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Pluralism: A Principle for Children's Rights

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> Some day, maybe, there will exist a well-informed, well-considered and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit.
>
> —Erik H. Erikson[1]

There has been a proliferation of scholarship on the harms caused by pressures to assimilate[2]—for example, pressures on Muslims not to wear their traditional garb, pressures on businesswomen to downplay their motherhood, and pressures on same-sex couples not to display affection publicly. Legal scholars have argued that assimilation demands strike a blow to a person's sense of identity,[3] imposing unjustified psychological burdens.[4] Kenji Yoshino has gone so far as to suggest a new civil rights move-

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[1] ERIK H. ERIKSON, YOUNG MAN LUTHER: A STUDY IN PSYCHOANALYSIS AND HISTORY 70 (1958).

[2] *See* Nathan Glazer, *Is Assimilation Dead?*, 530 ANNALS AM. ACAD. POL. & SOC. SCI. 122, 123 (1993) (describing the growing consensus among scholars that "assimilation . . . is somewhat disreputable, opposed to the reality of both individual and group difference and to the claims that such differences should be recognized and celebrated").

[3] Drawing from psychological literature, I define identity as the sense of self that individuals develop by committing to values and goals associated with particular social categories. Identity must be *developed*. Thus, for example, an individual of Chinese American ancestry does not develop a Chinese American identity unless she adopts values and goals associated with the Chinese American community. Others may label her as Chinese American based on her genes, but she does not possess a Chinese American identity in the psychological sense if she feels no allegiance to Chinese American values and goals.

[4] *See, e.g.*, Martha Nussbaum, *A New Type of Discrimination: The Prohibition Era*, NEW REPUBLIC, Mar. 20, 2006, at 22:

> [A demand] for assimilation to majority norms . . . is profoundly unfair, burdening minorities in ways that majorities are not burdened. Moreover, the demand is fraught with psychological danger. How can a person really have equality when she has to push some of her most deeply rooted commitments under the rug, treating them as something shameful and socially inappropriate?

ment that focuses on protecting a person's right not to assimilate and to live a life that is centered on an "uncovered," authentic identity.[5]

The existing legal scholarship on identity and assimilation focuses on adults. In this Article, I bring the discussion full circle, back to where the concept of identity first arose—the context of childhood. The concept of identity was not commonly used until the 1950s, when psychologist Erik H. Erikson introduced the terms "identity" and "identity crisis" in his works on children.[6]

Consider Kenji Yoshino's works on assimilation, in which he argues that it is troubling when an employer requires her gay (adult) employees to hide their same-sex relationships, demanding that employees assimilate to a heterosexual norm.[7] What happens when we shift the focus from the office to the schoolhouse? Is it equally, less, or more troubling when a public high school punishes students who openly display same-sex affection and threatens to out those students to their parents?[8] This Article contends that cases involving children are more troubling than cases involving adults and that the law should account for that fact. The developmental state of childhood renders children particularly vulnerable to the harmful effects of assimilation demands.

Throughout this Article, I focus on the harmful effects of demands to assimilate and not on assimilation itself, which may be uncoerced. For examples of legal scholarship on these demands, see Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2562–65 (1994) (discussing costs associated with gender-based assimilation); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–93 (2000) (discussing costs associated with race-based assimilation) [hereinafter Carbado & Gulati, *Working Identity*].

[5] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 27, 184–96 (2006). Borrowing from sociologist Erving Goffman, Yoshino uses the term "covering" to refer to the "ton[ing] down" of particular identity traits to fit into the mainstream. *Id*. at ix.

[6] *See* ERIK H. ERIKSON, CHILDHOOD AND SOCIETY (1950); ERIK H. ERIKSON, IDENTITY AND THE LIFE CYCLE (W. W. Norton & Co. 1980) (1959) [hereinafter ERIKSON, LIFE CYCLE]; ERIK H. ERIKSON, IDENTITY, YOUTH, AND CRISIS (1968) [hereinafter ERIKSON, YOUTH AND CRISIS]; ERIK H. ERIKSON, YOUTH: CHANGE AND CHALLENGE (1963); *see also* Glazer, *supra* note 2, at 124–25 (acknowledging that the concept of identity was introduced by Erikson through his works on children); Ruben G. Rumbaut, *The Crucible Within: Ethnic Identity, Self-Esteem, and Segmented Assimilation Among Children of Immigrants*, 28 INT'L MIGRATION REV. 748, 753 (1994) (same).

[7] *See* YOSHINO, *supra* note 5, at 69–70 (criticizing the federal government's "Don't Ask, Don't Tell" policy for requiring gay service members to hide their sexual orientation); *id*. at 93–101 (criticizing Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997), in which the court upheld the government's withdrawal of an employment offer from a lesbian because she flaunted her same-sex relationship).

[8] This question is inspired by the pending case of *C.N. v. Wolf*, in which a high school disciplined a lesbian student for being affectionate with her girlfriend and outed the student to her parents, even though the school allegedly never punished opposite-sex couples for similar conduct. 410 F. Supp. 2d 894 (C.D. Cal. 2005) (granting in part and denying in part defendants' motion to dismiss); *see also* Seema Mehta, *Lesbian Student Files Discrimination Lawsuit*, L.A. TIMES, Sept. 8, 2005, at B3.

Public policies often require children to conform to majoritarian community standards.[9] Of course, requiring children to conform may sometimes be desirable and not harmful. Children need to learn and adopt some basic social norms in order to grow into well-functioning members of society.[10] Socialization of children can be as innocuous as requiring schoolchildren to raise their hands before speaking and to wait patiently in line in the cafeteria. However, socialization processes become harmful when they require children to suppress their identities.[11] For example, forbidding girls to wear headscarves in school psychologically burdens many Muslim schoolgirls, for whom headscarves are an identity trait.[12]

The remainder of this Article contains three arguments: a normative policy argument in Parts I and II, a descriptive legal argument in Part III, and a prescriptive legal argument in Part IV. In Part I, I argue that children are harmed when they are pressured to suppress traits of minority social groups in order to fit into the mainstream.[13] Allegiance to a minority group informs an individual's identity.[14] Accordingly, suppression of mi-

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[9] *See* Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. 967 (2003); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 490 (1973).

[10] *See* Nussbaum, *supra* note 4, at 26.

[11] As discussed *infra* in Part I, the suppression of identity generates particular psychological burdens.

[12] In 2004, France banned the wearing of "ostentatious" religious symbols, including headscarves, in public schools. *See* Law No. 2004-22 of Mar. 15, 2004, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 17, 2004, p. 5190. For commentary on the law's psychological impact on Muslim girls, see Adrien Katherine Wing & Monica Nigh Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France, and the Headscarf Ban*, 39 U.C. DAVIS L. REV. 743, 777–83 (2006).

Recall that the term "identity" refers to the sense of self that individuals develop by committing to values and goals associated with particular social categories. Accordingly, I use the term "identity trait" as a shorthand (that is not part of psychology jargon) to refer to traits that have special value or represent particular goals to people within an identity group. Headscarves may seem like ordinary pieces of clothing to many people; however, they are an identity trait for Muslims who place special value on headscarves.

[13] In this Article, I focus on minority social groups based on race, ethnicity, religion, political opinion, disability, sexual orientation, and gender identity. Traditionally, prejudice has been based on these statuses, rendering them particularly relevant to a person's self-awareness. Although trait suppression manifests differently across these statuses, a common denominator is that coerced suppression of these statuses burdens children psychologically.

For a discussion addressing the question of slippery slopes, see *infra* text accompanying notes 137–141. For example, can shy students constitute a minority social group and, therefore, oppose all public speaking assignments? I answer in the negative and explain that such slippery-slope concerns are unwarranted.

[14]

> [O]rdinary discourse differentiates people according to social groups such as women and men, age groups, racial and ethnic groups, religious groups, and so on. Social groups of this sort are not simply collections of people, for they are more fundamentally intertwined with the identities of the people described as belonging to them.

IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 42–43 (1990); *see* Linda R. Tropp & Stephen C. Wright, *Ingroup Identification as the Inclusion of Ingroup in the*

nority traits undermines that identity, exacting a psychological toll. The law should endeavor to prevent such psychological burdens.[15]

That goal can be realized through pluralism, the making of space for difference.[16] Thus, in Part II, I propose a two-pronged pluralism principle for children's rights jurisprudence.[17] The first prong dictates that, while socialization of children is generally acceptable, the state must avoid socialization policies that undermine a child's ability to develop and express her identity (which I refer to as "identity interests"). However, according to the second prong, the state can restrict a child's exercise of identity interests if protecting that exercise would cause cognizable harms to the child or to others.[18]

Self, 27 PERSONALITY & SOC. PSYCHOL. BULL. 585, 585–86 (2001) (surveying psychological literature that acknowledges that "the self is construed in relation to one's group memberships").

Group status is particularly relevant to individuals' sense of self when the group is an oppressed minority group. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d. 1166, 1183 n.28 (9th Cir. 2006):

> There is, of course, a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status. Growing up as a member of a minority group often carries with it psychological and emotional burdens not incurred by members of the majority.

See also Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Stories*, 15 CHICANO-LATINO L. REV. 1, 13–15 (1994) (arguing that the suppression of minority traits is a particularly harmful form of conformity); Russell K. Robinson, *Uncovering* Covering, 101 NW. U. L. REV. (forthcoming 2007) (on file with author) (same).

[15] I do not suggest that the law should prevent all psychological burdens on children. For example, even though a child may experience stress from having a favorite television show canceled, I do not argue that the law should intervene. Accepting respected commentators' existing arguments that the law should prevent the particular psychological harms of assimilation demands, this Article simply contends that those commentators' main points are especially pressing for children; the Article does not make broad arguments about general psychological burdens.

[16] Although commentators often write about specific forms of pluralism (e.g., political pluralism, cultural pluralism, religious pluralism), I use the term pluralism to refer to the making of space for difference within identity categories generally.

[17] The pluralism principle builds on Emily Buss's developmentalist approach to children's rights, which asserts that in deciding what autonomy rights to extend to children, the government should consider the developmental benefits and harms of such extensions. *See* Emily Buss, *Allocating Developmental Control Among Parent, Child, and the State*, 2004 U. CHI. LEGAL F. 27, 35 [hereinafter Buss, *Allocating Developmental Control*].

[18] In Part II.B, *infra*, I define cognizable harms to include only a narrow range of consequences. Indeed, harms cognizable under the pluralism principle are not synonymous with harms in common parlance.

This prong is partly inspired by John Stuart Mill's time-honored harm principle. *See* JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS (John Gray ed., 1998). The pluralism principle clearly differs from Mill's harm principle because Mill explicitly excluded children from his principle's coverage. *See id.* at 14. Also, whereas Mill only was concerned with harms to others, the pluralism principle is concerned with children's harms to themselves as well. *See* JOEL FEINBERG, HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW 69, 325–33 (1984).

In Part III, I show that the pluralism principle is already emerging in jurisprudence on children's constitutional rights, even though courts and commentators have never clearly articulated the principle.[19] Critics charge that the Supreme Court's children's rights jurisprudence lacks coherence.[20] However, the Court's decisions are not inconsistent when viewed in light of the pluralism principle. The principle helps to explain why the Court has recognized children's rights in some instances and refused to do so in others. Explicitly acknowledging the pluralism principle would reconcile the seemingly inconsistent decisions while at the same time realizing the policy goal of protecting children's identity interests.

In Part IV, I present a case study on issues concerning gay and lesbian youth to illustrate how the pluralism principle should influence developing law.[21] Questions regarding gay and lesbian youth have elicited much attention. Lower courts have provided inconsistent answers to these questions due to divergent interpretations of the Supreme Court's jurisprudence on children's rights. That divergence stems from a failure to see and implement the pluralism principle.

Do gay and lesbian youth have a right to display romantic affection at school and to organize gay pride events at school?[22] Can a public school protect gay and lesbian youth from hate speech without violating the Constitution?[23] Do gay and lesbian youth have a right to privacy that includes a

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[19] Note that my current project focuses on children's constitutional rights. Thus, it only addresses children's claims against the state. It does not address children's claims against their parents, nor does it cover parents' claims against the state. I do address, however, how parental interests might influence children's claims against the state. *See infra* Part II.C.2.i.

[20] *See* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 12 (2005) ("[T]he children's rights movement has been a confused and often ridiculed one . . . . Nearly forty years after the movement began, it has made very little progress developing a cogent conceptual position."); NANCY E. WALKER, CHILDREN'S RIGHTS IN THE UNITED STATES 10 (1999) ("[C]ourts have answered [the question of children's rights] in inconsistent ways. Certain pronouncements make the rights of children explicit, but other U.S. Supreme Court opinions reflect a paternalistic view."); Martha Minow, *What Ever Happened to Children's Rights?*, 80 MINN. L. REV. 267–77 (1995) ("The Court's ambivalence swings between two starkly contrasting alternatives. One would extend adult rights to children; the other would treat children in important ways as subject to different authorities.") [hereinafter Minow, *Children's Rights*]; Rodham, *supra* note 9, at 487 ("The phrase 'children's rights' is a slogan in search of definition."); Lee E. Teitelbaum, *Children's Rights and the Problem of Equal Respect*, 27 HOFSTRA L. REV. 799, 799 (1999) ("Few areas present more difficult problems than does the definition of the rights of children.").

[21] Sexual orientation issues make for an illustrative case study because gays and lesbians are subject to a uniquely wide variety of assimilation demands. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

[22] Lower courts have issued disparate interpretations of the Supreme Court's case law on student expression. One court has held that bringing a same-sex partner to a high school prom is protected speech. *See* Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980). Other courts maintain that school officials have broad discretion to censor student expression. *See, e.g.*, Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 471 (6th Cir. 2000) (holding that school officials may prohibit a student from wearing a T-shirt with "illustrations of [the musician] Marilyn Manson largely unadorned by text" because Manson "promotes disruptive and demoralizing values").

[23] *Compare* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006)

right not to be outed by school officials?[24] The pluralism principle offers a normatively desirable, unified approach to these questions.

In the Conclusion, I take a cursory look at how the pluralism principle should influence laws affecting children who identify with other minority groups, such as religious and ethnic groups.[25] In doing so, I invite discussion on how the law should remedy assimilation-based wounds suffered by children.

I. Assimilation Demands and Their Effects on Children

How do the harms of coerced assimilation specifically affect children? Assimilation demands are disproportionately harmful to children because children lack the emotional maturity that helps adults cope with psychological burdens.[26] Older children are often the most vulnerable to assimilation harms. Not only do adolescents[27] generally have less coping capacity than adults, but they are also at the stage of development in which people are most preoccupied with identity issues.[28] Combining those two factors, adolescents not only are less capable of weathering the storms of assimilation demands, but also are situated in a storm zone.

In this Part, I first present existing legal scholarship on assimilation's harms. Then, I relate that scholarship to social science literature on children's coping capacity and identity development.

