded to Harvey Milk capped what some pundits called a 'gay summer.'"<sup>26</sup> Homosexual advances in 2003 to 2004 included the Episcopal Church's election of its first openly-gay Bishop, the Rev. V. Gene Robinson,<sup>27</sup> and the Supreme Court's holding that a Texas statute that made it a crime for two persons of the same sex to engage in intimate sexual conduct violated the Due Process Clause.<sup>28</sup> Conversely, Gallup and *Washington Post* polls indicate "support from the wider public for queer issues in general has dropped to lows not seen in years."<sup>29</sup> American society is clearly divided in its opinion concerning homosexual civil rights and activism,<sup>30</sup> much as it was divided in support of the Civil Rights Movement. "Have gays become the new blacks?" asks outed journalist Elliot Lane.<sup>31</sup> Ostensibly, the current rise of homosexual rights does parallel the twentieth century's Civil Rights Movement. Just as the Civil Rights Movement identified with celebrated boycotts and riots such as the 1965 protest march from Selma to Montgomery and the 1965 Watts riots, the homosexual movement honors Stonewall as a seminal event.<sup>32</sup> In 1967, the landmark case *Loving v. Virginia*<sup>33</sup> struck down statutes barring interracial marriages.<sup>34</sup> Similarly, in 2003 and 2005 respectively, Massachusetts<sup>35</sup> and Canada<sup>36</sup> legalized same-sex marriage. As one

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26. Baxter, *supra* note 10.

27. Megan Tench, *Gay Man Is Elected Bishop in N.H. Rift Likely to Widen in Episcopal Church*, BOSTON GLOBE, June 8, 2003, at B1.

28. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

29. Duncan Osborne, *Diaz Bashes Milk School: Bronx State Senator Files Lawsuit, Charges Discrimination*, GAY CITY NEWS, Aug. 15-21, 2003, available at <http://www.gaycitynews.com/gen233/diazbashes.html>.

30. Jonathan Yardley, *'Special' or Suspect?*, WASH. POST, June 10, 1985, at B2 ("One of the genuine oddities about the United States in the late Twentieth Century is that as it is becoming more 'conservative' economically and politically, it seems to be growing more 'liberal' socially and morally."). See generally Marc R. Poirier, *Hastening the Kulturkampf: Boy Scouts of America v. Dale and the Politics of American Masculinity*, 12 LAW & SEXUALITY 271 (2003).

31. Elliot Lane, *Got MILK? Wish You Didn't?*, at [http://www.outminds.com/outspoken/outspoken\\_column.cfm?cid=431](http://www.outminds.com/outspoken/outspoken_column.cfm?cid=431) (last visited Jan. 13, 2004).

32. Cock, *supra* note 16.

33. 388 U.S. 1 (1967).

34. *Id.* at 12.

35. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 949 (Mass. 2003) ("[A] person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy

pundit remarked, "[D]iscrimination against gay people is the last total wrong that's left in American law."<sup>37</sup>

The rise of homosexual rights differs, however, from the rise of race-based rights in their divergent approaches to education. *Brown* was a response to imbalanced segregation; HMHS is a response to flawed integration. Educational rights for the Civil Rights Movement developed during the 1950s, before government-approved Affirmative Action policies. Civil Rights proponents stressed equality and inclusion in schools, whereas current educational-rights activists today press for exceptional treatment. For fifty years, *Brown* has stood for the notion that segregated, "separate but equal" schools are unconstitutional.<sup>38</sup> At first glance, a "separate but equal" analysis of racially-segregated and sexually-segregated educational programs seems a logical comparison. In fact, most of the articles and editorials examining HMHS's expansion utilize *Brown*'s "separate but equal" term of art. Nonetheless, few, if any, of HMHS's skeptics note the differing legal statuses afforded race and sexuality.<sup>39</sup>

## II. EDUCATIONAL TRENDS AND LEGAL PRECEDENTS

### A. General Education Standards

In a 1973 case assessing whether a Texas school finance system that relied in part on property taxes was constitutional, the Supreme Court stated, "Education, of course, is not among the rights afforded explicit protection under our federal Constitution. Nor do we find any basis for saying it is implicitly so protected."<sup>40</sup> Nonetheless, thirty years later, in a case assessing the University of Michigan Law School's use of racial preferences in student admissions,<sup>41</sup> the Court, while not going so far as to declare education a fundamental right, described it as "pivotal to sustaining our political and cultural heritage."<sup>42</sup> Writing for the majority, Justice O'Connor also noted:

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and equality under law.").

36. See *Equal Marriage for Same-Sex Couples*, <http://www.samesexmarriage.ca/legal/qui210705.htm> (last updated July 21, 2005) ("[M]arriage equality for same-sex couples [in Canada] became the law of the land on July 19." On that date "the Canadian Senate passed Bill C-38 into law by a margin of 47-21.").

37. Scott Jaschik, *Law's New Course: Gay Rights*, N.Y. TIMES, Jan. 18, 2004, at 36.

38. *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954). See also George DeWan, *Fighter for Integration: How Marshall Made History*, NEWSDAY, Feb. 2, 1993, at 18 ("The *Brown* decision was the spark that set off the civil rights revolution in this country.").

39. See *infra* III.G.

40. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

41. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

42. *Id.* at 331.

This Court has long recognized that education . . . is the very foundation of good citizenship. For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. . . . Ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.<sup>43</sup>

Although the federal Constitution does not necessarily provide a right to education, every state has a public school education provision in its state constitution.<sup>44</sup> At the time of HMHS's founding, the chancellor of New York City schools declared in support of the school, "We have a responsibility to all youngsters to the age of 21 to provide them with an education."<sup>45</sup> Arcadia University professor of education law, Steven Goldberg, further agrees that a state's obligation to provide a public education allows it to implement group-specific educational programs.<sup>46</sup> Education law, however, treats gender issues, handicapped issues, religious issues, racial issues, and sexual orientation issues under varying standards. One may ask whether sexual orientation is treated fairly in comparison.

### *B. Gender-Based Schools*

With regard to equal protection, it is important not to confuse *sex* with *gender*.<sup>47</sup> In 1976, the Supreme Court's decision in *Craig v. Boren*<sup>48</sup> set the constitutional standard for gender-related equal protection: "[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>49</sup> Under this mid-tier standard, the Court ruled in 1982 that men could not be prevented from attending

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43. *Id.* at 331-32.

44. KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW*, Appendix C, 978-82 (5th ed. 2001).

45. Larry Rohter, *Quinones Cites Duty of the City to Teach Homosexual Pupils*, N.Y. TIMES, June 7, 1985, at A1.

46. Beggs, *supra* note 13.

47. "'Sex' refers to the anatomical and physiological distinctions between men and women; 'gender' is used to refer to the cultural overlay on those anatomical and physiological distinctions." Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

48. 429 U.S. 190 (1976) (declaring a state statute that set different age standards for the sale of beer to males and females as not substantially related to the achievement of a legitimate government objective).

49. *Id.* at 197.

an otherwise all-female nursing school.<sup>50</sup> By 1996, in a case examining Virginia Military Institute's (V.M.I.) single-sex admittance policies,<sup>51</sup> the Court had declared that "All gender-based classifications today warrant heightened scrutiny."<sup>52</sup> In 2003, only 91 of 93,000 public schools offered a form of same-gender education,<sup>53</sup> and a scant 24 same-gender public schools existed in the United States.<sup>54</sup>

In general, three types of single-gender public school offerings exist: public schools that have separate boys and girls schools located within the same facility; public schools that are entirely female; and, public schools that offer selected grade levels that are entirely single-sex.<sup>55</sup> Such schools are allowed to continue, as *Brown* has not been directly applied to sex segregation. Indeed, rather "[i]ronically, some cases have allowed the separation of the sexes as part of racial desegregation plans."<sup>56</sup> Yet, for more than three decades, the federal DOE has sought to eliminate race and gender based discrimination in schools.<sup>57</sup> On the question of discrimination based upon sexual orientation, it has remained silent. One commentator notes:

The high court's [sic] broad application of the 14th Amendment's equal-protection clause now compels lower courts to automatically look with suspicion on policies that provide differential treatment based on race or gender. But not so with sexual orientation, because the judiciary refused to connect the dots. . . . Gays thus occupy a unique position: No other minority group is the subject of as much public and political attention on so many fronts while remaining the target of as much blatant, government-sponsored discrimination . . . . The Court's recent decisions on gays carry the rhetoric but not the mandate of true equality. Despite the importance of the [*Romer v. Evans* and *Lawrence v. Texas*] holdings, both decisions shrank from

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50. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982).

51. *United States v. Virginia*, 518 U.S. 515 (1996).

52. *Id.* at 555.

53. Diana Jean Schemo, *Administration Proposes Same-Sex-School Option*, N.Y. TIMES, Mar. 4, 2004, at A16.

54. *Id.*

55. See, e.g., Brighter Choice Charter Schools, *Single-Sex Public Schools in the U.S.*, Apr. 29, 2002, <http://www.brighterchoice.org> (The Brighter Choice Charter School for Girls and the Brighter Choice Charter School for Boys are located in Albany, New York. The Brighter Choice Charter Schools were the first public elementary charter schools in the nation to educate boys and girls in separate classrooms.)

56. Comment, *Plessy Revived: The Separate but Equal Doctrine and Sex-Segregated Education*, 12 HARV. C.R.-C.L. L. REV. 585, 590 (1974).