(holding that a public school did not violate the First Amendment by prohibiting a student from wearing a T-shirt that condemned homosexuality), *with* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965 (S.D. Ohio 2005) (reaching the opposite conclusion in a case with nearly identical facts), *and* Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780 (E.D. Mich. 2003) (holding that a public school violated the First and Fourteenth Amendments by refusing to allow individuals who would condemn homosexuality from participating in a panel discussion). Some courts have held that schools' antiharassment policies violate the First Amendment. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001); Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157 (D. Mass. 1993).

[24] A student is asserting this controversial privacy claim in the pending case of *C.N. v. Wolf*. *See* Mehta, *supra* note 8.

[25] These groups are not mutually exclusive, of course.

[26] *See infra* Part I.B.1.

[27] I use the term "adolescents" to refer to a subset of "children," as opposed to an entirely distinct category, because the law has traditionally done so. For example, in *Bellotti v. Baird,* the Court addressed the rights of pregnant teenagers, yet referred to those teenagers' rights as "children's rights." *See, e.g.*, 443 U.S. 622, 634 (1979). Similarly, the international human rights community treats adolescents as a subset of children. *See* United Nations Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 28 I.L.M. 1448 ("For the purpose of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.") *But see* Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 Hofstra L. Rev. 549 (2000) (arguing for recognition of adolescence as a distinct legal category).

[28] *See infra* notes 75, 78–83 and accompanying text.

A. Assimilation's Flaws

1. History

Assimilation has long played a prominent role in American society. In the context of immigration, the "melting pot" ideal went largely unchallenged until recently.[29] According to this romantic metaphor, Americans of diverse ancestral backgrounds would "melt" into a unified blend of American identity.[30]

Progressives of the early twentieth century believed that the unified blend of American identity would constantly change over time, absorbing new characteristics from immigrants as they melted into the blend.[31] As discussed below, however, assimilation has not lived up to this metaphor. The demands of assimilation usually require immigrants and other minority groups to abandon, rather than contribute, traits that they value to melt into the existing American mainstream. Indeed, the term "assimilation" now generally refers to the process by which minority groups abandon, hide, or downplay their identity traits in an attempt to fit into the mainstream.[32]

Even if minorities do contribute some of their characteristics to a unified American identity,[33] the melting pot ideal is nonetheless troubling because blending identities still requires people to abandon, hide, or downplay some, though perhaps not all, of the identity traits that they value.[34] Accordingly, many commentators have discarded the melting pot imagery, embracing other metaphors such as salad bowls and mosaics, in which individual ingredients of the salad or individual pieces of the mosaic re-

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[29] The term "melting pot" derives from the play *The Melting-Pot* by Israel Zangwill, first performed in 1908. *See* ISRAEL ZANGWILL, THE MELTING-POT (1909). Kenji Yoshino asserts that criticisms against the melting pot grew out of the civil rights movement of the 1960s. *See* YOSHINO, *supra* note 5, at xi. Camille Gear Rich believes that it was not until the 1990s that most Americans abandoned the melting pot ideal. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1234 (2004). Even today, however, some political figures, such as Pat Buchanan, openly idealize the melting pot despite the criticism against it. *See, e.g.*, PATRICK J. BUCHANAN, STATE OF EMERGENCY: THE THIRD WORLD INVASION AND CONQUEST OF AMERICA (2006).

[30] For background on the melting pot, see Peter H. Schuck, *The Perceived Values of Diversity, Then and Now*, 22 CARDOZO L. REV. 1915, 1927–28 (2001).

[31] *Id.*

[32] The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines assimilation as "[t]he process whereby a minority group gradually adopts the customs and attitudes of the prevailing culture." Kenji Yoshino describes three forms of assimilation: conversion (i.e., abandoning traits), passing (i.e., hiding traits), and covering (i.e., downplaying traits). *See* YOSHINO, *supra* note 5, at 17–18.

[33] Mainstreaming of minority culture does occur to some degree. *Cf.* HOWARD WINANT, RACIAL CONDITIONS 26 (2002) (discussing the influence that blacks have had on mainstream American music).

[34] In Part I.A.3, *infra*, I recognize that pressuring people to relinquish personal traits they value is not troubling under exceptional circumstances, for example, when exercising a behavioral trait harms others.

tain their original characteristics while contributing to the overall flavor or picture.[35]

2. Harmful Effects

Legal commentators have identified both macro and micro levels of harm associated with assimilation demands. At the macro level, pressures to assimilate are harmful because they reinforce social dynamics that subordinate traditionally disadvantaged groups. For example, the pressure on racial and ethnic minorities to "act white" reinforces white supremacy.[36] When an employer bans traditionally black hairstyles from the workplace, she is demanding conformity with a white standard of beauty, which mainstream society assumes to be superior.[37] By maintaining her grooming code, the employer reinforces that notion of white superiority.[38]

Similarly, pressures on Muslim women to remove their veils, and on Jewish men to remove their yarmulkes, reinforce notions of Christian supremacy.[39] The pressure on businesswomen to hide their childcare responsibilities reinforces patriarchy.[40] And the pressure on gays and lesbians to downplay their romantic relationships in public reinforces heterosexism.[41] In these ways, pressures to assimilate reinforce oppressive social norms.

At the micro level, assimilation demands take their toll on individuals by imposing psychological costs. According to psychologists, a healthy identity requires congruence between one's inner sense of self and one's outward representations of that self.[42] Assimilation demands can undermine that congruence, creating a psychological burden.[43]

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[35] *See* John Rhee, *Theories of Citizenship and Their Role in the Bilingual Education Debate*, 33 COLUM. J.L. & SOC. PROBS. 33, 37 n.20 (1999); Rich, *supra* note 29, at 1234.

[36] *See* YOSHINO, *supra* note 5, at 132–36.

[37] *See* Rogers v. American Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (upholding an employer's restriction on braided hairstyles against a Title VII challenge, even though an employee argued that her hairstyle was an expression of black identity). According to Paulette M. Caldwell:

> [B]lack women who are permitted to break through the barrier of racial exclusion into "visible" jobs involving public contact are likely to be those who possess physical characteristics close to those of women of the dominant racial group . . . . Rather than focusing on the black woman herself, the impetus to exclude is transferred to the black woman's hair.

Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 391 (1991).

[38] *See* Caldwell, *supra* note 37, at 391.

[39] *See* YOSHINO, *supra* note 5, at 169–70.

[40] *See id*. at 142–66, 177.

[41] *See id*. at 93–101.

[42] *See infra* notes 84–86 and accompanying text.

[43] *See infra* notes 84–86 and accompanying text. While an individual subjected to assimilation demands bears a psychological burden, she might also "export" some of that burden to her family. *See* Zachary Kramer, *After Work: Family Harms in Employment Discrimination Law*, 95 CAL. L. REV. (forthcoming 2007).

Consider, for example, that some employers pressure their black employees to suppress traits that the employees value as racial traits.[44] Lakisha,[45] who once regularly wore cornrows and kente scarves, may submit to that pressure and adopt the name Mary, straighten her hair with synthetic chemicals, and abandon her kente scarves.[46] In doing so, Lakisha, now Mary, dons a mask. Lakisha's expressed self, her mask, is no longer congruent with her inner sense of self; this incongruity inflicts a psychological wound. Employers' assimilation demands suggest to Lakisha that black identity is inferior and unworthy of respect.[47] For Lakisha, who identifies with black culture despite her mask, that suggestion of inferiority demeans her inner sense of self and can produce self-hatred.[48]

Under statutory employment law, employers may not refuse to hire Lakisha simply because she is of African descent, but they generally may refuse to hire her for openly expressing black identity.[49] Lakisha is left with a harrowing decision: sacrifice financial livelihood or assimilate and betray her sense of self.[50] Excoriating this tradeoff between dignity and financial health, commentators have argued for statutory reform,[51] rein-

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[44] *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001) [hereinafter Carbado & Gulati, *Fifth Black Woman*]; Carbado & Gulati, *Working Identity*, *supra* note 4, at 1279–93.

[45] Economists Marianne Bertrand and Sendhil Mullainathan found that having a name associated with African American culture, such as "Lakisha" or "Jamal," significantly reduces one's likelihood of receiving a job interview. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), *available at* http://www.nber.org/papers/w9873.

[46] Some parts of this example are borrowed from Carbado and Gulati's "fifth black woman" hypothetical. *See* Carbado & Gulati, *Fifth Black Woman*, *supra* note 44, at 710–21.

[47] *See supra* notes 36–38 and accompanying text (discussing assimilation demands that derive from white supremacy).

[48] *See* Carbado & Gulati, *Working Identity*, *supra* note 4, at 1277 (describing assimilation processes as "self-negating" and "self-denying"); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2408 (1994) ("To be forced to suppress one's cultural identity . . . is insulting and demeaning."); Montoya, *supra* note 14, at 13 ("[Wearing] masks of acculturation can be experienced as self-hate.").

[49] *See* Rich, *supra* note 29, at 1137 ("[I]t has long been established that Title VII does not prohibit discrimination based on 'voluntary' or 'performed' aspects of racial or ethnic identity.").

[50] Even by betraying her sense of self, Lakisha suffers an economic burden. Commentators have noted that repackaging oneself requires time, effort, and significant cash expenditures. *See* Carbado & Gulati, *Working Identity*, *supra* note 4, at 1279 & n.43.

[51] *See, e.g.*, Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 809 (1994) (proposing an expansion of Title VII to protect expressions of ethnicity).

terpretation of existing statutes,[52] and extralegal remedies such as greater public discourse on assimilation's harms.[53]

3. Circumscribing the Criticism

Before proceeding to a discussion of assimilation in childhood contexts, I should clarify that criticism of pressures to conform is not absolute. The criticism should be circumscribed for three main reasons. First, not all socialization demands produce psychological harms. For example, there is innocuous social pressure to conform to unwritten codes of politeness—to say "thank you," to hold the door for others, and to offer one's bus seat to the elderly. Generally speaking, one would be hard-pressed to argue that such conformity compromises anyone's identity.[54] Moreover, pressure to conform is less offensive when it manifests in the form of encouragement. The pressure is most harmful when it is a coercive demand. For example, it is one thing for the state to encourage patriotism with a recitation of the Pledge of Allegiance in schools; it is quite another thing to coerce patriotism by suspending students who refuse to participate in the salute.[55]

Second, even when assimilation demands undermine individuals' identity, those demands may be justified. For example, a man may identify with a particular ethnic group that traditionally condones wife battering. Assimilating to social norms against domestic violence may contradict that man's identity; however, the state can justify requiring that man to conform to social norms against domestic violence because wife beating creates both physical and psychological harms to others.[56] In proposing a legal solution to assimilation demands on children, I am cognizant that, when social conformity prevents legitimate harms, assimilation demands should be allowed. I define those legitimate harms in detail below, in Part II.B.

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[52] *See, e.g.*, Caldwell, *supra* note 37, at 385–90 (arguing for an interpretation of Title VII that protects expressions of racial identity); Rich, *supra* note 29, at 1202–12 (arguing for an interpretation of Title VII that protects performances of racial and ethnic identities through behavioral traits).

[53] *See, e.g.*, YOSHINO, *supra* note 5, at 178 (proposing that parties who make assimilation demands and parties who are burdened by demands should have "reason-forcing conversations" to discuss whether the demands are justifiable).

[54] One could certainly argue that one is impolite and that impoliteness informs one's sense of self. However, self-concept is not synonymous with identity. Identity is the part of one's self-concept that is developed by committing to particular values and goals associated with social categories. Suppression of one's identity generates unique harms. *See infra* note 95 and accompanying text.

[55] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding mandatory participation in the Pledge of Allegiance in schools unconstitutional). For a discussion of *Barnette*, see *infra* notes 182–187 and accompanying text.

[56] *Cf.* Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL'Y 199 (2006) (noting that cultural defenses to violent crimes are largely unsuccessful).

Third, I believe that assimilation demands are sometimes less troubling when individuals are able to avoid the demands by exiting the situation. For example, a church's demands on its congregation and a political party's demands on its members are less troubling so long as members can exit the group with ease.[57] Children, however, usually lack the ability to avoid assimilation demands by exiting. Two major sources of assimilation demands on children are their parents and the state. Children rely on their parents and the state for support, and thus these sources are difficult for children to avoid. In this Article, I focus on crafting a legal response to assimilation demands from the state. Although parents' assimilation demands on children can also cause psychological wounds, the unique challenges to crafting a legal response to parents' assimilation demands warrant discussion in a separate article.[58]

B. The Case of Children

The assimilation harms identified by legal scholars are magnified when assimilation is demanded from children, especially adolescents. Children are more vulnerable to these harms because their capacity to deal with stressors is less than that of adults. Adolescents are particularly vulnerable because they are at a stage of development during which individuals are most preoccupied with the psychological task of identity formation.[59] Thus, adolescents struggle with more identity-related stress than adults, while also lacking the full range of mechanisms that adults have for coping with stress.

1. Children's Coping Capacity

Psychologists use the term "coping" to refer to individuals' "constantly changing cognitive and behavioral efforts to manage specific external and/or internal demands that are appraised as taxing or exceeding the

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[57] In previous writing, I have supported the idea that, under some limited circumstances, groups should have the right to demand conformity among their members, even if conformity contravenes public policy goals. *See* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1319 (2006); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that the Boy Scouts of America can require its members to adopt heterosexual norms because the organization's freedom of expressive association trumps an antidiscrimination law proscribing sexual orientation discrimination).

[58] American law has traditionally shielded the "private sphere" of the family from government intervention, save for exceptional circumstances. A discussion regarding the regulation of parents' assimilation demands requires a lengthy consideration of the pros and cons of this protection. For background and related criticisms, see Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207 (1999); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993).

[59] *See infra* notes 75, 78–83 and accompanying text.

resources of the person."[60] In other words, coping refers to people's efforts to deal with stress.[61] When coping is effective, individuals are described as having developed "resilience."[62] The stressors that trigger coping range from daily hassles to catastrophic natural disasters.[63] Stress, when not effectively mitigated, can undermine both psychological and physical well-being.[64]

The capacity to cope develops during the course of one's life and, therefore, adults are generally equipped with the greatest capacity.[65] Although researchers disagree on how to categorize particular coping techniques, there is general agreement that coping techniques emerge throughout one's life.[66] Infants and young children tend to deal with stress through purely involuntary means, such as crying.[67] As children develop their coping capacity, they usually develop passive techniques first, finding ways to avoid stress, for example, by withdrawing from stressful social interactions.[68] With time, children develop more active forms of coping, such as thinking about problems, trying to find solutions, and engaging in simple emotion-stabilizing exercises.[69] During adolescence, individuals broaden their range of coping techniques and learn to employ those techniques more effectively.[70] By adulthood, individuals usually employ an extensive range of both problem-solving and emotion-stabilizing techniques.[71]

For the purposes of this Article, it is useful to note that two factors—a strong sense of self and a supportive social network—contribute to one's coping capacity. A strong sense of self empowers individuals to confront

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[60] RICHARD S. LAZARUS & SUSAN FOLKMAN, STRESS, APPRAISAL, AND COPING 141 (1984); *see also* Bruce E. Compas, et al., *Coping with Stress During Childhood and Adolescence: Problems, Progress, and Potential in Theory and Research*, 127 PSYCHOL. BULL. 87, 88 (2001) (describing Lazarus and Folkman's definition as the "most widely cited" in research on children's coping).

[61] Some psychologists distinguish voluntary efforts from involuntary efforts, such as crying, and exclude involuntary efforts from their definition of coping. *See* Compas et al., *supra* note 60, at 91.

[62] *Id.* at 89.

[63] Dianna T. Kenny, *Psychological Foundations of Stress and Coping: A Developmental Perspective*, *in* STRESS AND HEALTH: RESEARCH AND CLINICAL APPLICATIONS 88–89 (Dianna T. Kenny et al. eds., 2000).

[64] *Id.*

[65] *See* Compas et al., *supra* note 60, at 91 ("Coping and other stress responses can be expected to follow a predictable developmental course."); Kenny, *supra* note 63, at 82 ("Changes in the ability to cope are linked to major maturational changes throughout the lifespan."); Christopher J. Recklitis & Gil G. Noam, *Clinical and Developmental Perspectives on Adolescent Coping*, 30 CHILD PSYCHOL. & HUM. DEV. 87, 97 (1999) (studying adolescent psychiatric patients and confirming "the developmental nature of coping behaviors").

[66] *See* Compas et al., *supra* note 60, at 91.

[67] *Id.* at 90.

[68] *Id.* at 91.

[69] *Id.*

[70] *Id.*

[71] *See* LAZARUS & FOLKMAN, *supra* note 60 (describing in detail typologies of coping techniques).

stressful situations and reflect on those situations with greater clarity.[72] Supportive social networks provide people with interpersonal emotional support.[73] As discussed below, children who face assimilation pressures often have weakened senses of self; for example, immigrant youth are more likely than nonimmigrant youth to suffer identity confusion.[74] Moreover, children who face assimilation pressures may need to overcome certain hurdles before they seek interpersonal support; for example, gay and lesbian youth must be comfortable enough to identify openly before they can seek emotional support in coping with sexual orientation-related stress. Thus, the very nature of assimilation demands makes coping with them particularly difficult.

2. Children's Identity Development

It is generally accepted that adolescence is the phase of human development in which people are most preoccupied with identity struggles.[75] Most literature on identity development derives from the work of Erik Erikson. Although scholars have expanded upon Erikson's work, his basic concepts provide the foundation for understanding identity development.[76] Recognizing the legitimacy of his work, the Supreme Court has already cited him in three opinions.[77]

According to Erikson, people face particular psychosocial challenges at various stages of life;[78] resolution of these challenges is required for one's health and growth.[79] The primary psychosocial challenge of adolescence is to establish a well-developed identity.[80] This is not to say that identity development is confined to adolescence. People confront questions of identity from early childhood to late adulthood.[81] However, it is during ado-

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[72] *See* Jeannie S. Kidwell et al., *Adolescent Identity Exploration: A Test of Erikson's Theory of Transitional Crisis*, 30 ADOLESCENCE 785, 789 (1995); Recklitis & Noam, *supra* note 65, at 93–96.

[73] *See* Kenny, *supra* note 63, at 82; Recklitis & Noam, *supra* note 65, at 97.

[74] *See infra* Part I.B.2. Some minority youth might experience identity confusion because of their minority status even in the absence of demands to assimilate. In these situations, assimilation demands might exacerbate any preexisting identity confusion.

[75] *See* Elizabeth Douvan, *Erik Erikson: Critical Times, Critical Theory*, 28 CHILD PSYCHOL. & HUM. DEV. 15, 18 (1997).

[76] *See generally id.*

[77] *See* Roper v. Simmons, 543 U.S. 551, 570 (2005) (citing ERIKSON, YOUTH AND CRISIS, *supra* note 6, in a juvenile death penalty case); Thompson v. Oklahoma, 487 U.S. 815, 835 n.43 (1988) (citing ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 261–63 (1985) and ERIKSON, YOUTH AND CRISIS, *supra* note 6, at 128–35 in a juvenile death penalty case); United States v. Vuitch, 402 U.S. 62, 78 n.1 (1971) (Douglas, J., dissenting) (citing Erik H. Erikson, *quoted in* GROUP FOR THE ADVANCEMENT OF SOCIETY, COMM. ON PSYCHIATRY & LAW, THE RIGHT TO ABORTION: A PSYCHIATRIC VIEW 219 (1969), in an abortion case).

[78] Erikson referred to these challenges as "normative crises," i.e., "normal phase[s] of increased conflict." ERIKSON, LIFE CYCLE, *supra* note 6, at 125.

[79] *Id.* at 51–57.

[80] *Id.* at 94–100; ERIKSON, YOUTH AND CRISIS, *supra* note 6, at 128–34.

[81] *See* ERIKSON, YOUTH AND CRISIS, *supra* note 6, at 91–96.

lescence that people are most preoccupied with the question, "Who am I?"[82] Failure to resolve that question jeopardizes psychological health, resulting in symptoms ranging from reduced productivity to depression to difficulty engaging in intimate relationships.[83]

A well-developed identity, as defined by Erikson, is "the accrued confidence that one's ability to maintain inner sameness and continuity . . . is matched by the sameness and continuity of one's meaning for others."[84] That is to say, an individual's identity is well developed when: (1) she has achieved a coherent sense of self—that is, an inner sameness—such that her thoughts and actions are not random but guided by specific principles and values; (2) that sense of self is continuous through time; and (3) the way she represents herself to others is consistent with that coherent and continuous sense of self.[85] The third requirement of a well-developed identity is particularly important for this Article because individuals who face assimilation pressures often develop an unhealthy incongruence between their internal sense of self and their external representations of self.[86]

Building on Erikson's works, James Marcia identified four statuses in the process of identity formation: identity diffusion, identity foreclosure, moratorium, and identity achievement.[87] Diffusion is the least-developed status. When an individual is in a state of identity diffusion, she has neither explored nor committed to any values or goals to shape her notions of self.[88] In the state of foreclosure, an individual has committed to specific values and goals but has committed based on little or no exploration of alternatives. Often, adolescents in the state of foreclosure have simply adopted their parents' goals and values without exploring alternatives.[89]

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[82] *See id.* at 91.

[83] *See* ERIKSON, LIFE CYCLE, *supra* note 6, at 131–46.

[84] *Id.* at 94.

[85] *See id.* at 127; *see also* Jenny Makros & Marita P. McCabe, *Relationships Between Identity and Self-Representations During Adolescence*, 30 J. YOUTH & ADOLESCENCE 623, 625 (2001) ("According to Erikson, the more developed one's sense of identity is, the more congruency (or less discrepancy) there should be among one's various self beliefs."); Serena J. Patterson et al., *The Inner Space and Beyond: Women and Identity*, *in* ADOLESCENT IDENTITY FORMATION 9 (Gerald R. Adams et al. eds., 1992) (summarizing Erikson's definition of identity).

[86] *See* ERIKSON, LIFE CYCLE, *supra* note 6, at 120. Following Erikson, E. Tory Higgins elaborated on the psychological harms of incongruence between an individual's inner sense of self and her outward representations of self; Higgins also provided empirical evidence to support his theory. *See* E. Tory Higgins, *Self-Discrepancy: A Theory Relating Self and Affect*, 94 PSYCHOL. REV. 319 (1987).

[87] *See* James E. Marcia, *Development and Validation of Ego Identity Status*, 3 J. PERSONALITY & SOC. PSYCHOL. 551 (1966); James E. Marcia, *Identity in Adolescence*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 159 (Joseph Adelson ed., 1980); *see also* Makros & McCabe, *supra* note 85, at 624–25 (describing Marcia's operationalization of Erikson's theory as "the most widely respected and researched" and noting that more than three hundred studies have incorporated Marcia's four statuses); Patterson et al., *supra* note 85, at 10–12 (summarizing the previous works of Marcia, one of the authors of the piece).

[88] Patterson et al., *supra* note 85, at 9.

[89] *Id.*

Marcia considers foreclosed identities to be underdeveloped, noting that people often abandon foreclosed identities to explore alternatives.[90] Moratorium refers to the state of development in which people actively explore their identity without committing to any goals or values.[91] In the state of identity achievement, which follows moratorium, individuals establish a strong identity by committing to a set of life goals and values.[92] Although those goals and values may still evolve over time, they are relatively stable.[93]

Identity is not synonymous with self-concept, although the two are often conflated in common parlance. In the tradition of Erikson and Marcia, identity is specifically the part of one's self-concept that is developed[94] by exploring and committing to particular values and goals associated with social categories such as religion, political ideology, gender, sexual orientation, race, ethnicity, and so on.[95] Thus, a person may be aware that she is afraid of heights. Being afraid of heights is part of her self-concept, but it is not a part of her identity because she did not develop an awareness of those fears by adopting particular values and goals. Society constructs the social categories that are salient to people's identities.[96] Categories like race and sexual orientation, for example, are particularly salient because history and social dynamics make people particularly aware of the allegiances they adopt with regard to those categories.

Note that, even though people may be born with a particular racial phenotype or a predisposition for same-sex attraction,[97] developing a sense of identity related to those biological traits is still a process—one that involves learning about, relating to, and committing to, socially constructed meanings associated with the biological status. For example, people who report feeling attraction to members of the same sex, and people who report having engaged in same-sex sexual behavior, do not always report a gay, lesbian, or bisexual identity.[98]

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *See* Marcia, *Identity in Adolescence*, *supra* note 87, at 159–60.

[95] Erikson's and Marcia's research focused on particular social categories: gender, religion, political ideology, and occupational choice. *See* Marcia, *Development and Validation*, *supra* note 87 (summarizing Erikson's and Marcia's work). Subsequent researchers extended Erikson's and Marcia's theories to other social categories. *See* Vivienne Cass, *Homosexual Identity: A Concept in Need of Definition*, 9 J. HOMOSEXUALITY 105, 111 (1984).

[96] *See* Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women's Human Rights*, 52 EMORY L.J. 71, 102–04 (2003).

[97] Whether an individual's sexual orientation is a product of nature or nurture is still unclear to scientists; however, mounting evidence suggests that sexual orientation can be related to genetics. *See* Brian Mustanski et al., *Genomewide Scan of Male Homosexuality*, 116 HUM. GENETICS 272 (2005).

[98] *See* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 287–301 (1994) (providing empirical data on the percentages of individuals who experience

Because the case study in Part IV of this Article focuses on the rights of gay and lesbian youth, it is worth spending a moment to consider specifically the development of sexual orientation as a component of one's identity. Developing specific components of one's identity—such as one's sexual orientation—comports with Erikson's and Marcia's theories.[99] Put differently, a key developmental challenge for youth is to achieve a sense of sexual identity that is coherent and continuous while also consistent with external representations.[100] That challenge is easier for straight youth than for gay and lesbian youth. Societal pressures have made heterosexuality the default sexual identity. Thus, youth with an inclination to opposite-sex intimacy can arrive at a stable heterosexual identity without much exploration of their sexual goals and values.[101] For youth with an inclination toward same-sex intimacy, however, achieving a stable sexual identity requires transgressing the heterosexual default by exploring values such as gay pride and aspirations for same-sex relationships. Because society generally discourages the exploration and adoption of such values and goals, gay and lesbian youth face hurdles in forming a strong identity. Weak identities among gay and lesbian youth contribute to the increased likelihood of poor psychological health, manifesting in both mental and physical symptoms.[102] Youth belonging to other stigmatized minority groups also face difficult challenges.[103]

Erikson acknowledged this phenomenon when he observed that "the increasing demand for standardization, uniformity, and conformity" threatens adolescents' identity formation.[104] Indeed, assimilation demands compel adolescents to commit outwardly to particular goals and values, without exploration, even when those goals and values conflict with the adolescents' inner sense of self. In that regard, assimilation pressures hinder the formation of minority youth identity, burdening them with considerable stress.

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homosexual attraction, who have engaged in homosexual behavior, and who self-identify as homosexual or bisexual).

[99] *See* Mary Jane Rotheram-Borus & Kris A. Langabeer, *Developmental Trajectories of Gay, Lesbian, and Bisexual Youth*, *in* LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH 97, 99–101 (Anthony R. D'Augelli & Charlotte J. Patterson eds., 2001) (concluding that development of sexual identity and ethnic identity conform to Erikson's and Marcia's theories).

[100] *See supra* notes 84–87 and accompanying text.

[101] *See* Rotheram-Borus & Langabeer, *supra* note 99, at 101.

[102] *See* Michael Radkowsky & Lawrence Siegel, *The Gay Adolescent: Stressors, Adaptations, and Psychosocial Interventions*, 17 CLINICAL PSYCHOL. REV. 191, 191 (1997) ("Social stigmatization hinders the ability of gay adolescents to achieve the tasks of adolescence. Because their sexual identity is denigrated by society, these youth have difficulty forming a positive identity.").

[103] *See, e.g.*, Margaret Beale Spencer et al., *Ethnicity, Ethnic Identity, and Competence Formation: Adolescent Transition and Cultural Transformation*, 60 J. NEGRO EDUC. 366, 380 (1991) (discussing the psychological health of ethnic and racial minority youth).

[104] *See* ERIKSON, LIFE CYCLE, *supra* note 6, at 120.

3. Compounded Effects of Assimilation

At the very least, assimilation demands impose harms on individuals who belong to minority groups. The preceding sections suggest that the harms of assimilation are compounded when assimilation demands are imposed on children specifically. In light of these compounded harms, requiring children to suppress minority group traits in order to fit into a mainstream is particularly troubling. The following three Parts detail how that normative claim can and should shape the law.

Before proceeding to legal arguments, however, it is worth noting that assimilation's compounded harms on children are not simply theoretical. Empirical evidence suggests that the compounded harms are alarmingly real. The evidence takes two forms. First, data show that minority youth contending with assimilation demands are more likely than other children to have poor psychological and physical health.[105] Second, survey results show that greater identity achievement among minority youth corresponds to better psychological and physical health.[106]

Consider gay and lesbian youth as an example. As discussed in Part IV, gay and lesbian youth are currently subject to striking assimilation demands. The majority of gay and lesbian youth cope with their increased stress and emerge from adolescence as healthy—and often remarkably resilient—adults.[107] Nevertheless, research shows that, compared to youth generally, a disproportionate number of gay and lesbian youth suffer from poor psychological and physical health.[108] Poor psychological health can lead to dire consequences. Survey-based studies since 1990 have consistently shown that thirty to forty percent of gay and lesbian youth attempt suicide.[109] That rate far exceeds the estimated three to fifteen percent attempt rate among all adolescents.[110] Gay and lesbian youth are also more likely to attempt suicide than gay and lesbian adults.[111] Although skeptics criticized the methodology used in early studies for relying on conven-

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[105] *See infra* notes 107–113, 119 and accompanying text.

[106] *See infra* notes 118–119 and accompanying text.