57. Ronald Schachter, *The Single-Sex Solution*, <http://www.districtadministration.com/page.cfm?p=350> (last visited Apr. 12, 2004).

declaring a broader constitutional standard of review for anti-gay discrimination.<sup>58</sup>

Starting in 2004, however, the DOE began to change its Title IX enforcement policies to make them easier for districts to create single-sex classes and schools at the elementary and secondary levels.<sup>59</sup> The federal government has yet to respond as definitively regarding segregated schools for homosexual students, but similar arguments concerning the value of separating students can be made.<sup>60</sup>

Advocates of single-gendered schools argue that such schools show better student attendance, achievement, and fewer discipline problems.<sup>61</sup> Opponents argue that there is no clear evidence of improvement and that "single-sex learning doesn't get students ready for an integrated world."<sup>62</sup> Along these lines, a 2001 California report concluded that single-sex education inadvertently reinforces gender stereotypes.<sup>63</sup> A 1998 report from the American Association of University Women found no overall benefit to same-sex classrooms or schools.<sup>64</sup> Nonetheless, "some research since [the study] has suggested that girls learn differently than boys, and that some students learn better when separated from the opposite sex."<sup>65</sup> Whether single-gendered schools or classrooms are beneficial, overall, to students remains an open debate.<sup>66</sup>

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58. Steve Sanders, *Parallel Bars*, AMERICAN PROSPECT ONLINE, <http://www.prospect.org/print-friendly/webfeatures/2003/09/sanders-s-09-08.html>.

59. Tom Carroll, the founder and chairman of Brighter Choice Charter School for Boys and Brighter Choice Charter School for Girls in Albany explained regarding Title IX, "Before the department was trying to stamp out single-sex instruction, and now they've thrown the door wide open for schools and districts to offer it." Schemo, *supra* note 53; *see also* Kim Paula Kirkley, *Symposium: Don't Forget the Safety Net That All Gay-Schools Provided in Considering the Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 127, 137 (1998) ("As society attempts to provide an equal education to all children, such alternatives must be considered and supported, especially where they seem to provide the only viable avenue to the public education that is every young person's right.").

60. *See* Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000).

61. *See generally* KAREN STABINER, ALL GIRLS: SINGLE-SEX EDUCATION AND WHY IT MATTERS (2002).

62. *See* Hall, *supra* note 13.

63. Schachter, *supra* note 57.

64. AM. ASSOC. OF UNIV. WOMEN, SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS (1998).

65. Schemo, *supra* note 53.

66. *See, e.g.*, Schachter, *supra* note 57 (quoting Harvard Education School Professor Emeritus Charles Willie as saying that his studies "have shown that the highest achieving students tend to be in schools most diversified in terms of race, gender and socioeconomic status").

An argument could be made that "gay males are so different from lesbians that each should be segregated into classes that have a teacher intimately familiar with what each orientation experiences."<sup>67</sup> Such schools would undoubtedly be declared unconstitutional. By analogy, single-gender schools may not cater to a single race. In the early 1990s, the Detroit school system moved to convert three elementary schools to all-black-male academies.<sup>68</sup> A federal court declared the Academies unconstitutional.<sup>69</sup> Although the Academies complied with the court's ruling, few girls enrolled.<sup>70</sup> As far as is known, no reverse discrimination claim has been raised by any heterosexual student denied acceptance into the overwhelmingly gay-bodied HMHS.<sup>71</sup> In 1985, New York City Schools Chancellor Nathan Quinones "acknowledged that 'it is more beneficial' to keep problem students in neighborhood schools rather than segregating them in special schools . . . [yet] such an approach had been tried and 'clearly did not work' for students at Harvey Milk School."<sup>72</sup>

### C. Mainstreaming the Disabled

The modern buzzword for "desegregation" is "mainstreaming."<sup>73</sup> Through such a process, disabled students are placed into general populace classrooms. This process encourages diverse student bodies and, proponents would argue, serves to promote parity and a diverse student body, long held to be a compelling state interest.<sup>74</sup> HMHS too, recognizes the importance of a diverse student body, and the New York City DOE promotes the school's mission in part as "to foster the . . . ability to succeed in a diverse community."<sup>75</sup> At first

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67. Lowell Ponte, *Re-Segregating the Classroom*, FRONTPAGEMAGAZINE.COM, July 30, 2003, at <http://wwwfrontpagemag.com/Articles/Printable.asp?ID=9158>; see also Michelle Malkin, *Liberal Segregationists in the Schools*, WORLDNETDAILY, July 30, 2003, [http://wnd.com/news/article.asp?ARTICLE\\_ID=33828](http://wnd.com/news/article.asp?ARTICLE_ID=33828).

68. See *Garret v. Bd. of Educ.*, 775 F.Supp. 1004, 1014 (E.D. Mich. 1991) (viewing the purpose for which the Academies came into being as important, despite acknowledging the status of urban males as an "endangered species," concluding that the purpose of the Academies is "insufficient to override the rights of females to equal opportunities"); see also Joseph Berger, *Some Fault School Plan as Political*, N.Y. TIMES, Jan. 11, 1991, at B1; DeWan, *supra* note 38.

69. *Garrett*, 77 F. Supp. at 101.

70. DeWan, *supra* note 38.

71. Brady, *supra* note 17; Dell'Angela, *supra* note 22.

72. Rohter, *supra* note 45, at A1.

73. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining mainstreaming as "integrat[ing] (a student with special needs) into regular school classes").

74. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1977).

75. The full mission statement reads, "The school seeks to provide a rigorous academic

glance, such a mission seems counter-intuitive,<sup>76</sup> as providing separate schools for certain classifications of students appears directly to contradict mainstreaming. Even HIV-positive students are mainstreamed when possible.<sup>77</sup> Although most homosexuals likely would resist being considered disabled, some segments of society continue to view homosexuality as a handicap. For example, a webpage run by Matthias Media, a publisher of evangelical books and resources claims that "given that they are sexually handicapped, homosexual people must try to do the best that they can within their limitations."<sup>78</sup>

The Individuals with Disabilities Education Act (IDEA)<sup>79</sup> requires states to provide disabled children with a "free appropriate public education."<sup>80</sup> Although research continues to suggest that there are key differences between the brains of homosexuals and heterosexuals,<sup>81</sup> per IDEA, homosexuals may opt for separate schools so long as the students are not classified as "disabled."<sup>82</sup>

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program with all the necessary support systems to foster the development of an individual's character, self-respect and ability to succeed in a diverse community." N.Y. City Dep't of Educ., *Harvey Milk High School*, <http://www.nycenet.edu/ourschools/region9/m586/default.htm>.

76. For the view that HHMS *does* prepare its students for a less tolerant world outside its doors, see Dell'Angela, *supra* note 22 (quoting Arthur Larsen, HHMS's 2003 valedictorian as saying that "[a]s much as people think this is some kind of gay utopia, the reality is the best thing about Harvey Milk is it prepares you for the real world. . . . This school made me better equipped on how to deal with bigotry . . . in a society that may not tolerate you"); see also The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking about HHMS*, <http://www.hmi.org> ("Being in a separate space during the school day doesn't mean that these students will never learn how to adjust to the demands of the larger world. Every day they face real-life pressures, including harassment."); *Contra* James Kirchick, *The Folly of Harvey Milk*, THE ADVOC., Sept. 16, 2003, at 10 ("We need to prepare gay kids to live and work in this world, not provide them a sheltered existence."); J.P. Mangalindan, *Harvey Milk High: Separate but Equal*, Sept. 24, 2003, <http://www.fclobserver.com/observer/9-24-03/commentary-milk.html> ("What happens when they leave the confines of their academic shelter, graduate, and are forced to face the sometimes harsh realities of a largely heterosexual society?").

77. *Martinez v. Sch. Bd. of Hillsborough County*, 861 F.2d 1502, 1505 (11th Cir. 1988) ("[R]emoval of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. This is referred to as the 'least restrictive environment' requirement.").

78. Andrew Shead, *Heather Has Two Mommies*, MATTHIASMEDIA: RESOURCES FOR GROWING CHRISTIANS, [http://www.matthiasmedia.com.au/briefing/archives/hs\\_heathermommies.html](http://www.matthiasmedia.com.au/briefing/archives/hs_heathermommies.html).

79. 20 U.S.C. § 1400 (2000).

80. *Id.* at (c)(3).

81. See *infra* note 149 and accompanying text.

82. Although highly unlikely, if gay students were to be labeled 'handicapped' or 'disabled,' a mainstreaming approach would likely be enforced. Homosexual students would also then qualify for additional funding and services afforded the disabled (counseling and transportation for example).

Nonetheless, it does not look as though such schools are likely to take root outside of New York City anytime soon. When asked about the likelihood of gay public schools in San Francisco, U.S. Schools Spokesman Felix Duag doubted that his city would follow New York's example, explaining, "We try to mainstream students so that they have the experience of meeting boys and girls from all walks of life, because that is what they're going to do when they graduate."<sup>83</sup>

In summary, in *Brown*, Chief Justice Warren noted, "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."<sup>84</sup> Consequently, under a mainstreaming rationale, LGBTQ schools likely would be considered unlawful.

#### *D. Charter and Magnet Schools*

In line with the twentieth century's mainstreaming movement, magnet schools<sup>85</sup> began in the 1960s as a means "to aid in desegregation."<sup>86</sup> Magnet, as well as charter schools,<sup>87</sup> usually focus on advanced skills or knowledge not otherwise encompassed in a general college-preparatory curriculum.<sup>88</sup> Principal Salzman anticipated that HMHS would "be academically challenging" and would "specialize in computer technology, arts and culinary arts."<sup>89</sup> HMHS's "curriculum follows standard courses of study but pupils also learn positive homosexual role models."<sup>90</sup> Still, HMHS's main

83. TIME, *Gay High; Furor over a New York School*, June 17, 1985, at 36.

84. *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954).

85. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1157 (2d ed. 1987) (defining a magnet school as "a public school with special programs and instruction that are not available elsewhere in a school district and that are specially designed to draw students from throughout a district, esp. to aid in desegregation").

86. *Id.*; see also *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995) ("Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis, without requiring extensive busing and redrawing of district boundary lines.").

87. Magnet schools are usually cooperatives of several public school systems which attract students from several general schools to build full student bodies interested in vocational, technical, culinary, cosmetology, or other specialized training. Charter schools are separate corporations from the public school system and are established via an enabling act. See, e.g., CHARTER SCHOOL PROGRAM ACT, N.J. STAT. § 18A:36A-1 - 36A-18 (2004).

88. Actual charters delineate what such schools plan to accomplish. On the other hand, magnet schools are usually cooperatives of several public school systems. Interview with New Jersey State Senator Robert Martin (March 10, 2004).

89. CBS Worldwide Inc., *City's First Public Gay High School to Open*, July 28, 2003, [http://cbsnewyork.com/topstories/topstoriesny\\_story209120607.html](http://cbsnewyork.com/topstories/topstoriesny_story209120607.html) (last visited Jan. 13, 2004).

90. For example, in literature and history courses, classes discuss the alleged homosexuality of prominent figures such as the poet Walt Whitman and Däg Hammarskjöld, the Nobel Prize winning Secretary General of the United Nations from 1953-1961. Students

focus seems to be to rescue potential or actual homosexual drop-outs. According to Ashkinazy, before entering HMHS, some of the students "hadn't set foot in school for two years because they hated it."<sup>91</sup> Such students had apparently already given up on New York's traditional public schools. New York Conservative Party Chairman Mike Long counters, "Is there a different way to teach homosexuals? Is there gay math?"<sup>92</sup> Such comments, however, sidestep that what is at issue is the learning environment, not the curriculum.

### *E. Private Schools*

Throughout the country, students attend secular private schools if they can afford to do so. Some private schools provide better educations than government schools, yet they are not challenged by the courts as "separate and unequal" because they are not publicly funded.<sup>93</sup> As one commentator has noted, "Single-sex and gay-only schools should be privately funded, not funded by taxpayers, and like all other private schools (be they religious or single-sex or gay-only schools . . .) vouchers ought to be awarded to parents that choose to have their children educated in those establishments."<sup>94</sup>

Although countless private schools exist that promote particular religions, many would not present an appealing alternative to an openly gay student because homosexuality is frowned upon by many

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also explore specific gay issues, such as the breakdown in communication with their parents. Theodora Lurie, MACLEAN'S, *A New School for Gays*, Mar. 17, 1986, at 5. As Steve Ashkinazy, director of clinical programs for HMI explained, "[t]he curriculum does not contain 'gay studies' material, but seeks to integrate material likely to be of interest to homosexual students into the subject matter." Larry Rohter, *New York Offering Public School Geared to Homosexual Students*, N.Y. TIMES, June 6, 1985, at A1. "Organizers of the school had said . . . that they were integrating material of special interest to homosexuals into regular course work. In literature classes there would be discussion of Shakespeare as a homosexual, and in history and geography the contributions gay people have made will be brought up." *Id.* "When informed of those remarks, Mr. Quinones [Schools Chancellor] said, 'That is not in agreement with what I think a school should be doing, and it would not be supported by me.'" Rohter, *supra* note 45, at A1.

91. Dennis A. Williams with Susan Agrest, *A Scandal for Homosexuals*, NEWSWEEK, June 17, 1985, at 93; *see also* TIME, *supra* note 83, at 36 (Chancellor Quinones stated, "[T]hese are dropouts. They are not just homosexuals. If it weren't for this program, they would be cruising on the West Side of Manhattan.").

92. The Talent Show, *Gay Math*, <http://www.thetalentshow.org/archives/00314.html> (last visited Sept. 15, 2005); *see also* Beggs, *supra* note 13 (quoting Foxnews columnist Joanne Jacobs as saying "[l]earning is the same, gay or straight").

93. Megan Hellerer, *LGBT Safe Haven Called a Dumping Ground: The New Harvey Milk School Meets Sudden Resistance*, GAY CITY NEWS, Aug. 1-7, 2003, available at <http://www.gaycitynews.com/gcn231/lgbtsafehaven.html> (quoting New York Senator Ruben Diaz that "[p]ublic funding should not be used to segregate kids").

94. Raymond Green, *NOW contradicts NOW*, July 29, 2003, <http://www.supportnospin.com/NOW.htm> (last visited Jan. 13, 2004).

religions.<sup>95</sup> Under the same legal principles that allow for the existence of LGBTQ schools, private institutions may expel people based upon sexual orientation with limited legal repercussions.<sup>96</sup> With regard to private discrimination, "[t]he Civil Rights Act of 1964 prohibited discrimination based on race, color and national origin, but did not cover sexual orientation, age or disability."<sup>97</sup>

In some respects, *Plessy v. Ferguson* was an improvement upon the Court's 1883 decision in *The Civil Rights Cases*,<sup>98</sup> which overruled the original Civil Rights Act and declared that the federal Constitution did not stop private discrimination.<sup>99</sup> Although *Plessy* accepted "separate," at least in theory, it demanded "equal." It would take fifty-eight years for the Court to recognize Justice Harlan's powerful dissent in which he expounded, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."<sup>100</sup> The "separate but equal" issue at hand generally would dissolve if separate schools for gay students remained, as they once were, solely private institutions.<sup>101</sup>

#### *F. Police Powers: Serving a Legitimate State Interest*

Separate schools for LGBTQ students may be created if they can be shown to serve a "legitimate state purpose or interest."<sup>102</sup>

95. See, e.g., *Bible-Toting Clerics Quarrel on Gay School*, CHI. TRIB., June 13, 1985, at 36C.

96. See, e.g., *B.S.A. v. Dale*, 530 U.S. 640, 648 (2000) (holding that to require the Boy Scouts to admit a homosexual Eagle Scout violated their First Amendment right of expressive association). Nonetheless, the Commerce Clause and Civil Rights Act of 1964 prevent such private discriminations based upon race. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzbach v. McClung*, 379 U.S. 294 (1964). See generally Scott A. Johnson, *The Conflict Between Religious Exercise and Efforts to Eradicate Housing Discrimination Against Non-traditional Couples: Should Free Exercise Protect Landlord Bias?*, 53 WASH. & LEE L. REV. 351 (1996) (examining the refusal by landlords to rent on the basis of both marital status and sexual orientation).

97. Beyond the public-or-private funding issue, the Constitution's Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, opens the potential for court cases against private institutional activity. The Commerce Clause applies to hospitals and educational institutions because the equipment they use comes through interstate commerce. Consequently, court decisions ruling on discrimination or harassment issues may also be based on statutory interpretations, and not simply on Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, equal protection guarantees.

98. 109 U.S. 3 (1883) (holding that private acts of racial discrimination were simply private wrongs that the national government was powerless to correct).

99. *Id.* at 17.

100. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

101. See, e.g., Beggs, *supra* note 13 (quoting Krista Kafer, the Heritage Foundation senior education analyst who explained in reference to HMHS, "I would have no issue with it if it were a private school").

102. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

Several New York City alternative schools provide safe communities for what HMI defines as “students who [are] not able to benefit from more traditional school environments.”<sup>103</sup> In 1985, New York City Mayor at the time of HMHS’s founding, Edward Koch, explained, “It is far better to have those students in a class than wandering the streets of the city of New York and doing things that are antisocial, violative of the law or hurting themselves in some other way.”<sup>104</sup> New York City has offered schools for at-risk pregnant girls, recovering drug addicts, language-challenged students, juvenile delinquents, and “assorted troubled children who are unwilling, or unable, to attend general public schools.”<sup>105</sup> A *New York Times* article summarized:

One of the best things about New York City public high schools is their enormous variety, giving children a chance to find a niche. There are elite schools for future Ivy Leaguers and vocational schools for the skilled trades. There are five international schools servicing 2,300 students who must be immigrants to attend. And five sites around the city for pregnant girls only — 600 attended last year. For children too severely handicapped to be in mainstream classes, New York City has 56 schools exclusively for the disabled.<sup>106</sup>

For a police power<sup>107</sup> regulation to be valid, it must be substantially related to the advancement of the public health, safety, morals, or general welfare.<sup>108</sup> Police powers allow municipalities to experiment with approaches and to test creative ordinances without involving entire states. Under powers granted to the states under the Tenth Amendment,<sup>109</sup> about one-fifth of the states specifically protect students from sexual harassment in public schools.<sup>110</sup> Some

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103. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking about HMHS*, <http://www.hmi.org>.

104. Yardley, *supra* note 30.

105. TIME, *supra* note 83, at 36.

106. Michael Winerip, *A Safe Haven Finds Itself Under Siege*, N.Y. TIMES, Aug. 27, 2003, at B9 (noting that of all these alternative schools, “the only one catching heat is little Harvey Milk”).

107. Police power is defined as “[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.” BLACK’S LAW DICTIONARY, 1178 (7th ed. 1999).

108. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

109. The Tenth Amendment reads in full, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. amend. X.

110. JEFF PERROTTI & KIM WESTHEIMER, *WHEN THE DRAMA CLUB IS NOT ENOUGH: LESSONS FROM THE SAFE SCHOOLS PROGRAM FOR GAY AND LESBIAN STUDENTS* 35-37 (2001). *See also* TRANSGENDER LAW & POLICY INSTITUTE, *NON-DISCRIMINATION LAWS THAT INCLUDE GENDER*

municipalities and school systems also promote anti-sexual-orientation harassment policies.<sup>111</sup> New York Chancellor Regulation A-830 requires an equal education opportunity and prohibits discrimination based on "sexual orientation."<sup>112</sup> Under safety and health rationales, LGBTQ students deserve for new approaches to be taken toward their educations.<sup>113</sup> Statistically, the numbers certainly support such new approaches. Approximately 28% of gay teens drop out of school annually, which represents three times the national average.<sup>114</sup> Even more disturbing, LGBTQ youth are three times more likely to attempt suicide than other youth.<sup>115</sup>

Considering such statistics, a strong argument can be made that schools that protect LGBTQ students further legitimate state interests.<sup>116</sup> The Court of Appeals for the Seventh Circuit ruled that schools in states with raised equal protection standards for sexual orientation have a duty to protect harassed homosexual students.<sup>117</sup>

IDENTITY AND EXPRESSION, <http://www.transgenderlaw.org> (providing state-by-state analyses).

111. PERROTTI & WESTHEIMER, *supra* note 110, at 37.

112. See, e.g., N.Y. City Dep't of Educ., Chancellor's Reg. A-830, available at <http://www.nycenet.edu/offices/OEO/Files/ComplaintsSummaryReg.aspx>. Sexual orientation is not protected under the New York State Constitution, however, New York's Sexual Orientation Non-Discrimination Act (SONDA) prohibits discrimination based on sexual orientation in employment, credit, housing, and public accommodation, but does not cover education. N.Y. EXEC. LAW § 291 (Consol. 2005).

113. For a fuller discussion of the pressures LGBTQ students face, see BECOMING VISIBLE: A READER IN GAY AND LESBIAN HISTORY FOR HIGH SCHOOL AND COLLEGE STUDENTS (Kevin Jennings ed. 1994); NAN STEIN, CLASSROOMS AND COURTROOMS: FACING SEXUAL HARASSMENT IN K-12 SCHOOLS (1999); TELLING TALES OUT OF SCHOOL: GAYS, LESBIANS, AND BISEXUALS REVISIT THEIR SCHOOL DAYS (Kevin Jennings ed. 1998); HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS, VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS (2001) available at <http://hrw.org/reports/2001/uslgbt/toc.htm>.

114. HMI also reports that 41.7% of LGBTQ youth do not feel safe in their school and 69% of LGBTQ youth reported experiencing some form of harassment or violence. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

115. See Joyce Murdoch, *Gay Youths' Despair; High Rate of Suicide Attempts Tracked*, WASH. POST, Oct. 24, 1988, at A1 (noting that "30 to 40 percent of gay teen-age boys attempt suicide"); Marc Peyser & Donatella Lorch, *High School Controversial*, NEWSWEEK, Mar. 20, 2000, at 54 (noting that a 1997 study of Massachusetts high-school students found that 46% percent of homosexual or bi-sexual kids had attempted suicide in the last year); Dell'Angela, *supra* note 22 ("At [HMHS], students are asked not whether they've ever attempted suicide, but how many times.").

116. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). See generally *Avon W. Corp. v. Woolley*, 42 N.Y.S.2d 690, 695 (N.Y. App. Div. 1943). The court held:

To sustain legislation under the police power the operation of law must . . . tend to prevent offense or evil, or to preserve public health, morals, safety or welfare and it should appear that the interests of the public generally are served and that the means used are reasonably necessary . . . and not unduly oppressive upon individuals.

117. *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996) (holding that defendant school

Nonetheless, the fact that HMHS can claim a safety factor does not necessarily legalize or legitimize the public funding of a separate school. One of the original rationales for having separate facilities for blacks and whites was to avoid conflicts and tensions. Such a safety philosophy was endorsed by the Court in *Plessy*<sup>118</sup> and later overturned by *Brown*.

Opponents of LGBTQ schools proffer that schools such as HMHS promote immoral behavior and corrupt their communities' morality.<sup>119</sup> Similar morality concerns were raised in *Boy Scouts of America v. Dale*,<sup>120</sup> a case in which the Boy Scouts of America argued that engaging in homosexual conduct is contrary to being "morally straight" and "clean," and as a private organization, it had a constitutional right to bar homosexuals from serving as troop leaders.<sup>121</sup>

Ultimately, the school systems acting under the police powers must decide "whether it is appropriate for students who feel threatened to be able to separate themselves from the mainstream at taxpayer expense or whether voluntary segregation is ultimately stigmatizing and hurtful in the long run."<sup>122</sup> It remains to be seen

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administrators violated homosexual plaintiff's Fourteenth Amendment right to equal protection by failing to protect him, although they had a policy of investigating and punishing battery and sexual harassment); *see also* The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>:

It is not segregation to remove a child from a dangerous situation in order to give them a chance to learn safely. HMHS is a successful refuge for a small portion of youth, who have fled unsafe schools in order to secure their right to a safe educational environment; no one is arguing for a totally separate school system.

118. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896):

If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

119. Yardley, *supra* note 30 (arguing that New York taxpayers are contributing \$50,000 a year "to a school that teaches a homosexually oriented interpretation of history, literature, geography and, presumably, everything else," and HMHS "is clearly engaged in homosexual advocacy at public expense"); Robert Knight, *Promoting Homosexuality at the Expense of School Children*, July 30, 2003, <http://www.cwfa.org/printerfriendly.asp?id=4366&department=cfi&categoryid=cfreport> (last visited Jan. 13, 2004) ("In a sense, homosexual activists are taking students aside and 'branding' them as their own.").

120. 530 U.S. 640 (2000).

121. *Id.*

122. Joyce Purnick, *School Issues Pose Problem of Perspective*, N.Y. TIMES, Aug. 4, 2003, at B1.

whether separate schools for homosexuals truly are in the students' best long-term interests and welfare.<sup>123</sup>

### *G. Scrutiny Levels: Race Versus Sexuality*

"All equal protection cases pose the same basic question: Is the government's classification justified by a sufficient purpose?"<sup>124</sup> Legislation often involves drawing distinctions that either advantage or disadvantage one group of persons over another.<sup>125</sup> If these laws are challenged based upon equal protection, the issue is whether the government can identify a sufficiently important objective for its discrimination.<sup>126</sup>

As one of the preeminent Constitutional scholars has noted, "Of all the infinite array of distinctions drawn by American government in the past 230 years, none has been more important than race discrimination."<sup>127</sup> Today, racial classifications are only allowed if the government can demonstrate that the discrimination is necessary in achieving a compelling government interest.<sup>128</sup> Thus, all racial classifications must meet strict scrutiny.<sup>129</sup> As Justice O'Connor explained in a 2003 case analyzing whether the University of Michigan Law School's use of racial preferences in student admissions violated the Equal Protection Clause or the 1964 Civil Rights Act, "[G]overnment may treat people differently because of their race only for the most compelling reasons."<sup>130</sup>

Understanding Supreme Court classifications of protected persons is critical to any credible analysis of the topic of separate-but-equal school systems. Law professor Steven Goldberg has explained:

To single black students out — even for their own benefit — is clearly unconstitutional. [Nonetheless,] separating gay students can be legally justified in the same way that special-education classes, gifted classes, and before-school prayer groups are justified. Ironically, because [gays] don't have equal protection

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123. Beyond adjustment issues, diplomas will forever associate graduates with such an institution and affect other people's perceptions.

124. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 643 (2002).

125. *Id.*

126. *Id.*

127. *Id.* at 666.

128. *Id.* at 668; *Wygant v. Bd. of Educ.*, 476 U.S. 267, 273 (holding that a collective bargaining agreement provision for race-based layoffs violated the Equal Protection Clause).

129. The strict scrutiny test requires a narrowly tailored means to achieve a compelling state interest. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

130. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

under the Constitution, there's nothing wrong [with] segregating them legally, particularly if they're doing it voluntarily.<sup>131</sup>

"The Supreme Court has not yet ruled as to whether discrimination based on sexual orientation warrants the application of intermediate or strict scrutiny."<sup>132</sup> Despite compelling arguments that homosexuals should be a protected class,<sup>133</sup> "all of the United States Courts of Appeals to rule on the issue have found that only rational basis review should be used for discrimination based on sexual orientation."<sup>134</sup> Although the Court has rendered decisions affecting the rights of homosexuals in *Bowers v. Hardwick*,<sup>135</sup> *Romer v. Evans*,<sup>136</sup> and most recently *Lawrence v. Texas*,<sup>137</sup> in none of these cases has the Court gone so far as to rule that discrimination based on sexual orientation warrants intermediate or strict scrutiny.<sup>138</sup>

The concept of raising the federal scrutiny level afforded to sexual orientation has long been examined and debated.<sup>139</sup> Nonetheless, the Court has expressed great "reluctance" to expand the number of classifications afforded heightened scrutiny.<sup>140</sup> In 1973, the Court noted, "The highly suspect character of classifications

131. Beggs, *supra* note 13.

132. CHEMERINSKY, *supra* note 124, at 759.

133. See *infra* note 147 and accompanying text.

134. CHEMERINSKY, *supra* note 124, at 759-60. When one court reviewed the military's Don't Ask, Don't Tell Policy, it held, "[B]ecause homosexuals do not constitute a suspect class and the policy does not infringe on the exercise of a fundamental right, analysis of the regulations at issue under strict scrutiny is not appropriate." *Thomasson v. Perry*, 895 F.Supp. 820 (E.D. Va. 1995). "The only exception, thus far, is a 1989 decision by the United States Court of Appeals for the Ninth Circuit that strict scrutiny should be used for discrimination based on sexual orientation." *Watkins v. United States Army*, 847 F.2d 1329, 1347 (9th Cir. 1989) (arguing that regulations discriminating on the basis of sexual orientation were subject to strict scrutiny because homosexuals constituted a suspect class).