[107] *See* RITCH C. SAVIN-WILLIAMS, GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY 182–85 (1990) ("[T]he results of the current study presented lesbian and gay adolescents as essentially psychologically and socially healthy individuals.").

[108] *See* James Lock & Hans Steiner, *Gay, Lesbian, and Bisexual Youth Risks for Emotional, Physical, and Social Problems: Results from a Community-Based Survey*, 38 J. AM. ACAD. CHILD & ADOL. PSYCHOL. 297 (1999).

[109] *See* J. Stephen McDaniel et al., *The Relationship Between Sexual Orientation and Risk for Suicide: Research Findings and Future Directions for Research and Prevention*, 31 SUICIDE & LIFE-THREATENING BEHAV. 84, 87–96 (2001).

[110] *See id.* at 87 (citing Patrick J. Meehan, *Attempted Suicide Among Young Adults: Progress Toward a Meaningful Estimate of Prevalence*, 149 AM. J. PSYCHOL. 41 (1992)).

[111] *See* Heidi S. Kulkin et al., *Suicide Among Gay and Lesbian Adolescents and Young Adults: A Review of the Literature*, 40 J. HOMOSEXUALITY 1, 2 (2000) ("Most suicide attempts by gays or lesbians take place during their youth."); McDaniel et al., *supra* note 109, at 88 (summarizing two studies of gay and lesbian adults who had attempted suicide, which showed that most attempts were made before age twenty-five).

ience samples,[112] four recent studies based on statewide school-population samples confirm the figures from the earlier studies.[113]

Meanwhile, survey-based studies reveal what ought to be self-evident: high self-esteem among gay and lesbian youth is directly related to their degree of comfort with homosexuality.[114] One study directly asked high school students: "Are you comfortable with your sexual orientation?"[115] The study found that students who were comfortable with their sexual orientation had higher measures of both mental and physical health.[116] Straight students who were comfortable with their sexual orientation were the healthiest; gay students who were uncomfortable were the least healthy.[117] Studies also show that self-esteem is directly related to disclosure of sexual identity, which is a sign of identity achievement.[118] This research suggests that the high suicide rate among gay and lesbian youth can be reduced by protecting them from assimilation demands, which breed self-

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[112] Early studies recruited subjects from places such as gay and lesbian support groups, which could have biased the studies' findings. *See* McDaniel et al., *supra* note 109, at 87–90 (discussing the early studies' methodologies); *see also* Amy Lovell, Comment, *"Other Students Always Used to Say, 'Look at the Dykes'": Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 624–25 (1998) (discussing the early studies' methodological flaws).

[113] Four studies, published between 1998 and 1999, reported the following suicide attempt rates among gay and lesbian students: first study, 35% (high school students); second study, 35% (high school students); third study, 27.5% (high school students); and fourth study, 28%/21% (male/female, junior high and high school students). *See* McDaniel et al., *supra* note 109, at 91–95 (summarizing findings from statewide school-based studies).

One should note that these newer studies still have minor methodological shortcomings. For example, school-based surveys do not account for school dropouts, who may be more likely to have attempted suicide. *See id.* at 95. Also, these studies vary in their definitions of suicide attempts and sexual orientation (some surveys asked students to identify their sexual orientation; others asked students whether they had ever experienced same-sex sexual contact). *See id.* Finally, three of the studies do not capture how attempt rates may vary by sex. *See id.* at 94.

[114] *See* Margaret Rosario et al., *The Coming-Out Process and Its Adaptational and Health-Related Associations Among Gay, Lesbian, and Bisexual Youths: Stipulation and Exploration of a Model*, 29 AM. J. COMMUNITY PSYCHOL. 133, 153 (2001).

[115] Lock & Steiner, *supra* note 108, at 299.

[116] *Id.* at 302. Students' mental health was measured through their reporting of issues such as depression, suicide, stress, anxiety, family problems, self-harm, temper problems, life and social dissatisfaction, and loneliness; general health was measured through reporting on factors such as growth, headaches, and chronic diseases. *See id.* at 299.

[117] *Id.* at 300–02.

[118] *See, e.g.*, SAVIN-WILLIAMS, *supra* note 107, at 128 (finding a relationship between coming out and self-esteem among gay and lesbian youth); Stephanie K. Swann & Christina A. Spivey, *The Relationship Between Self-Esteem and Lesbian Identity During Adolescence*, 21 CHILD & ADOLESCENT SOC. WORK J. 629, 632 (2004) (summarizing existing research showing that disclosure of sexual identity, inter alia, is "specifically relevant to lesbian adolescents' self-esteem"). Although these studies do not conclusively show that disclosure causes higher self-esteem, they warrant attention. If disclosure does not produce self-esteem, but self-esteem produces disclosure, one can hypothesize that disclosure is an important part of maintaining self-esteem. Disclosure is a sign of identity achievement because congruence between one's inner sense of self and one's outward representation of that self is necessary for identity achievement.

denial and make it more difficult for gay and lesbian youth to achieve stable identities.

These findings are not unique to the context of sexual orientation. Research on ethnicity consistently shows that adolescents who strongly identify with an ethnic group have greater psychological well-being than their peers.[119] These findings suggest that, to avoid jeopardizing the health of minority youth, the law should be conducive to the identity achievement of minority adolescents; disfavoring assimilationist laws would contribute to this end.

II. The Pluralism Principle

How should the law protect children from harmful assimilation demands? Most existing legal scholarship on assimilation proposes reforming statutory employment law.[120] Because most children are not employed, those legal proposals are insufficient.

Rather than focus on employers, I focus on the government as a source of assimilation demands. Both in the United States and abroad, assimilation demands on children often come directly from the state, especially from public schools. For example, when the French government banned girls from wearing headscarves to school, it demanded that Muslim girls assimilate by muting their religious identity.[121] Similarly, when the grooming codes at American schools have the effect of banning Native American hairstyles, they require Native American youth to downplay their ethnic identity.[122]

Pluralism is the antidote to assimilation demands. Thus, as stated at the beginning of this Article, I propose a two-pronged pluralism principle for children's rights jurisprudence. According to the first prong, socialization of children is generally acceptable, but the government must avoid socialization policies that undermine children's ability to develop and ex-

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[119] *See* Eunai K. Shrake & Siyon Rhee, *Ethnic Identity as a Predictor of Problem Behaviors Among Korean American Adolescents*, 39 Adolescence 601, 602–03 (2004) (concluding that achievement of an ethnic identity corresponds with "self-esteem and psychological well-being as measured in self-worth, sense of mastery, purpose in life, and social competence," while "feelings of role confusion and alienation resulting from ethnic identity conflicts can lead to psychological as well as behavioral problems for ethnic minority adolescents"); *see also* Joseph D. Hovey & Cheryl A. King, *Acculturative Stress, Depression, and Suicidal Ideation among Immigrant and Second-Generation Latino Adolescents*, 35 J. Am. Acad. Child & Adolescent Psych. 1183, 1188–90 (1990) (presenting evidence that first- and second-generation Latino adolescents in the United States are more likely to experience depression and suicidal ideation than adolescents generally, and that this likelihood correlates with the amount of acculturation stress reported by the adolescents).

[120] *See, e.g.*, Bartlett, *supra* note 4; Caldwell, *supra* note 37; Carbado & Gulati, *Working Identity*, *supra* note 4; Perea, *supra* note 51; Rich, *supra* note 29.

[121] *See supra* note 12.

[122] *See* New Rider v. Bd. of Educ., 480 F.2d 693 (10th Cir. 1973) (rejecting a First Amendment challenge to a school grooming code with a hair-length requirement that prohibited Pawnee students from wearing traditional Native American hairstyles).

press their identities. This requirement creates a presumption against state-sanctioned assimilation demands. According to the second prong, the government can rebut the presumption by showing that protecting a child's exercise of identity interests would generate cognizable harms to the child herself or to others. I offer a narrow definition of cognizable harms below.

In the remainder of this Part, I first clarify the pluralism principle by comparing and contrasting it with some other commentators' proposals regarding children's rights. I then define in more detail each of the principle's prongs.

A. The Principle's Liberatory Function

Before proceeding, I should clarify that the pluralism principle is not synonymous with a positive right to identity development. Instead, the principle is a normative proposition that guides determinations regarding whether to afford negative liberties to children.[123]

Indeed, the impetus for the pluralism principle is to protect children from the state's assimilation demands. Accordingly, the principle suggests that children should have the right to demand that the government refrain from policies that undermine their identity interests, such as bans on headscarves and Native American hairstyles. However, the principle does not obligate the government to take positive actions to facilitate identity development, such as institutionalizing events on Islamic awareness or Native American pride.

The pluralism principle is a starting point. I acknowledge that the principle's negative liberties are necessary but probably insufficient to protect children's identity development fully. Perhaps children ought to have a positive right to particular types of education that foster identity development.[124] Perhaps children ought to have a positive right to government intervention when parents' assimilation demands become unbearable.[125] I bracket these issues regarding potential positive rights for a future article; they warrant additional consideration because defining and enforcing positive rights pose unique challenges.[126] In the meantime, this Article focuses on children's freedom from governmental assimilation demands.

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[123] Negative rights entail freedom from government interference, whereas positive rights entail government assistance in actualizing the decisions that one freely makes. On the difference between negative and positive rights, see generally ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958).

[124] For an argument in favor of children's positive rights, see Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1 (2004).

[125] *See supra* note 58.

[126] On the difficulty of defining and enforcing positive rights, see Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001). For counterarguments, see Stephen Holmes & Cass R. Sunstein, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (1999); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990). State governments already afford some positive rights to children, such as rights to education and shelter. *See* Teitelbaum, *supra* note 20, at 804–06.

Existing theories of children's rights are often either liberationist or protectionist.[127] In contrast, the pluralism principle is a hybrid; while it is liberatory in practice, its normative underpinnings are protectionist in nature. Drawing from psychological literature, the principle embodies the idea that liberation can be a form of protection. By allowing children to explore and express identity-forming values freely, the principle protects children from the harms of incomplete identity development. By giving children the liberty required for identity moratorium and identity achievement, the principle protects children from psychological harm.

The pluralism principle diverges from traditional liberal theory. Early liberal theorists such as John Stuart Mill explicitly denied negative liberties to children. Mill argued that children lacked the competency required for autonomous decisionmaking and, therefore, that granting children freedom would harm them.[128] Child liberationists often challenge the assumption that children lack competency. Some advocates have argued that children should be presumed competent unless proven otherwise.[129] Other commentators have since criticized those proposals for being unworkable because it is difficult to define and measure competence and because people develop competency at different rates.[130]

I eschew the traditional liberal emphasis on competency as a requisite for exercises of liberty.[131] Mill and contemporary opponents to chil-

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[127] Child liberationists argue for increasing children's autonomy rights. The original child liberationists from the 1970s compared children to other oppressed classes, such as women and racial minorities. For examples of liberationist literature, see JOHN HOLT, ESCAPE FROM CHILDHOOD (1974); John Holt, *Why Not a Bill of Rights for Children?*, *in* THE CHILDREN'S RIGHTS MOVEMENT: OVERCOMING THE OPPRESSION OF YOUNG PEOPLE 319 (1977); Rodham, *supra* note 9. Protectionists argue not for children's autonomy rights but for welfare rights that protect children from harm, such as rights to nutrition and shelter. *See* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 BYU L. REV. 605, 644–50 (1976) (arguing for child protectionism and against child liberation); Teitelbaum, *supra* note 20, at 804–06 (discussing children's welfare rights).

[128] In discussing liberty, Mill remarked: "We are not speaking of children . . . . Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury." MILL, *supra* note 18, at 14.

[129] *See, e.g.*, Robert Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363, 373 (1982) (arguing that "in a situation in which the state would defer to the desires of an adult, the state can refuse to defer to the considered desires of an adolescent only upon a showing that the adolescent is not competent to make the decision"); Rodham, *supra* note 9, at 508 (arguing to "abolish the status of minority and to reverse its underlying presumption of children's incompetency").

[130] *See, e.g.*, Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 5 (1986) (arguing that "there are [no] knowable boundaries between competence and incompetence for any given societal task" and that "[t]here are no uncontroversial principles to pinpoint the kinds of competencies crucial to accord an individual independent decision-making power and to relinquish paternalist control").

[131] *See* Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 DEPAUL L. REV. 983, 985 (1993) ("It is my contention not only that competency is unnecessary to any formulation of rights for children, but also that it is extremely confining to rights theory in ways that make it difficult to

dren's autonomy rights claim that the competency requirement protects children from the potentially harmful consequences of their own decisions.[132] However, as illustrated in the previous Part, autonomous exploration and expression of identity is not intrinsically harmful; rather, it is a requirement for healthy psychological development. Accordingly, the pluralism principle presumes that children's freedom to exercise identity interests should be protected, unless the state satisfies a showing of harm.[133] Unlike many existing liberal arguments for children's rights, the pluralism principle hinges on a harm-based inquiry instead of a competency-based inquiry. Competency is a second-order question that only matters if the state first shows harm.

The principle's harm-based approach to children's rights is inspired by the writings of Emily Buss, who has asserted that, in deciding what autonomy rights to extend to children, the government should consider how extending such rights would foster or harm child development.[134] The pluralism principle builds on that idea by establishing a legal presumption that fosters identity-related aspects of child development and by narrowly defining the types of harms that would counter that presumption.

B. Protecting Identity Interests

The pluralism principle's first prong protects children's exercise of identity interests: the development and expression of identity. Protecting children's identity development means protecting children's ability to attain moratorium and achievement statuses. In other words, it means protecting children's ability to develop a sense of self by exploring and committing to goals and values associated with different social categories.[135] Pro-

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conceptualize, much less acknowledge, the rights of children and other groups."); Melinda A. Roberts, *Parent and Child in Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 485, 514–15 (1996) (arguing that "children [should] have a right of liberty . . . only in those particular circumstances in which the child's choice in fact serves his or her own best interests").

[132] *See* MILL, *supra* note 18, at 14; Hafen *supra* note 127, at 650.

[133] Note that the pluralism principle protects children *qua* children. In contrast, some commentators have argued that children should have some freedoms because they are potential adults; the idea is that giving children some autonomy prepares children for the decisions that they will face as adults. *See* Sharon Bishop, *Children, Autonomy and the Right to Self-Determination*, *in* WHOSE CHILD? 174 (William Aiken & Hugh LaFollette eds., 1980). I reject merely viewing children as potential adults because such a view ignores the fact that, when children are denied certain liberties, they suffer immediate harms as children. *See* Minow, *Children's Rights*, *supra* note 20, at 296 n.160.

[134] *See* Buss, *Allocating Developmental Control, supra* note 17, at 35.

[135] *See supra* notes 87–92 and accompanying text. Because the pluralism principle protects exploration of fluid goals and values, it rejects the notion that people belong in rigid, fixed identity categories. For example, an American of Asian descent can explore and choose to adopt goals and values that she may or may not label as "Asian American." Indeed, the pluralism principle protects, for example, the individual of Asian descent who identifies, in the psychological sense, with goals and values typically associated with people of another racial phenotype. There is no correct way to be Asian American, and an individ-

tecting children's identity expression means protecting children's ability to make outward representations of that internal sense of self.[136]

Often particular conduct constitutes a prima facie exercise of identity interests: for example, wearing a shirt that reads "gay and proud," wearing a yarmulke, or joining the Young Republicans of America. These exercises should be protected. Surely, whether conduct constitutes an exercise of identity interests will not always be clear. However, the difficult cases neither detract from the principle's normative weight nor render the relatively easy cases any less worthy of legal protection.[137]

An opponent of the pluralism principle might worry that protecting identity interests would create a slippery slope. For example, some might argue that shy people constitute an identity group. Under the principle, would a shy student have a claim against a teacher who requires her students to study public speaking? Below I explain why such worry about slippery slopes is unwarranted. Personality traits, such as shyness, can be distinguished from identities, such as racial, religious, and sexual identities.[138]

As explained above, individuals develop identities through a process of exploring and committing to goals and values associated with particular social categories.[139] For example, even if someone is born to black parents, she only develops a sense of black identity through a process of learning and adopting goals and values associated with the black community.[140] Similarly, there are shared goals and values within the Jewish community, the gay and lesbian community, and other identity groups, that an individual may adopt or reject as a part of her identification process. In contrast, one does not develop a "shy identity" by committing to values and goals associated with shy people. The pluralism principle focuses on the suppression of identities because of the particularly harmful effects of that process.[141]

This Article does not articulate a comprehensive list of social categories that are worth discussing. Not all social categories are equally relevant to a person's sense of self. In this Article, I focus on the categories of race, ethnicity, religion, political opinion, disability, sexual orientation, and

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ual with an Asian phenotype may identify, for example, with black identity. *See* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (arguing that Title VII should prohibit discrimination against people who are not phenotypically black but identify with, or are regarded by others as, being black).

[136] *See supra* notes 84–86 and accompanying text.

[137] Compare the exercise of identity interests to the exercise of religion. Whether particular conduct constitutes an exercise of religion has often vexed courts. However, those difficult cases do not suggest that the Free Exercise Clause should be amended out of the Bill of Rights.

[138] *See supra* note 95 and accompanying text.

[139] *See supra* note 137 and accompanying text.

[140] *See supra* note 103 and accompanying text.

[141] *See supra* Part I.B (discussing harms).

gender identity, because those categories are particularly relevant to a person's sense of self. These categories are not relevant by nature. They are relevant because, historically, social prejudice based on these statuses has been pervasive, rendering these statuses socially salient. Perhaps one day society truly will be colorblind.[142] Or perhaps one day an individual's choice of intimate partner will be no more socially salient than her choice of a favorite ice cream flavor. Until that day arrives, however, people will continue to be particularly self-aware of their identities based on the aforementioned categories.[143] Accordingly, attacking someone's identity with regard to these categories is particularly injurious and worthy of censure.

C. Exceptional Cases: Preventing Cognizable Harms

Although the first prong of the pluralism principle presumes that all identities deserve protection, the government can rebut that presumption and legitimately impose assimilation demands if it shows that by doing so it prevents harms. For example, the government can prohibit children's exercise of Neo-Nazi identity if it shows that the conduct is sufficiently violent or hateful to constitute a cognizable harm. Below, I clarify the categories of cognizable harm that the government can invoke to rebut the principle's presumption against assimilation demands.

In developing and expressing her identity, a child will sometimes impose harms on herself or on others. Those harms legitimize government infringement of that child's identity interests. However, only a narrow scope of harms should be cognizable under law.

1. Binding Commitments as Harms to Self

What constitutes a cognizable harm to a child's self? The state must exercise restraint in construing such harm. Because the pluralism principle is meant to protect difference, the state must not make subjective judgments about whether any particular exercise of identity is culturally or morally desirable. Thus, for example, the government should not limit a young girl's access to genital mutilation practitioners simply because the government views the practice as lacking legitimate cultural purposes. However, the government may limit that access because, by agreeing to genital mutilation, a young girl commits to a decision that is difficult to

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[142] Of course, whether colorblindness is desirable in the first place is disputed. *See* Charles R. Lawrence III, *The Epidemiology of Color-Blindness: Learning To Think and Talk about Race, Again*, 15 B.C. THIRD WORLD L.J. 1 (1995).

[143] *Cf.* Charles Stangor et al., *Categorization of Individuals on the Basis of Multiple Social Features*, 62 J. PERSONALITY & SOC. PSYCHOL. 207, 208 (1992) ("[S]ocial categories are well learned . . . . [B]ecause they are [perceived to be] highly informative about underlying dispositions, social categories such as race and sex may be used so frequently in social perception that their use becomes habitual and automatic, occurring without conscious thought or effort.").

undo.[144] The state invokes a cognizable harm when it shows that, by exercising her identity, a child is making a binding commitment—either in a physical sense or a legal sense.

Children are less capable of fully assessing relevant factors before making decisions.[145] Accordingly, there is good reason to preserve a child's ability to change her mind on important decisions.[146] This logic has been incorporated, for example, into contract law. Contract law generally protects children from their own commitments by rendering contracts unenforceable when they involve child signatories.[147] By the same rationale, the government may justifiably restrict children's exercises of identity that bind them to consequences that are difficult to undo. For children, such self-binding amounts to a cognizable harm.

Generally speaking, binding commitments fall into two categories: decisions of a legal nature, such as marriage, and conduct with bodily consequences.[148] Conduct with bodily consequences, such as genital mutilation, involves binding commitments because changes to one's body are often difficult to undo. As James Marcia has pointed out, exploring and "committing" to social values and goals is an important part of adolescent identity development.[149] When Marcia spoke of commitment, however, he did not mean commitment in any binding sense. There is directional freedom in moving between competing values associated with social categories—for example, liberal and conservative, masculine and feminine, heteronormative and queer, Christian and Buddhist. Although one may feel committed to certain values, such intangible allegiance is not binding in the same way as legal or bodily consequences, and individuals are free to return to their starting positions.

Thus exercising identity interests usually does not require making binding commitments. For example, wearing a yarmulke does not preclude someone from converting to another religion. Similarly, protesting a war

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[144] My argument here is normative rather than descriptive. As a descriptive matter, subjective cultural factors probably play a significant role in the promulgation of laws regulating female genital mutilation.

[145] *See* Emily Buss, *Constitutional Fidelity Through Children's Rights*, 2004 SUP. CT. REV. 355, 358–59 [hereinafter Buss, *Constitutional Fidelity*].

[146] *See* Buss, *Allocating Developmental Control, supra* note 17, at 41 ("[T]he ongoing process of identity development, which continues through adolescence, compromises the extent to which it is appropriate to bind an individual at Time 2 to the choices made by that individual, as a child, at Time 1.").

[147] *See* MARTIN R. GARDNER & ANNE PROFFITT DUPRE, CHILDREN AND THE LAW 410–17 (2002).

[148] Similarly, age-of-consent laws regulating sexual intimacy are justified even if they assimilate adolescents to majoritarian moral codes. Consent to sex has a legal nature. By consenting to the act of sexual intimacy, one essentially agrees to waive certain rights, such as the right to press charges for rape.

[149] *See* FRANKLIN E. ZIMRING, CHANGING LEGAL WORLD OF ADOLESCENCE 65–72 (1982) (arguing that adolescence should be viewed as something like a driver's permit for adulthood, during which individuals experiment with different values); *supra* notes 87–93 and accompanying text.

does not bind someone to an antiwar position. Holding hands with a same-sex partner also does not bind someone to being gay.

Insofar as the pluralism principle's second prong is concerned, binding commitments are the only cognizable harm to oneself. A respect for difference prohibits the government from making subjective determinations about whether a particular exercise of identity is culturally or morally desirable, but the state can make a more objective determination that an exercise of identity interests has enduring consequences. Thus, the state can require greater maturity from individuals who engage in such behavior.[150]

2. Harms to Others

The state also has a legitimate interest in limiting a child's exercise of identity if that exercise harms others. This limitation is a partial incorporation of John Stuart Mill's harm principle into the pluralism principle.[151] Because the purpose of the pluralism principle is to protect children from assimilation demands, the state cannot assert that the community is harmed simply because children's exercises of identity interests offend the community's majoritarian sensibilities. Changes in community norms are not intrinsically harmful. As H. L. A. Hart persuasively argued, there is no empirical support for the claim that deviation from community mores—in and of itself—harms the community, unless the term "harm" is conflated with "change."[152]

Accordingly, I offer a narrow definition of cognizable harms to others. These include (1) incitement of other children to harm themselves[153]

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[150] The pluralism principle merely gives the government discretion to infringe upon identity interests when long-term consequences are at stake. The state is not obligated to regulate children's actions whenever those actions lead to long-term consequences. For example, lawmakers may very well determine that some actions—such as ear piercing—have relatively inconsequential long-term effects that do not warrant regulation.

[151] *See* MILL, *supra* note 18, at 165 ("[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."). I discuss, in notes 131–133 and accompanying text, *supra*, why I reject Mill's wholesale exclusion of children. Mill argued that harm to others is the only justification for limiting adults' freedom. *See* MILL, *supra* note 18, at 165. Because I am writing about children, my claim is much more modest. The pluralism principle's first prong states that the government *may* limit children's freedom for socialization purposes, except when the freedom at stake implicates identity interests. Not all conduct involves identity interests. Since the state may limit a child's exercise of identity when that exercise harms the child herself, the pluralism principle protects significantly fewer freedoms than Mill's broader harm principle.

[152] *See* H. L. A. HART, LAW, LIBERTY AND MORALITY 49–51 (1963). According to Hart, the notion that changes in morality are inherently harmful is "entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes." *Id.* at 50.

[153] In other words, the state may intervene when children incite other children to make binding commitments of either a legal or bodily nature, as discussed in Part II.B.1, *supra*. Typically, states will exercise this power in school contexts. Thus, for example, even if a student believes strongly in the legalization and consumption of certain drugs—whether for religious, cultural, or political reasons—a school may be permitted to prevent that stu-

and (2) harms to others' protected interests—such as privacy, physical well-being, and property interests.[154]

Regarding the question of harm, two particular situations are uniquely complex and warrant further discussion: when a child's exercise of identity interests challenges her parents' desires, and when her exercise of identity interests compromises other children's identity interests.

a. Parents' Childrearing Interests

Can the state's allowance of a child's exercise of identity interests harm her parents by infringing their protected interest in childrearing? For example, consider a child who wants to explore Buddhism by borrowing books on Buddhism from the school library, even though her devout Christian parents object to her interest. Should the school limit the child's identity exploration in order to protect her parent's childrearing interests?

As long as the government protects children's exercise of identity interest through negative liberties, parents' childrearing interests generally are not infringed. The Supreme Court has held that the Constitution protects parents' rights to direct the upbringing of their children, especially with regard to religion,[155] but that protection is limited.[156] The Constitution protects parents' rights to remove their children from public schools

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dent from openly preaching drug use to her classmates because drug use entails bodily consequences and a legal decision, i.e., to break the law. However, the school may only intervene if the student's classmates are vulnerable to peer pressure, which will depend on their maturity. As this Article goes to publication, the Supreme Court is poised to release its decision in *Frederick v. Morse*, a case in which a high school principal punished students for displaying a banner stating, "Bong Hits 4 Jesus." 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S.Ct. 722 (U.S. Dec. 1, 2006). Under the pluralism principle, the principal's actions only would be justified, as a normative matter, if she could show that the banner was likely to incite drug use, and not just parody the school's position against drugs.

[154] *See* FEINBERG, *supra* note 18, at 38–62, 105–06 (1984) (clarifying Mill's principle by defining harms in terms of setbacks to others' protected interests).

[155] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish parents' free exercise right to direct children's religious upbringing outweighed state interests in mandating schooling for children until the age of sixteen); Farrington v. Tokushige, 273 U.S. 284 (1927) (invalidating state regulations of private schools because the regulations violated parents' substantive due process right to direct their children's education); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the Due Process Clause protects parents' right to send their children to private religious schools in lieu of public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that Fourteenth Amendment Due Process Clause protects parents' right to employ a private school teacher to instruct their children in foreign languages). For a thorough criticism of these cases and the notion of parents' rights, see James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); *see also* Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1276–88 (2000) (relying on Eriksonian psychological literature to question the appropriateness of home schooling and private religious schooling for older adolescents).

[156] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (explaining, in a case involving child labor laws, that parents' interest in directing children's religious upbringing is not absolute); *infra* note 159 and accompanying text.

and educate their children through private institutions or home schooling.[157] However, parents do not have a protected interest in having the state take steps to facilitate their childrearing.[158] Therefore, "preventing harm to parents" does not implicate the pluralism principle's second prong. Protecting parents' rights, for example, does not require public schools to alter their curricular requirements, textbooks, or school activities just to further parents' childrearing goals. Indeed, parents have argued that their childrearing interests were infringed when schools' sex education and condom distribution policies conflicted with their childrearing goals, and these arguments have generally failed in court.[159]

b. Other Children's Identity Interests

Can the state, by protecting a child's identity interests, set back other children's identity interests? Indeed, in cases of hate speech, a child speaker might harm another child's identity development in the process of expressing her own identity. I argue the state can legitimately impose assimilation demands in public schools when doing so prevents the harms caused by hate speech.[160]

The pluralism principle's second prong only gives a public school the discretion to restrict a child speaker's negative liberties when it considers her expression to be hate speech.[161] The principle does not grant children a free-standing positive right to hate speech intervention. Pinpointing a precise definition of hate speech is difficult, and thus enforcing a positive right to protection from hate speech would be difficult. However, granting schools a degree of discretion is not novel. Current law already grants public schools broad discretion to foresee and preempt other harms, such as stu-

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[157] *See supra* note 155.

[158] In cases where a child's conduct implicates cognizable harms, the state may consider parental interests to determine whether and how to limit the child's freedom; however, the state must first show a cognizable harm independent of so-called "harm to parents." *See infra* Part III.B.2 (discussing deference to parents in cases such as abortion cases, which potentially involve cognizable harms because of abortion's long-term consequences).

[159] *See, e.g.*, Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003) (holding that a father did not have a constitutional right to excuse his son from mandatory sex education classes); Brown v. Hot, Sexy & Safer Prod., Inc., 68 F.3d 525 (1st Cir. 1995) (determining that parents' right to childrearing did not include the right to limit flow of information in public school); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) (rejecting parents' free exercise challenge to textbooks).

[160] I am only making a normative argument at this point. The Supreme Court has yet to decide a case regarding hate speech in the school context. Lower courts have reached conflicting opinions. I evaluate these conflicting opinions in Part IV.B, *infra*.

[161] The pluralism principle only justifies the regulation of hate speech in contexts involving child speakers and child audiences; regulating child speakers—but not adult speakers—makes sense as a legal matter because children have always possessed less freedom of expression than adults. *See infra* Part IV.B. Protecting child audiences makes sense because of children's particular vulnerabilities. *See supra* Part I.B; *see also* RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 93–109 (2004) (discussing hate speech and the special case of children).

dents' infringements upon other students' privacy interests and physical safety.[162] The pluralism principle simply puts identity interests on par with these other protected interests because, as discussed in Part I, infringement of identity interests can seriously undermine children's psychological and physical health.