135. 478 U.S. 186, 191 (1986) (holding that the Constitution did not protect a right to engage in homosexual behavior).

136. 517 U.S. 620, 635-36 (1996) (striking down a Colorado constitutional amendment that implicitly supported discrimination against homosexuals because it served no legitimate state interest and was, therefore, unconstitutional). As Erwin Chemerinsky has explained:

*Romer* is significant because it is the first time the Court has invalidated discrimination based on sexual orientation. Although the Court used just rational basis review, the decision indicates at least some judicial willingness to protect gays, lesbians, and bisexuals from discrimination. *Romer* establishes that animus against gays and lesbians, even when presented as a purported "moral" basis for a law, is not sufficient to meet the rational basis test.

CHEMERINSKY, *supra* note 124, at 75.

137. 539 U.S. 558, 578 (2003) (applying a rational basis standard and concluding that Texas's anti-sodomy law served no legitimate state interest).

138. CHEMERINSKY, *supra* note 124, at 758.

139. See, e.g., Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEXUALITY 195 (1994).

140. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold."<sup>141</sup> The Court has cited several relevant indicia of a suspect class: whether the class has been subjected to a history of discrimination or unequal treatment;<sup>142</sup> whether the class has been relegated to a position of political powerlessness;<sup>143</sup> whether the class has been recognized as "discrete and insular minorities;"<sup>144</sup> and whether the class has a trait or condition which is immutable.<sup>145</sup> The indicia of "discrete and insular minorities" and immutability deserve further review.

In 1938, in the famous *Carolene Products* "footnote four," the Court indicated that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and which may call for a correspondingly more searching judicial inquiry."<sup>146</sup> Although the Court has never ruled that homosexuals fit this description, in 1985, a dissent by Justice Brennan noted:

[H]omosexuals constitute a significant and insular minority of this country's population. . . . State action taken against members of such groups based simply on their status as members of the group traditionally has been subjected to strict, or at least heightened, scrutiny by this Court. . . . Discrimination based on sexual preference has been found by many courts to infringe various fundamental constitutional rights, such as the rights to privacy or freedom of expression.<sup>147</sup>

All American children must be provided with a public education. Perhaps the "discrete and insular minority" rationale, afforded to schoolchildren of illegal aliens,<sup>148</sup> should evolve to protect homosexual citizens.

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141. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (internal footnotes omitted).

142. *Id.* at 28.

143. *Id.*

144. *Id.* at 105.

145. *Cleburne*, 473 U.S. at 472 (1985).

146. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153, n.4 (1938).

147. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014-15 (1985) (Brennan, J., dissenting) (internal footnotes omitted).

148. *Plyer v. Doe*, 457 U.S. 202, 230 (1982) ("If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.") (footnotes omitted).

Recent research has suggested that there may be a genetic predisposition for male homosexuality.<sup>149</sup> If such a finding were definitively substantiated, the conclusion that homosexuality is an immutable trait would follow. Nonetheless, at this time it remains undecided to what extent homosexuality is truly immutable.

In *Romer v. Evans*, Justice Kennedy stated, "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."<sup>150</sup> As discussed, school systems can arguably proffer such a "legitimate government interest" for establishing LGBTQ schools.<sup>151</sup>

Ironically, the same rational basis review which prevents many lawsuits against homophobic sexual discrimination from succeeding may protect school systems that wish to segregate based on sexual orientation. Indeed, were discrimination based on sexual orientation to warrant the application of strict scrutiny, LGBTQ schools would likely be considered unconstitutional. Liberty Counsel<sup>152</sup> Attorney Rena Lindevaldsen has argued that providing a better educational opportunity for 100 HMHS students based on their sexual orientation violates the equal protection provision demanded by New York City's Chancellor Regulation A-830.<sup>153</sup> "We're not primarily arguing about the constitutionality, but that the city is violating its own regulation. We're just saying, 'Enforce it!'"<sup>154</sup>

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149. Most of the research has concerned the hypothalamus, a region in the central base of the brain that governs sexual behavior. See, e.g., CHANDLER BURR, A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION (1997); DEAN HEILMAN HAMER, SCIENCE OF DESIRE: THE GAY GENE AND THE BIOLOGY OF BEHAVIOR (1994); SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY (1997); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 937 (1989); Neil Swidey, *What Makes People Gay*, BOSTON GLOBE MAG., at 33 (noting that research reveals that the hypothalamus for heterosexual men is on average more than twice the size as in homosexual men); Nicholas Wade, *For Gay Men, Different Scent of Attraction*, N.Y. TIMES, May 10, 2005, at A1 ("[R]esearchers have shown that homosexual and heterosexual men respond differently to two odors that may be involved in sexual arousal.").

150. *Romer v. Evans*, 517 U.S. 620, 632, (1996).

151. See, e.g., Malkin, *supra* note 67 (quoting New York City Mayor Michael Bloomberg [e]verybody feels that [HMHS] is a good idea because some of the kids who are gays or lesbians have been constantly harassed and beaten in our schools and this lets them get an education without having to worry").

152. According to their mission statement, "Liberty Counsel is a nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family." See <http://www.lc.org/aboutus.html>.

153. E-mail from Rena Lindevaldsen, Liberty Counsel Attorney in Trenton, NJ, to Louis Nappen (Apr. 15, 2003) (on file with author).

154. *Id.*

### H. Voluntariness

One of the greatest differences between HMHS and the segregated schools of the pre-integrated United States is that admission to HMHS is voluntary.<sup>155</sup> In *Romer v. Evans* the Supreme Court held "that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate government interest."<sup>156</sup> This danger would arise if LGBTQ students were being forced to go to a separate school under a guise of helping them. The proposed easing of Title IX same-sex schools also promotes that single-gender enrollment must remain voluntary.<sup>157</sup>

Although no state actor is explicitly forcing gay students to attend separate schools, it could be argued that bullies, teachers, and administrators are implicitly forcing gay students out of their schools. Indeed, applicants to HMHS are given acceptance preferences based on their past experiences in schools. Essentially, the more traumatic the past experiences, the better the chance of getting into HMHS.<sup>158</sup> Other students are not the only source of harassment, however. Sometimes the adults responsible for protecting homosexual children neglect their duties. *Nabozny v. Podlesny*<sup>159</sup> is one such example. In the seventh grade, Nabozny confided to Principal Podlesny that he was gay, and he detailed the physical harassment he was subjected to at the school.<sup>160</sup> Principal Podlesny was responsible for school discipline and the school had a policy indicating that it would investigate and punish battery and sexual harassment.<sup>161</sup> Principal Podlesny promised to protect Nabozny but did nothing.<sup>162</sup> Indeed, after a "mock rape" of Nabozny by a group of boys, Principal Podlesny told Nabozny that "boys will be boys" and if he was "going to be so openly gay," he should "expect

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155. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

156. *Romer v. Evans*, 517 U.S. 620, 634.

157. See Schemo, *supra* note 53.

158. Arce, *supra* note 25 ("Teens are admitted regardless of sexual orientation, but must show that they are at risk of dropping out because of harassment."). As the Hetrick-Martin Institute explains on its website, "These are children that have been in traditional schools, but have needed to leave or have dropped out because of physical violence and/or emotional harm." The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

159. 92 F.3d 446 (7th Cir. 1996) (finding defendant school administrators violated plaintiff student's Fourteenth Amendment right to equal protection by discriminating against him based on his gender or sexual orientation).

160. *Id.* at 451.

161. *Id.* at 449.

162. *Id.* at 451.

such behavior from his fellow students.”<sup>163</sup> Some public schools seem to promote the bullies’ rights to bully rather than the homosexuals’ rights to learn in an environment free from emotional and physical abuse.

### *I. Strange Bedfellows*

“[HMHS] has been hammered by conservatives and liberals alike,”<sup>164</sup> and the debate has made for some strange bedfellows and inconsistent policies. As one commentator questioned, “Because I’m gay, does this mean I should back a school which simultaneously promises protection for persecuted minorities, but encourages discrimination based solely on sexual orientation?”<sup>165</sup> The National Organization for Women (NOW) argues against same-gender schools yet supports separate schools for homosexual students.<sup>166</sup>

One of the primary arguments made against separate schools for LGBTQ students is that they are based on preferential treatment.<sup>167</sup> Two of the most vocal opponents of HMHS, New York Conservative Party Chairman Mike Long and New York State Senator (Democrat) Ruben Diaz have held that the idea expends limited resources on the few rather than the many.<sup>168</sup> In 2003, Diaz

163. *Id.*

164. Dell’Angela, *supra* note 22.

165. Mangalindan, *supra* note 76.

166. Schachter, *supra* note 57 (explaining that NOW’s position is “[s]eparating girls and boys in primary and secondary educational programs . . . threatens to exacerbate, rather than ameliorate, inequities between boys and girls.” In 1991, NOW, along with the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP) successfully opposed the attempt to establish three all-male academies in Detroit. The ACLU and NOW also have a longstanding complaint pending with the DOE against The Young Women’s Leadership School (YWLS), which opened in East Harlem, N.Y., in 1996. *Id.* Perhaps HMHS’s voluntary enrollment and alleged acceptance of heterosexual students rationalizes NOW’s position.

167. Karey Quarton, *First Public Gay High School Should Be Made Private*, CORRESPONDENCES.ORG, Nov. 23, 2003, <http://www.correspondences.org/archives/000460.html> (“[HMHS] should become a private or charter school because public education was not designed to give a preference to the specific needs of a certain group.”) If not in terms of sexual orientation, HMHS is ethnically diverse. In 2003, approximately seventy-five percent of HMHS students were African American or Latino. *Straight Facts About Harvey Milk*, N.Y. DAILY NEWS, Aug. 25, 2003, at 32.

168. Jay Nordinger, *The South Africanization of American Life, Part 8*, 235, 958. *Gay High. Our Friends, the Germans — and More*, NATIONAL REVIEW ONLINE, July 29, 2003, <http://www.nationalreview.com/impromptus/impromptus072903.asp> (quoting Mike Long as asking, “[w]hat about fat kids? What about clumsy kids? What about kids with acne? What about handicapped kids? Do we farm them all out, ghettoize them, to protect them from the bumps and bruises of community living?”); see also *Suit Planned to Prevent Opening of NYC Gay School*, <http://www.proudparenting.com/page.cfm?typeofsite=snippetdetail&ID=720&snippetset=yes> (quoting Diaz as asking, “[i]f [homosexuals] say they are normal people, then

filed a lawsuit,<sup>169</sup> with an anonymous Bronx Latino mother and her four children as plaintiffs against the city, challenging HMHS as illegal and demanding that taxpayer money awarded to HMHS be returned to the state.<sup>170</sup> Before the case was dismissed, New York DOE Spokesman Paul Rose commented, "It is a frivolous lawsuit attacking a program that has helped children for many years."<sup>171</sup>

The most striking "strange bedfellow" this issue has confronted is Harvey Milk's nephew, Andy Milk, who claims that his uncle would have opposed the creation of separate schools for LGBTQ students.<sup>172</sup> Upon hearing of the \$3.2 million public expansion of HMHS, Andy Milk countered:

If you want to honor the man — fine. But make it equal for everyone. Segregation is not what he stood for. He was for equal rights for everyone. Harvey stood for, "We're out of the closet and we want to exist among everyone else." A separate school is putting things back to where you started . . . .<sup>173</sup>

One may think that some social conservatives would push for segregating gay students to prevent them from influencing heterosexual students. Nevertheless, as long as separate schools for homosexuals continue to divert limited funds from the general coffers and arguably promote homosexuality, the issue will make for strange bedfellows.

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why do they need a private school?"). Although twelve HMHS students come from Diaz's district, Diaz claims the school "is segregation. They are showing preference and they are leaving my children, my Spanish children, my black children behind." Osborne, *supra* note 29.

169. See *Liberty Press Release*, *supra* note 13 (noting that New York law allows taxpayers to challenge public expenditures).

170. Hedlund, *supra* note 5; Herszenhorn, *supra* note 14; Osborne, *supra* note 29; Paul Schindler, *The Ruben Principle: Diaz Continues His Comeback in Bronx Democratic Politics*, GAY CITY NEWS, Aug. 30-Sept. 5, 2003, available at <http://www.gaycitynews.com/GCN14/ruben.html>. The Florida-based Liberty Counsel joined Diaz in the suit.

171. Osborne, *supra* note 29.

172. Richard Thompson Ford, *Symposium: Brown at Fifty: Brown's Ghost*, 117 HARV. L. REV. 1305, 1327 (2004):

It is ironic that New York's segregated gay high school is named after Harvey Milk. . . . Milk insisted on public visibility for homosexuals in the mainstream of . . . politics, and his legacy has been the steady integration of homosexuals into mainstream public life in that most cosmopolitan of American cities. Harvey Milk's tragic death demonstrates the need to resist homophobia wherever it appears; his life as a public official suggests that engagement and achievement in integrated institutions provides the surest means to do so.

173. Beth Shapiro, *Harvey Milk Would Have Rejected Gay School Nephew Says*, 365GAY.COM NEWSCENTER, Aug. 11, 2003 at <http://www.365gay.com/NewsContent/081103/milkSchool.htm>.

### III. OTHER ISSUES AND CONCERNS

#### A. An Infinite Number of Subclassifications

Although some conservatives believe that public money should not support gay schools because homosexuality is a sin, others “argue that separate schools encourage ‘social fragmentation.’”<sup>174</sup> Indeed, a plethora of *non-suspect* human classifications of students are easily as identifiable and subject to harassment as sexuality. For instance, should the government support separate schools for students with bad acne? red hair?<sup>175</sup> weight problems?<sup>176</sup> height issues? students who wear glasses?<sup>177</sup> braces? students with funny or uncommon names? with famous or infamous relations? who are rich or poor? who speak with accents? stutterers? fashion outcasts? nerds? punks? nosepickers? supporters of unpopular sports teams?<sup>178</sup> All of the preceding types of students, reviewed under the same rational basis standard applied to sexual orientation, experience difficult learning environments, but in most schools they receive less protection than students with sexual orientation issues. Essentially, we are working towards classrooms with one teacher and one student because everyone is deserving of special attention.<sup>179</sup> Homosexuals are more similar to heterosexuals than different.<sup>180</sup> Elliot Lane stresses, “If we as gays want the rest of the world to see us as equals, to see us as regular humans just like everyone else, than the last thing that will help us is a school just for gay people.”<sup>181</sup>

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174. Gilliam, *supra* note 13.

175. Hair color could suggest heritage, which could, arguably, invoke a higher scrutiny for discrimination.

176. Orly Shoham, *Harvey Milk High School: Voluntary Segregation*, THE COLLEGIAN, Sept. 9, 2003, available at <http://www.utulsa.edu/collegian/article.asp?article=1796>.

177. *Id.*

178. American Civil Liberties Union, *In Football Controversy, ACLU of MN Sues School District on Behalf of 10-Year-Old*, <http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=8217&c=87> (filing a lawsuit against the new Prague School District for excluding a boy from participating in school activities because of his allegiance to the Green Bay Packers football team).

179. Quarton, *supra* note 167 (“It doesn’t seem feasible that every group with a special need can demand their own facility to be fully funded by the public system.”).

180. Baxter, *supra* note 10 (quoting one HMHS student as saying, “Just because we’re gay or lesbian doesn’t mean we learn side-by-side in constant harmony. We have cliques, rivalries, popular kids, unpopular kids, fights. We’re gay. So what?”). *But see* Mike Sarzo, *New School. Old Segregation Problems*, The Politix Group, <http://www.politixgroup.com/comm173.htm> (“[A] high school separate from the rest of the system creates an artificial caste system which doesn’t serve anyone well, gay or straight.”).

181. Lane, *supra* note 31.

As *Brown* signifies, at some point communities must meet the challenge of a problem instead of encouraging separation and avoidance.<sup>182</sup>

### *B. Sexuality at the Forefront of Discussion*

"[S]houldn't the life of young people be as little sexualized as possible?" asks a *National Review* article.<sup>183</sup> HMHS officials claim that their curriculum is "no different than that of any other high school."<sup>184</sup> Yet, they also note that their curriculum stresses positive homosexual role models and that students explore specific gay issues.<sup>185</sup> Not surprisingly, a school established as a safe haven for homosexuals emphasizes sex and sexuality. Many taxpayers, however, disapprove of publicly-funded sex education.<sup>186</sup>

### *C. Outed For Life*

A question on every college application, a typical job interview query, and information forever listed on a curriculum vitae is "What high school did you graduate from?" HMHS supposedly "does not discriminate against or exclude heterosexual students from attending."<sup>187</sup> Yet, as one journalist points out, "While any student can theoretically attend HMHS, it's unlikely that a straight student would choose to do so. As of now, not one straight student attends the high school."<sup>188</sup> Attending HMHS does not necessarily mean that one is gay; yet, assuming someone knows anything about Harvey Milk (the man or the school), the perception would be that a student who attends or graduated from Harvey Milk High School would be gay. HMHS's "application process mandates a series of personal one-on-one interviews; this is presumably where one's sexuality is exposed. As a result of the limited number of spaces available, being

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182. Ford, *supra* note 172, at 1331-32 ("New York's Harvey Milk School gives up on the idea that integrated schools can overcome bigotry. . . .").

183. Nordinger, *supra* note 168.

184. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

185. Lurie, *supra* note 90.

186. See generally *Bowen v. Kendrick*, 487 U.S. 589 (1988) (examining whether the Adolescent Family Life Act (AFLA), which provided federal funding for organizational services and research in the area of premarital teenage sexuality, was constitutional). The case was brought on behalf of several federal taxpayers, clergymen, and the American Jewish Congress. *Id.*

187. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

188. Quarton, *supra* note 167.

straight would probably come as a huge check in the negative column [regarding acceptance to the school]."<sup>189</sup> Arguably, one's sexual orientation is a private issue; yet attending a LGBTQ school makes it a public issue.<sup>190</sup> In other words, the separate-school solution is not a viable option for gay students who do not want to be publicly "out" or for harassed straight students who do not want others to infer that they are gay.<sup>191</sup> This issue of when we truly understand our sexualities remains debatable,<sup>192</sup> however, attending a separate school for LGBTQ students likely reinforces the public's perception of one's sexuality.