Although the state has discretion to regulate hate speech among students, there are minimum requirements for expression to be deemed hate speech. A gay teenager might associate Christian fundamentalism with homophobia, and thus be offended by even the slightest expression of Christian fundamentalism, but the state should not suppress all such expression. Expressions of Christian fundamentalist pride do not necessarily harm gays and lesbians. To constitute the type of hate speech that is a cognizable harm, the fundamentalist's speech must directly attack other children, suggesting that they are to be despised and denied respect because of their identity.[163] Such hateful speech is an assimilation demand that undermines identity development. Hate speech is an assimilation demand because it essentially suggests that members of the targeted group need to abandon or suppress their identity as much as possible, or leave the community because their identity is despised and unworthy of respect.[164]

The state may err on the cautious side, opting to intervene rarely. Some forms of expression, however, present easy cases. When a child wears a shirt declaring "Islam: Rotten to the Core"[165] or "God Hates Fags,"[166] the speech seems to say rather clearly that members of certain identity groups should be despised and denied respect.

Most debates on social issues need not devolve into hate speech. For example, classroom debates over whether homosexuality is immutable or whether same-sex marriage should be banned, while controversial, should generally be acceptable under the pluralism principle's second prong because they do not inherently suggest that gays and lesbians should be despised and denied respect. Indeed, the same-sex marriage debate largely

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[162] *See infra* note 262 and accompanying text (on privacy); *infra* notes 249–250 accompanying text (on physical safety).

[163] This definition of hate speech draws from Canadian jurisprudence. *See* R. v. Keegstra, [1990] 3 S.C.R. 697, 777 (Can.) ("[H]atred[,] . . . if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.").

[164] Hate speech can be distinguished from assimilation pressures that merely encourage people to change. For example, when a school encourages students to be patriotic by conducting flag salutes, it still respects unpatriotic students who choose not to participate in the salute. *See infra* notes 182–187 and accompanying text. In contrast, hate speech is by definition a denial of respect.

[165] For an online vendor selling T-shirts with this slogan, see Café Press, http://www.cafepress.com/religion_01 (last visited Mar. 9, 2007).

[166] For a photograph of children wearing T-shirts stating "GOD HATES FAGS.COM," see Vox Hunt: Sign O' The Times GOD HATES FAGS!, http://dancingbear.vox.com/library/post/vox-hunt-sign-o-the-times-god-hates-fags.html (last visited Mar. 9, 2007).

has been over whether the government has other interests, aside from hate, that legitimize same-sex marriage bans.[167]

In contrast, schools should have the discretion to decide that debates over whether particular identity groups should be hated have no place on school grounds (even if the debate creates no physical disturbances) because arguments on one side of the debate will amount to hate speech. Children should not be expected to protect themselves against hate speech because they are particularly vulnerable to the crippling effects of assimilation demands, including hate speech. A child who is attacked in this way is not empowered to respond with defensive speech.

III. Uncovering the Pluralism Principle in Existing Law

In the remainder of this Article, I focus on how the pluralism principle relates to constitutional law. Although courts have never clearly articulated the pluralism principle, it seems already to influence the Supreme Court's decisions in cases involving children's constitutional rights. Different cases have implicitly embraced different parts of the pluralism principle. My goal is to uncover and piece together the pluralism principle, which has been emerging in the Supreme Court's jurisprudence on children's rights.

The pluralism principle has been manifested as both a shield and a sword. In some cases, children have successfully raised the principle as a shield, preventing the government from limiting their rights in relation to those of adults; I refer to these cases as regarding equal rights to those of adults. In at least one other case, the pluralism principle has been wielded as a sword to justify affording children more negative liberty than adults. I refer to such cases as regarding special rights.[168]

In this Part, I first provide background on constitutional principles that are not explicitly stated in the Constitution's text. I then show how the pluralism principle has begun to inform the Court's decisions—first in cases regarding children's equal rights and then in cases regarding children's special rights.

A. Constitutional Principles Generally

Legal principles, which fill lacunae within the Constitution's text, have a history of guiding judicial decisionmaking, including that of the Supreme

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[167] *See, e.g.*, Andersen v. King, 138 P.3d 963, 980–81 (Wash. 2006) (disagreeing with plaintiffs that Washington's same-sex marriage ban was motivated only by antigay animus); Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006) (reaching the same conclusion regarding New York's same-sex marriage ban).

[168] I borrow the term "special rights" from Buss, who has written extensively on how Bellotti v. Baird, 443 U.S. 622 (1979), suggests that children have not only equal constitutional rights but special constitutional rights. *See* Buss, *Allocating Developmental Control*, *supra* note 17, at 47; Buss, *Constitutional Fidelity*, *supra* note 145, at 356.

Court.[169] Some principles guide constitutional decisionmaking generally, as opposed to decisionmaking concerning one particular constitutional provision. For example, the principle of constitutional avoidance guides constitutional decisionmaking generally, dictating that the Court will construe statutes so that they do not infringe the Constitution.[170] Recently, constitutional law scholars have argued that an equality principle guides the Court's decisionmaking not only in equal protection cases, but also in substantive due process and First Amendment cases.[171]

Just as equality can be articulated as a principle that guides constitutional decisionmaking generally, the pluralism principle for children's rights should also guide decisionmaking in a range of cases—from First Amendment, to due process, to equal protection cases.[172] As discussed below, the pluralism principle and its expansive reach are both grounded in existing Supreme Court jurisprudence.

Nowhere in its text does the Constitution specify how constitutional rights affect children. The Court has been filling in that gap through case law, and the pluralism principle has been emerging from that case law.[173]

B. The Principle and Children's Equal Rights

Children's identity interests are implicated in various constitutional contexts. Freedom of expression and free religious exercise both foster children's abilities to develop and express their religious identities, including religious identity specifically. Minority children's identity interests are implicated when the government invokes majoritarian community standards to restrict liberties that minority children value, such as the liberty to speak a foreign language. Unequal treatment not only deprives some children of a good, but also stigmatizes the disadvantaged group, undermining the iden-

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[169] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677, 710 (2005) (acknowledging a neutrality principle in Establishment Clause cases); Ewing v. California, 538 U.S. 11, 20 (2003) (describing the proportionality principle of the Eighth Amendment).

[170] *See, e.g.*, United States v. Booker, 543 U.S. 220, 286 (2005) (Stevens, J., dissenting in part) (invoking the principle of constitutional avoidance in a question of procedural due process); Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944) (applying the principle of constitutional avoidance to a question about the Commerce Clause).

[171] *See, e.g.*, Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (discussing equality as a principle in Establishment Clause cases); Nan D. Hunter, *Living with* Lawrence, 88 MINN. L. REV. 1103 (2004) (discussing equality as a principle in substantive due process cases).

[172] Similarly, when Ken Karst wrote his seminal essay on intimate association, he argued that the freedom of intimate association is an organizing principle that should guide decisionmaking in the areas of substantive due process, the First Amendment, and equal protection. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980).

[173] Constitutional principles often emerge—like the common law does—through a pattern among cases, rather than manifesting in a specific opinion. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) (comparing the Court's reasoning in *Lawrence* to deriving a regression line from a scatter diagram of previous substantive due process cases).

tity development of its members. Accordingly, the legal analysis that follows focuses on cases regarding freedom of expression, free religious exercise, substantive due process, and equal protection.[174]

In *In re Gault*, the Supreme Court famously declared that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[175] However, the Court subsequently asserted, in *Bellotti v. Baird*, that "three reasons justify[ ] the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[176] Although the Court has identified these three factors, it has not clarified how these factors interact. As a result, critics charge that the Supreme Court's children's rights jurisprudence lacks coherence.[177] The pluralism principle reveals previously unrecognized coherence in that jurisprudence.

Assessing vulnerability is the first-order task, and that is when the pluralism principle comes into play. When the state argues that children's rights should be more limited than those of adults, it typically begins by asserting that children are vulnerable to specific harms and that rights reduction is a form of protection. When the Court finds that states have not identified cognizable harms to which children are vulnerable, the Court extends equal rights to the child.[178] Only when the state has identified a cognizable harm does the Court engage in significant analyses regarding the two other *Bellotti* factors: maturity and deference to parents.[179]

In the Court's assessment of vulnerability, it has implicitly raised the pluralism principle to defend children's freedom to exercise identity interests from governmental socialization policies. In cases where children's ability to develop and express their identities has been at stake, the Court has repeatedly stated that children are not vulnerable to harm just because

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[174] Although there are many free exercise cases that involve children, I only address W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). I do not devote more attention to free exercise cases because the Court generally assumes that children and adults have equal rights to free exercise. *See* Note, *Children as Believers: Minors' Free Exercise Rights and the Psychology of Religious Development*, 115 HARV. L. REV. 2205, 2209 (2002).

[175] 387 U.S. 1, 13 (1967).

[176] 443 U.S. 622, 634 (1979) (upholding an abortion law's parental notification requirement because it included a satisfactory judicial bypass mechanism).

[177] *See supra* note 20 (listing criticisms of children's rights jurisprudence).

[178] *See infra* Part III.B.1 (discussing cases in which the state failed to identify cognizable harms).

[179] In *Bellotti*, the Court recognized that it only concerns itself with the maturity factor when children are demanding rights to make "choices with potentially serious consequences," "choices that could be detrimental to them," or choices that "present[ ] a danger against which they should be guarded." 443 U.S. at 635–36. The Court was less clear on when the deference-to-parent factor comes into play, but it did state that "[u]nder the Constitution, the State can 'properly conclude that parents . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.'" *Id.* at 639 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)). That statement implies that the state may defer to parents when children's well-being is at risk. When children are not vulnerable to cognizable harms, their well-being is not at risk.

they do not conform to majoritarian community norms.[180] In essence, the Court has stated that the government's desire for children to conform to majoritarian norms is not reason enough to infringe children's identity interests. The Court has repeatedly protected children's ability to explore and express unorthodox values associated with minority identities. This protection comports with the pluralism principle's first prong. The Court has only infringed upon children's identity interests in cases where doing so prevented harms that are cognizable under the pluralism principle's second prong.[181]

1. Protecting Identity Interests

a. Foundational Cases

The Court planted the seed of the pluralism principle in *West Virginia State Board of Education v. Barnette*.[182] *Barnette* was not formally a children's rights case because parents brought the suit, but Justice Jackson, writing for the plurality, suggested that children's rights were at stake.[183] The parents challenged a state statute that compelled students to salute the American flag and recite the Pledge of Allegiance.[184] Jackson recognized that students' interests in developing their religious and political identities were at stake in the case.[185]

Jackson stated that the compelled salute and pledge violated constitutional protections of free expression and free religious exercise and could not be justified by the state's desire to assimilate children to a unified standard of nationalism.[186] The children were vulnerable to adopting unorthodox values, but Jackson reasoned that the possibility of children adopting "eccentricity and abnormal attitudes" did not justify restricting the students' constitutional rights.[187] This prioritization of identity interests over assimilation is consistent with the pluralism principle's first prong. Jackson also noted that students' deviation from majoritarian standards of nationalism did not threaten national security.[188] If national security were threatened, the school's policy would have been constitutional.[189] That logic

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[180] *See infra* Part III.A.1.

[181] *See infra* Parts III.A.2–3.

[182] 319 U.S. 624 (1943).

[183] *See id.* at 630–31 ("The State . . . coerce[s school] attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.").

[184] *Id*. at 625–30.

[185] *See id*. at 634–36 (noting that students' "religious views" as well as "matters of opinion and political attitude" were implicated).

[186] *See id*. at 642.

[187] *Id.*

[188] *Id.* at 640.

[189] *Id*.

comports with the pluralism principle's second prong because a threat to national security would qualify as a cognizable harm.

After *Barnette* planted the pluralism principle's seed, the principle sprouted in the later cases of *Tinker v. Des Moines*,[190] *Island Trees Union Free School District v. Pico*,[191] and *Carey v. Population Services International*.[192] In *Tinker*, the Court upheld secondary students' First Amendment right to protest the Vietnam War in school.[193] The Court stated that, even though the protests exposed vulnerable children to controversy, that did not justify infringing students' rights to express their political identity.[194] The Court stated that public schools may not censor students' speech just because the speech is unpopular or unpleasant to the community.[195] Put differently, the Court again protected children's ability to explore and to commit to values associated with identities that are out of the mainstream. The Court did make two exceptions: public schools may restrict speech if it impinges upon the rights of other students to be free and let alone or if it is substantially disruptive.[196] These exceptions comport with the pluralism principle's second prong because they both prevent cognizable harms.

Island Trees Union Free School District v. Pico, which dealt with the removal of controversial books from public school libraries,[197] reinforced the pluralism principle. The school board argued that removing the books was necessary "to protect the children in our schools from . . . moral danger."[198] Writing for the plurality, Justice Brennan noted that schools do have an interest in inculcating children with values, but that interest alone cannot justify limiting children's First Amendment rights.[199] Justice Brennan's opinion held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[200] By removing controversial books, the school board delegitimized minority values

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[190] 393 U.S. 503 (1969).

[191] 457 U.S. 853 (1982).

[192] 431 U.S. 678 (1977).

[193] 393 U.S. at 514. *Tinker* is the first case in the Court's trilogy on student speech. The second case in the trilogy is Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), which specifically governs low-value speech, such as obscene and indecent speech, and is discussed in Part III.B.1.b, *infra*. The third case, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988), governs school-sponsored speech, such as school-run newspapers, and is discussed in notes 262–265 and accompanying text, *infra*.

[194] *See Tinker*, 393 U.S. at 510–11.

[195] *See id.* at 509.

[196] *See id.* at 508–09, 514.

[197] The school board claimed that the books were "anti-American" and "offensive to . . . Americans in general." 457 U.S. at 873 (quoting Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

[198] *Id.* at 857 (quoting Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

[199] *See id.* at 864.

[200] *Id.* at 872 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

and goals that conflicted with majoritarian community values. Brennan suggested that the community's desire to protect children from "moral danger" did not justify reducing children's First Amendment rights.[201] In *Pico*, the Court again protected children's ability to explore minority identities, while reiterating that nonconformity is not in and of itself a "danger."