The same perceptions likely would be reinforced against former HMHS faculty members, who may find their career opportunities limited because of the assumption associated with their prior employment.<sup>193</sup> Public schools are allowed to fire homosexuals if their sexual orientation compromises their teaching responsibilities. For example, in 1983, the Court of Appeals for the Sixth Circuit allowed a school system to suspend an untenured high school guidance counselor because of her bisexuality.<sup>194</sup> Given the low scrutiny level afforded sexual orientation, LGBTQ schools also may discriminate against heterosexuals seeking employment.<sup>195</sup>

#### *D. Exclusive or Limited Acceptance Capabilities*

In *United States v. Virginia*,<sup>196</sup> the Supreme Court warned that school acceptance policies "must not rely on overbroad generalizations about the different talents, capacities, or preferences of

189. Robert Chirwa, *Got Milk?*, THE PRIMARY SOURCE: THE J. OF CONSERVATIVE THOUGHT AT TUFTS UNIV., Sept. 21, 2003, available at <http://www.tuftsprimarysource.org/issues/22/02/chirwa.html>.

190. This factor, for example, could affect one's acceptance into the armed forces.

191. Susan J. Becker, *The Immorality of Publicly Outing Private People*, 73 OR. L. REV. 159 (1994); TIME, *supra* note 83, at 36 ("More troubling is the early age at which the Harvey Milk students have, in effect, been publicly identified as homosexual.").

192. TIME, *supra* note 83, at 36 ("Are twelve-year-olds certain of their sexual orientation?") (quoting Dr. Willard Gaylin, chief of New York's Hastings Center, who claims that "[a]dolescents are in a period of confusion about sexuality. The whole idea that an adolescent knows [whether he or she is homosexual] is ludicrous").

193. For a review of obstacles homosexual educators face see ONE TEACHER IN TEN: GAY AND LESBIAN EDUCATORS TELL THEIR STORIES (Kevin Jennings ed. 1994).

194. Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied* 470 U.S. 1009 (1985); see also Michelle Eisenmenger, *Sexual Orientation Discrimination: Teachers as Positive Role Models for Tolerance*, 31 J.L. & EDUC. 235 (2002).

195. Cf. NEW YORK SMALL BUSINESS RESOURCE CENTER, *Employer Guidelines, Business Owner's Manual, Anti-Discrimination Laws*, [http://www.nypl.org/research/sibl/smallbiz/business/employer/employer\\_anti.html](http://www.nypl.org/research/sibl/smallbiz/business/employer/employer_anti.html) (New York City protects employees based on sexual orientation; New York State does not).

196. 518 U.S. 515 (1996).

males and females.”<sup>197</sup> Districts with LGBTQ schools may be over-generalizing the different talents, capacities, or preferences of homosexuals and heterosexuals. For instance, HMHS’s concentration on art programs<sup>198</sup> could be considered a stereotypical assumption about what homosexuals want to study.

Assuming that it is a good idea to separate students based on sexual orientation, facilities are insufficient to educate all homosexuals who likely would wish to attend separate LGBTQ schools. “HMHS services only a small portion of the youth population. The vast majority of [homosexual] youth in the New York City public school system attend their zoned schools.”<sup>199</sup> What happens to harassed LGBTQ students not within commuting distance of a separate school for them? Students rejected from LGBTQ schools, such as HMHS, do not receive the protections afforded other similarly situated students. Yet, school officials have a duty to protect students. This duty most likely demands rectification upon official notice of an incident of harassment. Arguably, when students apply to, or are interviewed by LGBTQ school admission officers, the school system has been put on notice of violent and/or discriminatory situations. To what degree school systems are liable for not addressing the violence or harassment towards students who are denied admittance to a LGBTQ school and are later subjected to continued or heightened harassment or injury remains an open question.<sup>200</sup>

### *E. Negative Attention*

Upon learning that New York City was funding a separate school for homosexuals, senior education analyst at The Heritage Foundation, Krista Kafer, said, “I thought it was a joke when I first read it.”<sup>201</sup> It is possible that separate schools for LGBTQ students actually hurt homosexuals’ causes in the minds of the general public.<sup>202</sup>

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197. *Id.* at 533.

198. CBS Worldwide Inc., *supra* note 89.

199. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>; see also Jessica Kowal, *Is Separation the Best Answer?*, *NEWSDAY*, Apr. 24, 1998, at A35 (noting that HMHS “enrolls 80 students annually but has a waiting list of 200”).

200. See generally *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, (1999) (holding that a school board can be held responsible under Title IX of the Education Amendments of 1972, which was meant to secure equal access of students to educational benefits and opportunities, for student-on-student harassment).

201. Beggs, *supra* note 13.

202. See, e.g., Campanile, *supra* note 13 (“The opening [of HMHS] was followed by months

LGBTQ schools may also attract sexual predators. After an incident in which HMHS teenagers, dressed as prostitutes, robbed a man, a police spokesman noted, "The areas [near the school] are frequented by men seeking encounters with transgendered young people."<sup>203</sup>

#### *F. The Bullies Win*

Are we stigmatizing victims instead of disciplining offenders?<sup>204</sup> NOW reported that separating girls from boys "treats girls as the problem by removing them from the presence of their male peers."<sup>205</sup> The same could be said of separate schools for homosexuals. George Washington University Law School Professor Jonathon Turley comments:

For those of us who have supported gay rights, the announcement of the new high school is baffling. The city's . . . solution is not to correct those failings but to remove the students, as if they are the source of the problem.<sup>206</sup> The establishment of gay high school rings of a civil rights breakthrough when it is the scourge of equal rights.<sup>207</sup>

Separate schools for LGBTQ students are, in part, being created to ease tensions and conflicts; however, segregated schools for LGBTQ students can become focal-points for homophobic violence.<sup>208</sup> For instance, HMHS has been "dubbed 'Homo High' by its detractors"<sup>209</sup> and a "lightning rod" since its expansion.<sup>210</sup> "[J]ournalists have flocked around the outside of the school, some taking pictures, and many of the students have felt so harassed that they have been forced to cover their heads as they entered the school, as if in

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of bad publicity.").

203. Tina Kelley, *Teenagers Accused of Posing as Police in a Robbery Spree*, N.Y. TIMES, Nov. 7, 2003, at B7.

204. Kirchick, *supra* note 76 ("Instead of rooting out the gay bashers and disciplining them, the city is rooting out the gay kids, as if their very existence were the problem.").

205. Green, *supra* note 94.

206. Herszenhorn, *supra* note 14 (quoting Senator Diaz, an ardent opponent of HMHS, as acknowledging that "[t]he ones that we have to segregate really are the bullies. Those are the ones with the problems. The homosexual kids, they are not the ones with the problems").

207. Armstrong, *supra* note 11.

208. As a point of comparison, the Civil Rights Movement experienced backlash in the form of infamous burnings of black churches.

209. Anna Cock, *Milking School Outing for All It's Worth*, THE ADVERTISER, Aug. 11, 2003, at 38.

210. Zoepf, *supra* note 23.

shame.”<sup>211</sup> “We don’t need to create ‘safe’ high schools for queer kids, we need to do the equivalent of sending in the National Guard to ensure their safety.”<sup>212</sup> One explanation as to why school systems may prefer to provide a separate school for homosexuals is that they do not want to confront the actual violence in their schools or its negative publicity. In a sense, schools that discipline bullies admit that violence and harassment occur in their schools.<sup>213</sup> Disciplining or expelling disruptive or violent students is operatively and legally challenging,<sup>214</sup> yet may be the best solution.<sup>215</sup>

### *G. When Does the Segregation End?*

Separate schools for homosexuals are a form of Affirmative Action. Such publicly-funded schools differ from typical Affirmative Action programs in one key aspect: “Affirmative Action remains salutary because it helps channel minorities out of spatial segregation and into the civic mainstream. The gay parallel universe, by contrast, channels gays who are already in the spatial mainstream into legal and civic segregation.”<sup>216</sup> At some point, affirmative favoritism becomes reverse discrimination.<sup>217</sup> In 2003, a closely divided Supreme Court upheld the University of Michigan Law School’s use of racial preferences in student admissions.<sup>218</sup> Nonetheless, Justice O’Connor also recognized that Affirmative Action

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211. Gilliam, *supra* note 13. As a point of comparison, the first black students defiantly entered desegregated Southern schools.

212. Quarton, *supra* note 167. The No Child Left Behind Act, 20 U.S.C. § 6301 (2001), is designed to hold states and schools accountable for the academic achievement of all students. The Act could, perhaps, be the impetus to ensure the safety of all students regardless of sexual orientation. Arguably, the \$3.2 million grant to expand HMHS should have been spent for school protection programs throughout the city, thereby helping all New York City students.

213. Sanders, *supra* note 58 (“Alternative gay classrooms and schools, though well-intentioned, signal the failure of public schools to maintain safe, tolerant educational environments for all students.”); *see also* Knight, *supra* note 119 (“By plucking ‘homosexual’ kids out of public schools, the system is acknowledging a colossal failure to protect all its students.”).

214. Consider the repercussions Principal Joe Clark faced while attempting school reform. *See LEAN ON ME* (Warner Bros. 1989).

215. For administering a model anti-harassment policy *see* PERROTTI & WESTHEIMER, *supra* note 110, at 193-201.

216. Sanders, *supra* note 58.

217. Yardley, *supra* note 30 (“What is to prevent the city from funding special schools — or skating rinks, or swimming pools, or subway cars — for any other group that it feels its members have been singled out for unfair treatment?”).

218. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that the Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body).

policies are at odds with the Fourteenth Amendment and “must be limited in time.”<sup>219</sup> Schools must, therefore, undertake periodic reviews of their admissions policies to ensure that they are still required and as “narrowly tailored” as possible.<sup>220</sup> Affirmative Action programs must end someday. Separate schools for LGBTQ students should not be seen as permanent panaceas or, necessarily, the best or only solution.

#### IV. ALTERNATIVES AND CONCLUSION

##### A. *Unified and Equal*

Why are homosexuals settling for separate-but-equal treatment? The architect of Boston’s school desegregation program of the 1990s, Charles Willie, cautioned, “The reason why the Civil Rights Movement in education started was that all those black students who had been set apart were not doing that well. The only way we can teach our student to catch up is to have them run the race with other students.”<sup>221</sup>

The key to HMHS’s success<sup>222</sup> has been its exceptionally low student to teacher ratio, individualized attention, and newly renovated facilities, while “a vast majority of schools in New York City are overcrowded and violently dangerous.”<sup>223</sup> Every student, however, deserves small classes, individual attention, modern facilities, and a safe learning environment. Attorney Rena Lindevaldsen argues that

219. *Id.* at 341-42.

220. *Id.* at 330.

221. Schachter, *supra* note 57; *see also* Kirchick, *supra* note 76 (“We need to prepare gay kids to live and work in this world, not provide them a sheltered existence.”); Mangalindan, *supra* note 76 (“How are people to learn that homosexuals are normal, every day men and women, when they’re separated from the rest of the populace based on the very characteristic they want to be accepted for?”).

222. HMHS officials boast that their graduation rate is 95%, well above the New York City public school average, and over 60% of its students go on to attend advanced programs or college. The Hetrick-Martin Institute, *F.A.Q.s: What People Are Asking About HMHS*, <http://www.hmi.org>.

223. Hedlund, *supra* note 5; *see also* THE ECONOMIST, *The Odd Schoolhouse*, June 15, 1985, at 43 (noting that in 1985, the year HMHS was founded, “38% of NYC’s high-school youngsters [were] dropouts, and many of those who graduate[d] lack[ed] the basic skills necessary for modern life”); *see also* Liberty Press Release, *supra* note 13:

55% of NYC students fail to meet grade expectancy in reading and writing, while 65% of the students fail to meet grade expectancy in math. The students attend schools lacking necessary computers, books, classrooms and sets. In spite of the cut backs and dismal learning conditions offered for our NYC children, the DOE saw fit to spend nearly \$4 million dollars to renovate, expand and operate a school for 100 lesbian, gay, bisexual, transgender and questioning youth. That constitutes a waste of taxpayer funds.

HMHS gives one small group of students a better education at the expense of poor kids across the city.<sup>224</sup> Where state or local governments provide equal protection based on sexuality, school systems have a duty to address homosexual harassment as they would harassment of any other protected class. This statement neither means that homosexuals deserve separate schools nor that separate schools are constitutional.

### *B. Teach Tolerance, Ethics, Self-Defense, and Conflict-Resolution Skills*

Several critics of separate schools for LGBTQ students have argued that such schools hamper the teaching of tolerance.<sup>225</sup> Elliott Lane for example, a homosexual opposed to HMHS, has argued that it is the relationships that heterosexuals and homosexuals form that best teaches tolerance and equality.<sup>226</sup> Similarly, James Kirchick, also a gay man opposed to HMHS, argues that HMHS and "schools like it forbid the adolescent interaction that breeds understanding."<sup>227</sup> Finally, when Long Island officials considered funding their own separate school for LGBTQ students, officials argued that "the very idea of sending gay students to a separate school, even in the case of harsh harassment, would undermine educators' efforts to teach tolerance to other students."<sup>228</sup>

In addition to teaching tolerance, school districts need to proactively defend harassed students. As one commentator explained, "What today's gay New York students need are no-nonsense teachers and principals actually willing to make clear to students that if they shove their gay classmates into lockers, they should themselves expect to be shoved out of the school system

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224. Osborne, *supra* note 29.

225. The focus of this paper is not how to eliminate violence in schools. Numerous books and studies have examined the issue and offer detailed solutions. See, e.g., NANCY DAY, *VIOLENCE IN SCHOOLS: LEARNING IN FEAR* (1996); SUE ELLEN FRIED & PAULA FRIED, *BULLIES & VICTIMS: HELPING YOUR CHILD THROUGH THE SCHOOLYARD BATTLEFIELD* (1996); Amy Lovell, "Other Students Always Used to Say, 'Look at the Dykes'": *Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617 (1998).

226. Lane, *supra* note 31.

227. Kirchick, *supra* note 76.

228. Kowal, *supra* note 199, at A35. While districts fight homophobia, they must be careful not to squelch students' First Amendment rights and the general public's parental rights. Enforced teaching of tolerance can become extreme, to the point of squelching free speech, as the headline below exemplifies. *Judge to Christian Mom: No 'Homophobic' Teaching: In Custody Case Orders Child's Religious Upbringing Must Not Expose Her to Idea Homosexuality Wrong*, WORLDNETDAILY, Oct. 31, 2003, [http://www.worldnetdaily.com/news/printerfriendly.asp?ARTICLE\\_ID=35365](http://www.worldnetdaily.com/news/printerfriendly.asp?ARTICLE_ID=35365).

altogether.”<sup>229</sup> School systems need to discipline, suspend, and expel abusive and violent students.<sup>230</sup> School systems should additionally offer self-defense and conflict-resolution classes,<sup>231</sup> perhaps through the auspices of physical education, health, and social studies departments.

Some critics who believe that “creating entire schools just for gay students smacks a bit too much of segregation,”<sup>232</sup> nevertheless support gay-straight alliances.<sup>233</sup> LGBTQ Student Unions and Gay-Straight Alliances (GSAs) are basically school-sponsored clubs that encourage students to meet, discuss, and perhaps resolve issues facing their communities. “Gay-Straight Alliances have been a major factor in helping teenagers create openly gay lives. First established in 1988, GSAs were designed as both support groups for gay students and — with the help of the sympathetic straight students — a bulwark against homophobia.”<sup>234</sup>

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229. Kirchick, *supra* note 76.

230. In the interest of tolerance, troublemakers should, of course, be rehabilitated, in part through ethics and conflict resolution classes.

231. Organizations such as Pink Pistols, which promotes the motto “Armed Gays Don’t Get Bashed,” specifically promotes defense strategies for homosexuals. See Jonathan Rauch, *Pink Pistols*, SALON.COM, Mar. 13, 2000, <http://www.salon.com/news/feature/2000/03/14/pistol>.

232. Sarzo, *supra* note 180.

233. See, e.g., Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 85, 90 (1994) (recommending Speakers Panels, Equity Training, and Peer Training); Mangalindan, *supra* note 76 (“If need be, teach school faculty to enforce strict anti-‘gay-bashing’ policy, strongly encourage students to participate in gay-straight alliance clubs and offer more activities and programs which teach teenagers the meaning of tolerance and acceptance.”); Peyser & Lorch, *supra* note 115, at 54 (“Most of the 700 Gay-Straight Alliances . . . that exist nationwide were formed in reaction to the 1998 murder of Matthew Shepard.”). For information on Matthew Shepard and the galvanizing impact his death had on the gay community, see Mark Cook, *The Laramie Project*, THE GUARDIAN (LONDON), Mar. 15, 2003 (“Matthew Shepard, a 21-year-old gay student . . . was found lashed to a fence . . . pistol-whipped, beaten and barely alive, he died five days later.”).

234. Students attempting to establish GSAs in general public schools, however, often face resistance from fellow students, administrators, and the general public. See, e.g., Peyser & Lorch, *supra* note 115, at 54 (explaining that in Baton Rouge, Louisiana, after failing to convince a principal to approve such a program, a GSA-advocate placed, over the period of one month, twenty-five unreturned phone calls to the system’s superintendent. The superintendent eventually answered with a one-word response, “inappropriate”); see also Susan Broberg, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act*, 1999 BYU EDUC. & L.J. 87 (1999); Matthew Hilton, *Options for Local School Districts Reviewing Local Governance and Moral Issues Raised by the Equal Access Act: The Gay-Straight Student Alliance in Utah*, 1996 BYU EDUC. & L.J. 1 (1996); Ralph D. Mawdsley, *The Equal Access Act and Public Schools: What Are the Legal Issues Related to Recognizing Gay Student Groups?*, 2001 BYU EDUC. & L.J. 1 (2001); HUMAN RIGHTS WATCH, *supra* note 113, § IX (“Many of the youth we interviewed had to overcome opposition from school administrators, the local school board, and the community before they could start gay-straight alliances at their schools.”).

## CONCLUSION

Separate schools for homosexuals are most likely not in violation of *Brown* for several reasons. First, governed for the most part by state and local law, school systems are allowed to establish a variety of distinct charters for individualized education. Second, homosexuals currently attend their separate schools voluntarily, and heterosexuals are (purportedly) not prohibited from attending these schools. Third, separate schools for homosexual students are not being charged with providing inferior education, as most black schools prior to *Brown* were charged. To the contrary, based on its success rate, New York's LGBTQ high school, HMHS, is, apparently a respectable model for other systems looking for alternative approaches to save at-risk students. Finally, under current Supreme Court jurisprudence, sexual orientation is not a suspect classification, whereas race is. Therefore, unless state or local governments afford higher scrutiny to sexual orientation discrimination, school systems may legally provide separate schools for LGBTQ youth. Perhaps, however, the more important consideration is whether they should.