The privacy case of *Carey v. Population Services International* is also consistent with the pluralism principle. In *Carey*, the Court invalidated a New York statutory provision that banned the sale of contraceptives to minors under the age of sixteen, except when deemed appropriate by the minors' physicians.[202] New York contended that its law was "permissible as a regulation of the morality of minors in furtherance of the State's policy against promiscuous sexual intercourse among the young."[203]

Although the Court did not say so explicitly, identity interests were at stake in *Carey* because the government was seeking to assimilate children to the sexual mores of majoritarian identity groups. In addition, identity interests were at stake because intimate relationships can inform one's sense of self.[204] The plurality recognized that New York had a legitimate reason for limiting promiscuous sex among teenagers: the prevention of physical and psychological harms associated with adolescent intercourse, especially the physical and psychological harms that teenage motherhood imposes on the mother and child.[205] The plurality did not believe that merely sending a moral message to youth could credibly curb those physical and psychological harms.[206] Critically, however, sending a moral message was not in and of itself a legitimate reason for reducing minors' rights.[207] By invoking physical and psychological harms as the only way the state could have justified its law, the plurality adhered to the pluralism principle's second prong. The Court was not making a culturally subjective judgment regarding sexual mores, but was concerned about both the enduring consequences of teenage intercourse and the harms that such intercourse imposes on others, namely children resulting from the intercourse.[208]

In *Barnette*, *Tinker*, *Pico*, and *Carey*, the Court did not analyze all three of the factors identified in *Bellotti*: vulnerability, maturity, and deference to parents. In these cases, the Court focused on analyzing whether

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[201] *See id.* at 857.

[202] Carey v. Population Servs. Int'l., 431 U.S. 678, 681–82 (1977).

[203] *Id.* at 692.

[204] *See* Karst, *supra* note 172, at 628 (discussing the relationship between intimate associations and personal identities).

[205] In discussing the risks of sexual activity among youth, the Court noted numerous physical and psychological harms but did not raise any social or moral concerns. *See, e.g.*, *Carey*, 431 U.S. at 696 n.21 ("[T]eenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby." (internal quotation marks and brackets omitted)).

[206] *See id.* at 696.

[207] *See id.* at 697.

[208] *See id.* at 696 n.21 (noting pregnancy's "physical and psychological effects upon the minor and her baby").

children were vulnerable to harms. Those analyses were driven, at least implicitly, by the pluralism principle. In each case, the state sought to limit children's ability to explore or express values and goals associated with minority identities to protect children from straying from community norms. In each case, the Court stated that nonconformity is not inherently harmful and then protected children's identity interests by extending the constitutional rights of adults to children. In these cases, the Court raised the pluralism principle to shield children from a rights reduction.

b. Deconstructing Potential Challenges

The Supreme Court case that potentially challenges the pluralism principle is *Bethel School District No. 403 v. Fraser*,[209] a subsequent case involving vulgar speech. The Court held that a high school did not violate the First Amendment by punishing a student who delivered a speech laced with gratuitous sexual references.[210] In the speech, Matthew Fraser nominated a classmate for student office while referring to the candidate in graphic sexual metaphors.[211] Ultimately, as discussed below, *Fraser* does not challenge the pluralism principle because no identity interests were at stake.

Some commentators and lower courts wrongly view *Fraser* as implicitly overruling *Tinker* and granting schools broad discretion to censor the expression of any ideas that they deem offensive.[212] In such cases, the pluralism principle is violated based on a misinterpretation of *Fraser*. Before reaching my analysis of *Fraser*, I consider one lower court example, *Boroff v. Van Wert City Board of Education*.[213]

In *Boroff*, the Sixth Circuit upheld a school's prohibition of T-shirts featuring the musical performer Marilyn Manson.[214] One T-shirt was critical of Christianity and another T-shirt had illustrations of Marilyn Manson "largely unadorned by text."[215] Citing *Fraser*, the court stated: "[t]he

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[209] 478 U.S. 675 (1986).

[210] *Id.* at 686 (plurality opinion).

[211] *Id.* at 677–78.

[212] *See, e.g.*, Hosty v. Carter, 412 F.3d 731, 739 (7th Cir. 2005) (noting that Supreme Court case law on student speech has become "difficult to understand and apply"); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 474 (6th Cir. 2001) (Gilman, J., dissenting) (stating that the majority interpreted *Fraser* and *Hazelwood School Bd. v. Kuhlmeier*, 484 U.S. 260 (1988), as "essentially overruling *Tinker*"); Baxter v. Vigo County Sch. Corp., 26 F.3d 728, 737 (7th Cir. 1994) (asserting that *Fraser* "cast some doubt" on *Tinker*); David L. Hudson & John E. Ferguson, *A First Amendment Focus: The Courts' Inconsistent Treatment of* Bethel v. Fraser *and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 183 (2002) (noting that some courts have relied on *Fraser* to prohibit not just vulgar and lewd speech but also ideas that school boards find offensive).

[213] 220 F.3d 465 (6th Cir. 2000).

[214] *Id.* at 465.

[215] *Id.* at 469, 71. The T-shirt criticizing Christianity featured a "three-headed Jesus," the words "See No Truth. Hear No Truth. Speak No Truth." on the front and the word "BE**LIE**VE" with "LIE" highlighted on the back. *Id.* at 469.

Supreme Court has held that the school board has the authority to determine what manner of speech in the classroom or in school is appropriate."[216] The court concluded that the rock artist "promotes disruptive and demoralizing values," and the T-shirts "were determined to be vulgar, offensive, and contrary to the education mission of the school."[217]

Identity interests were at stake in *Boroff*. Commentators have noted that Marilyn Manson's music has a value-laden agenda: to challenge the gender binary, to question mainstream American values, to champion individuality, and to have people take responsibility for their actions.[218] Commentators have also noted that Marilyn Manson's values are consonant with queer identity.[219] Because of the identity interests involved, the *Boroff* majority violated the pluralism principle. The principle protects children's identity interests: the ability to explore and express values and goals that shape their identities. Invoking community norms without pointing out cognizable harms as the *Boroff* court did is insufficient justification for infringing identity interests.

The school administrators in *Boroff* were particularly troubled by the shirt that conveyed anti-Christian sentiments.[220] The court would have adhered to the pluralism principle had it reasoned that the anti-Christianity T-shirt amounted to hate speech, thereby harming other students.[221] Similarly, the court would have adhered to the pluralism principle had it reasoned that Marilyn Manson T-shirts incited students to harm themselves, for example by engaging in drug use.[222] Instead of doing so, the court simply asserted that both T-shirts contravened school morals and thus were subject to regulation.[223]

Contrary to the *Boroff* court's interpretation, however, *Fraser* does not afford schools with broad discretion to assimilate children to community norms as the school did in *Boroff*. Correctly understood, *Fraser* suggested that schools may censor "low-value"[224] language but not offensive ideas.[225] The Court described the language, not the ideas, in Fraser's speech

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[216] *Id.* at 470.

[217] *Id.* at 471.

[218] *See* Jeff Q. Bostic et al., *From Alice Cooper to Marilyn Manson: The Significance of Adolescent Antiheroes*, 27 ACAD. PSYCH. 54 (2003); Judith A. Peraino, *Listening to the Sirens: Music as Queer Ethical Practice*, 9 GLQ: J. LESBIAN & GAY STUD. 433 (2003).

[219] *See* Peraino, *supra* note 218.

[220] *See id.* at 469.

[221] *See supra* Part II.B.2.

[222] *See id.*

[223] *Boroff*, 220 F.3d at 471.

[224] *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words.").

[225] *See Fraser*, 478 U.S. at 689 (Brennan, J., concurring) ("There is no suggestion that school officials attempted to regulate [Fraser's] speech because they disagreed with the views he sought to express."); Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1193 (9th Cir. 2006) (Kozinski, J., dissenting) ("'[P]lainly offensive' under *Fraser* is determined

as "obscene," "vulgar," "lewd," and "offensively lewd."[226] In cases involving adult speakers and child speakers alike, the Court has repeatedly stated that such expression is not just offensive;[227] it is of low value and thus subject to reduced First Amendment protection, if any at all.[228] According to the Court, obscene and indecent expressions are low value because "such utterances are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth."[229]

Unlike the gratuitous sexual remarks made by the student in *Fraser*, expressions of identity are anything but low value. Expressions of identity are expositions of ideas, although such expositions may be coded and implicit. Recall that identities are commitments to specific values and goals with regard to particular social categories.[230] Thus, expressions of identities are expressions of ideas, endorsements of particular values and goals. The student who wears kente scarves to express her African American identity is endorsing values that she associates with African Americans. The student who wears a Marilyn Manson T-shirt to express her queer identity is also endorsing a particular set of values.

Expression of one's identity also is not low-value speech because expression of one's identity is a form of self-realization. Jurists have touted the facilitation of self-realization as being one of the reasons why the Constitution protects free speech.[231] Expressions of identity are especially valuable for adolescents because realizing one's sense of self is the primary psychosocial developmental task of adolescence.[232]

Had Fraser argued that his use of sexual language was itself a substantive message (which he did not), his case would have posed a more difficult question. He might have argued that his use of sexual language was a political statement against his school's rule against sexual language. As an expression of political ideology, the student's speech would not be of low value. Nonetheless, under the pluralism principle, the school still would have been able to intervene under the second prong, because treating rule breaking itself as protected speech would plant the seeds of anarchy. The

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by the language used, not the idea conveyed."); East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist., 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.").

[226] *See Fraser*, 478 U.S. at 687 (Brennan, J., concurring) (summarizing the Court's description of the speech in question).

[227] *See* FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978).

[228] *See* Miller v. California, 413 U.S. 15, 24 (1973); *see also* Ashcroft v. Free Speech Coal., 535 U.S. 234, 265 (2002); Reno v. ACLU, 521 U.S. 844, 865 (1997); *Pacifica Found.*, 438 U.S. at 745–47.

[229] *Fraser*, 478 U.S. at 685 (quoting *Chaplinsky*, 315 U.S. at 572).

[230] *See supra* Part I.B.

[231] "'Self-realization' theories of the First Amendment stress the relationship between free expression and personal fulfillment . . . [which includes] developing a self-identity." DANIEL A. FARBER, THE FIRST AMENDMENT 3–4 (2d ed. 2003). However, self-realization theories of free speech have never been absolute. *Id.* at 4.

[232] *See supra* Part I.B.

disorder that would ensue is a cognizable harm, as it would compromise other students' interests in security and public education.

Note that the government may regulate many areas of children's expression, not just obscene and indecent speech, without implicating identity interests. The pluralism principle only protects children's exercise of identity interests and not free expression generally. Therefore, a teacher can mandate that students raise their hands rather than randomly shout responses to the teacher's questions; mandate silent reading time; deduct points for students' poor grammar;[233] and discipline cheaters by having them write "I will not cheat" one hundred times on the whiteboard. In each of these instances, children are unlikely to argue that restrictions on their expression undermine identity interests. Thus, the pluralism principle is not implicated.

2. Preventing Cognizable Harms

a. Binding Commitments as Harms to Self

While the cases just discussed dealt primarily with the pluralism principle's first prong, other cases reinforce the second prong, which dictates that the government can infringe identity interests to prevent the cognizable harms defined in Part II.B. Consider *Bellotti*, in which the Court addressed whether pregnant teenagers should have the same constitutional right as pregnant adults to make reproductive decisions.[234] The State of Massachusetts had a statute that required pregnant teenagers to procure either parental consent or a judicial bypass prior to undergoing an abortion.[235] The Court stated that a pregnant teen is entitled to a judicial bypass if, upon a hearing, a judge finds that the teen is "mature enough and well enough informed to make her abortion decision" or that "the desired abortion would be in her best interests."[236] In so holding, the Court suggested that minors do not have the same reproductive rights as adults because minors who face decisions regarding abortion are vulnerable to cognizable harms.

The law in *Bellotti* implicated identity interests by precluding many teenage women from making reproductive choices based on their own reli-

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[233] One might argue that requiring students to use "standard" English in assignments is an assimilation demand on, for example, Ebonics speakers. Drawing from the writings of Lisa Delpit, I believe that requiring students to learn standard English is not a coercive assimilation demand, as long as teachers do not denigrate Ebonics as inherently "wrong" or "deficient." Teachers can simultaneously affirm the cultural worth of Ebonics and require students to learn standard English because of its practical value. *See* Lisa Delpit, *What Should Teachers Do About Ebonics?*, *in* TONGUE TIED: THE LIVES OF MULTILINGUAL CHILDREN IN PUBLIC EDUCATION (Otto Santa Ana ed., 2004)).

[234] Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[235] *Id.* at 625–26.

[236] *Id.* at 643–44.

gious and moral sensibilities. The *Bellotti* decision required teenage women to assimilate to specific religious and cultural norms. While the Court noted that abortion decisions raise "profound moral and religious concerns,"[237] it emphasized that abortion is ultimately a medical decision with irreversible consequences.[238] Reading *Bellotti* in light of the Court's larger jurisprudence on children's rights suggests that the morality and religious concerns were aggravating but not dispositive factors.[239] Rather, the Court seems to have been swayed by the long-term consequences involved in medical decisionmaking. By emphasizing the irreversible nature of abortions, the Court invoked the pluralism principle's second prong.

Because the Court determined that teenagers facing abortion decisions are vulnerable to cognizable harms, the other two *Bellotti* factors—deference to parents and maturity—came into play. The Court upheld the government's deference to parents on whether their daughters should receive abortions, but maintained that daughters could trump that deference by proving to judges that they were mature.[240]

Veronica School District v. Acton[241] also supports the pluralism principle's second prong. In *Acton*, the Court upheld a school's policy of randomly testing student athletes for drug use.[242] The Court upheld the tests, over a Fourth Amendment challenge, by invoking a compelling government interest in preventing a cognizable harm: the long-term bodily consequences of drug use.[243] The Court invoked the harms of drug use to reduce children's constitutional rights, emphasizing at length not only the harmful physical and psychological consequences of drugs generally,[244] but also the enduring effects they have on children specifically.[245] The case did not implicate identity interests. However, by emphasizing that drug use is harmful because it binds children to long-term bodily consequences, the

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[237] *Id.* at 640.

[238] *Id.* at 640–42 (noting abortion's long-term consequences, medical nature, and legal implications).

[239] *See supra* Part III.B.1 (discussing cases in which the Court stated that cultural and moral norms alone are not sufficient reasons to reduce children's constitutional rights). In particular, recall that in *Carey v. Populations Servs. Int'l*, the Court stated that moral reasons were not enough to justify a New York law that limited the sale of contraceptives to minors. *See* 431 U.S. 678, 719 (1977).

[240] Pregnant teenagers could bypass the statute's parental consent component through a judicial hearing in which they proved themselves to be mature or proved that an abortion was in their best interest, regardless of their maturity. *Bellotti*, 443 U.S. at 643–44.

For a case similar to *Bellotti*, consider Parham v. J.R., 442 U.S. 584 (1979). In *Parham*, the Court upheld a statute that empowered parents to commit their children to psychiatric institutions against their children's will. *Id.* The Court reduced children's autonomy rights by granting power to their parents only after establishing that medical harms were central to the case. *Id.* at 609.

[241] 515 U.S. 646 (1995).

[242] *Id.*

[243] *Id.* at 660–65; *see also* New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (noting that schools have a legitimate interest in preventing drug use).

[244] *See Acton*, 515 U.S. at 662.

[245] *See id.* at 661.

Court lent support to the definition of "cognizable harm" in the pluralism principle's second prong.

Interestingly, the Court emphasized that the tests only looked for drugs and not diabetes, epilepsy, teen pregnancy, or other stigmatized medical statuses.[246] One element of the tests that did give the Court pause was the requirement that students give advance disclosure of prescription drug use, so as to avoid false positives.[247] Interestingly, the Court only paused when children's identity interests had the possibility of being unduly compromised—when the school may have "outed" students as belonging to a potentially stigmatized identity group based on medical status.[248] This attention to identity interests thus lends further support to the pluralism principle's first prong.

b. Harms to Others

The final type of equal rights cases arises when a government's efforts to protect children's identity interests are trumped by its efforts to prevent harms to others. *Tinker*, discussed above, made room for government intervention in these cases. *Tinker* held that students have freedom of expression in schools, but that schools may limit that freedom when a student's expression substantially disrupts class or when a student's expression impinges upon the rights of others to be free and let alone.[249] The first exception specifically prevents students from violating other students' interests in public education and in an educational environment free of physical disturbance.[250] The second exception is a broad provision that protects others' interests more generally.[251]

Another case on student expression, *Hazelwood School District v. Kuhlmeier*,[252] can also be read to support the pluralism principle's second prong. *Kuhlmeier* leaves room for interpretation that affects its relationship to

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[246] *See id.* at 658.

[247] *Id.* at 659–60. The Court ultimately decided that students could give advance disclosure in a confidential manner, thus mitigating privacy concerns. *Id.* at 660.

[248] Disclosing individuals' membership in stigmatized identity groups against their will can negatively influence those individuals' identity development. *See infra* Part IV.C (discussing the disclosure of individuals' sexual orientation); *see also* James P. Madigan, *Questioning the Coercive Effect of Self-Identifying Speech*, 87 Iowa L. Rev. 75 (2001).

[249] *See* Tinker v. Des Moines, 393 U.S. 503, 508–09, 514 (1969).

[250] Courts generally have stated that schools invoking the substantial disruption exception must show that there is a risk of physical disturbance, but courts have afforded schools varying degrees of discretion to forecast and define physical disturbances. *See generally* Royal C. Gardner, III, Case Note, *Protecting a School's Interest in Value Inculcation to the Detriment of Students' Free Expression Rights:* Bethel School District v. Fraser, 28 B.C. L. Rev. 595, 603–05 (1987); Kathleen Hart, Note, *Sticks and Stones and Shotguns at Schools: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 Ga. L. Rev. 1109, 1138 (2005).

[251] Cases almost never rest on the rights-of-others exception. *See infra* note 277. *But see* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

[252] 484 U.S. 260 (1988).

the pluralism principle. At best, *Kuhlmeier* lends full support to the pluralism principle; at worst, *Kuhlmeier* stands for the proposition that, when the line between student speech and the school's own speech is blurred, the school may define cognizable harms more capaciously than the pluralism principle does.

In *Kuhlmeier*, students challenged censorship of two articles in a student newspaper.[253] At the outset, the Court distinguished *Kuhlmeier* from *Tinker*. The Court reasoned that children have reduced First Amendment rights when they are speaking through a school-sponsored newspaper because the newspaper bears the school's imprimatur.[254] In *Tinker*, the student protest happened to be on school grounds, but the school did not sponsor the protest.[255] Because a school-sponsored newspaper bears the school's imprimatur, people may reasonably attribute opinions in the newspaper to the school, blurring the line between the speech of the student and that of the school.[256] As a result of this blurring, the Court declared that schools may censor school-sponsored speech "so long as their actions are reasonably related to legitimate pedagogical concerns."[257]

The holding in *Kuhlmeier* required the determination of what constitutes a legitimate pedagogical concern. The *Kuhlmeier* Court held that the first article, which addressed the impact of divorce on students, was censored for legitimate pedagogical reasons.[258] The school refused to publish the article partly because its author's inadequate research did not satisfy journalistic standards.[259] Indeed, requiring thorough and unbiased research, proper spelling, correct grammar, and the like seems to be directly related to pedagogy. Here, the difference between pure student speech and school-sponsored speech becomes clear: a school can refuse to publish an article in the school newspaper because of poor grammar or poor research, but it cannot ban an antiwar protest that happens to be on school grounds just because the protesters are speaking with poor grammar and making poorly researched arguments.

In addition, the school was concerned that the article on divorce compromised the privacy of some parents.[260] The school was concerned that the second article also threatened privacy interests. The second article, which addressed student pregnancies, did not adequately protect the ano-

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[253] *Id.* at 260.
[254] *See id.* at 270–71.
[255] *See id.*
[256] *See id.*
[257] *Id.* at 273.
[258] *See id.* at 273–75.
[259] The author of the article failed to interview a divorcée whom the author sharply criticized. *See id.* at 274–75. A professional newspaper editor and a former college journalism instructor both testified that the author's reporting did not meet journalistic standards. *See id.* at 275 n.8.
[260] *See id.* at 263, 275.

nymity of the students interviewed for the piece.[261] Thus, the school principal feared that the article would jeopardize the privacy interests of the students interviewed, their boyfriends, and their families.[262] Protecting those individuals' privacy interests constituted a legitimate pedagogical goal.[263] In fact, most of the Court's analysis was devoted to discussing this pedagogical goal of preventing harm to others' privacy.[264]

As analyzed thus far, the school's refusal to publish the two articles supports the pluralism principle. The censorship was not based on a desire to limit the underlying ideas. The censorship was motivated in part by the school's desire to prevent cognizable harms to others, in this case, threats to others' privacy. Insofar as poor research justified censorship, the censorship did not delegitimize the author's opinion, which may have been central to her identity. Censoring for poor research does not undermine identity interests.

A small component of the *Kuhlmeier* opinion may, however, conflict with the pluralism principle. In addition to discussing the pedagogical concerns already listed, the Court mentioned that the school was reasonable in its concern that the pregnancy article's discussion of sexual activity and birth control might be "inappropriate" for the school's freshmen and for the "even younger brothers and sisters" of students who may bring the school newspaper home.[265] It is unclear whether that concern was purely a moral concern, which would not amount to a cognizable harm under the pluralism principle, or rather was a concern that the article might encourage younger students and siblings, who may not be adequately informed about sex, to explore potentially irresponsible or dangerous sexual activity. The latter concern would amount to a cognizable harm under the pluralism principle.

By emphasizing the article's impact on younger students, the Court seemed to imply that the school was concerned about something more than mere moralism. The Court could have said that instilling a sense of morality was itself a legitimate pedagogical concern. Instead, it said that the article's impact on younger children was a legitimate concern. The age-specific nature of the Court's reasoning suggests that there was concern about more than just a moral harm.

C. The Principle and Children's Special Rights

The cases cited above concerning whether children should have the same rights as adults constitute the majority of the Court's children's rights

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[261] *See id.* at 274.

[262] *See id.*

[263] *See id.* at 274–75.

[264] At least one lower court has interpreted the protection of privacy as the dispositive factor in the Court's decision in *Kuhlmeier*. *See* Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780, 795 (E.D. Mich. 2003).

[265] *Kuhlmeier*, 484 U.S. at 274–75.

cases. However, in a small but growing number of cases, the Court has considered whether children should have greater constitutionally protected negative liberties than adults and has answered in the affirmative.

In *Bellotti v. Baird*, the Court noted that children's rights cannot be equated with those of adults.[266] When children's rights are not equal to those of adults, however, they need not be less. *Bellotti* reminds us that courts must apply constitutional principles "with sensitivity" to "children's vulnerability and their needs for concern, sympathy, and paternal attention."[267] That sensitivity may require courts to grant children greater, not lesser, negative liberties, which have been referred to as children's special rights.[268] Specifically, courts should be sensitive to children's vulnerability to the identity-related harms discussed in Part I.

Properly understood, *Brown v. Board of Education*[269] was the first case on children's special constitutional rights. In *Brown*, the Court explained that segregated schools inflicted identity-related harms specifically on children,[270] even if segregated schools were equal by tangible measures such as physical facilities.[271] Segregating children because of their race "generates a feeling of inferiority as to their status in the community that may affect [children's] hearts and minds in a way unlikely ever to be undone."[272] The implied inferiority resulting from racial segregation hinders racial minorities' identity development.[273] The Court held that segregated schools were unconstitutional, even if the schools were equal by tangible terms.[274]

In *Brown*, the Court emphasized that segregation was particularly harmful to children.[275] Accordingly, its explicit holding only spoke to the

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[266] 443 U.S. 622, 633 (1979).

[267] *Id.* at 633–36.

[268] *See supra* note 168.

[269] 347 U.S. 483 (1954).

[270] I should note that many commentators have criticized *Brown*'s use of social science literature to discuss developmental harms for being crude and problematic. *See, e.g.*, Garrick B. Pursley, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 154 n.8 (2003) (noting that this aspect of *Brown* "has generated an entire body of scholarship critical of such an approach"). These criticisms should not lead jurists to ignore insights from social science; rather, they should prompt greater interdisciplinary dialogue in order to improve the way jurists draw from social science. *See* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 445–54 (2006) (supporting the Court's more recent steps to integrate psychology "into constitutional decisionmaking"); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1005–08 (2006) (providing an example of an appropriate way in which the courts can utilize social science theories within their jurisprudence); Michael Heise, Brown v. Board of Education*, Footnote Eleven, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 307–18 (2005) (showing that *Brown* has fueled greater multidisciplinarity in court decisions and legal scholarship).

[271] *See* Brown, 347 U.S. at 493–94.

[272] *Id.* at 494.

[273] *See supra* notes 47–48 and accompanying text (discussing the relationship between racial stigma and sense of self).

[274] *Brown*, 347 U.S. at 493.

[275] *Id.* at 494 (noting that criticisms of racial segregation "apply with added force to

context of public schools, that is, the context of children.[276] Today, *Brown* is rarely thought of as a case of children's special rights because legislators and the Court have rightly extended *Brown*'s holding against racial segregation to adult contexts such as public transportation and other public accommodations.[277] When *Brown* was decided, however, it granted special rights to children because its explicit holding was so narrow.[278]

Surely, *Brown* was not about assimilation demands; it concerned quite the opposite. Nonetheless, the Court implicitly invoked identity interests to justify special rights for children. Reframed with regard to the pluralism principle, the Court determined that the state could not justify its socialization policy of segregated schools, because children's identity development was at risk and the state did not invoke any cognizable harm.

A second case worth mentioning is *Roper v. Simmons*, in which the Court held that children have a categorical right under the Eighth Amendment to be free from the death penalty, even though adults do not.[279] The pluralism principle does not apply to *Roper* because identity interests were not at stake; however, I highlight *Roper* because it created special rights for children and the *Roper* majority acknowledged that children's vulnerabilities led to that outcome. Children's "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[280]

As Emily Buss put it, courts should sometimes extend heightened constitutional protections to children in order to "maintain[ ] fidelity to the principles animating constitutional rights."[281] Together, *Brown* and *Roper* show that, after examining children's particular vulnerabilities, the Court has indeed extended special rights to children in order to satisfy constitutional principles.[282] Similarly, to the extent that constitutional provisions are meant to protect identity interests, they may necessitate special rights

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children in grade and high schools").

[276] *See* Michael Heise, *Litigated Learning and the Limits of Law*, 57 VAND. L. REV. 2417, 2419 (2004) [hereinafter Heise, *Litigated Learning*] (noting that *Brown* did not expressly overrule Plessy v. Ferguson, 163 U.S. 537 (1896)).

[277] *See* Lee v. Washington, 390 U.S. 333 (1968) (prison); Johnson v. Virginia, 373 U.S. 61 (1963) (courtroom); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (city park); Gayle v. Browder, 352 U.S. 903 (1956) (city bus); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf course); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beach and bathhouse); *see also* Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 247–48 (2006) (describing how Congress and federal courts extended desegregation to different contexts post-*Brown*).

[278] *See* Heise, *Litigated Learning*, *supra* note 276.

[279] 543 U.S. 551, 560 (2005).

[280] *Id.* at 553.

[281] Buss, *Allocating Developmental Control*, *supra* note 17, at 35.

[282] For an argument that staying true to constitutional principles requires granting children special rights, see generally Buss, *Constitutional Fidelity*, *supra* note 145, at 355.

for children because children are particularly vulnerable to threats against their identity development.

IV. Applying the Pluralism Principle: A Case Study on Gay and Lesbian Youth

As discussed in Part III, the pluralism principle already seems to drive the Supreme Court's existing children's rights jurisprudence. The Supreme Court and lower courts should explicitly recognize and implement the pluralism principle in future disputes regarding children's constitutional rights. The rights of gay and lesbian youth provide fertile ground for a case study on the pluralism principle's applicability to future disputes.

The rights of gay and lesbian youth have become a highly contested area of law. In the past year, nineteen state legislatures considered bills that proposed either expanding or limiting the rights of gay and lesbian youth in public schools.[283] Similarly, numerous courts across the country are wrestling with how to define the rights of gay and lesbian students.[284] Deliberations in legislatures and courthouses have produced inconsistent results.

In this Part, I discuss how courts should decide the constitutionality of state policies affecting the identity development and expression of gay and lesbian youth. The sketches in this Part are drawn in broad strokes because particular cases are highly fact specific. Nonetheless, these sketches illustrate how the pluralism principle should guide judicial analysis.

First, I discuss school policies that restrict students from joining noncurricular student groups that promote gay pride. I then address school policies that protect gay and lesbian youth from hate speech. Finally, I discuss the pending case of *C.N. v. Wolf*,[285] in which a high school suspended a lesbian student and outed her to her family because she hugged, kissed, and held hands with her girlfriend on school grounds.

A. Free Expression

Student expression related to sexual orientation has become a contentious issue. Most of the debate has focused on the rights of secondary students to participate in gay-straight alliances ("GSAs"), which are noncurricular student organizations dedicated to combating homophobia and fostering welcoming school environments for gays and lesbians.[286] Like

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[283] *See* Wyatt Buchanan, *Bills Nationwide Address Gays in Schools: 19 States Have More or Fewer Rights for Students on Agenda*, S.F. Chron., Apr. 1, 2006, at B1.

[284] *See* Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. Times, June 9, 2005, at A18.

[285] 410 F. Supp. 2d 894 (C.D. Cal. 2005).

[286] For background on GSAs, see Gay Straight Alliance Network, http://www.gsanet

other membership organizations, GSAs are expressive associations.[287] For many gay and lesbian youth, joining a GSA is an expression of gay pride. For many other students, joining a GSA is an expression of support for the gay community.

Most GSA-related litigation has involved the Equal Access Act ("EAA"), a federal nondiscrimination law governing noncurricular student organizations.[288] Based on the EAA, courts have held fairly consistently that, if a school allows any noncurricular student group to operate on school grounds, it may not bar students from forming GSAs.[289] In light of these developments, some policymakers now seek to limit students' access to GSAs by requiring students to obtain parental consent before participating.[290] These policymakers are writing new laws to require parental consent for participation in any noncurricular student group, so that there is no disparate treatment between GSAs and other student groups.[291]

In August 2006, Georgia became the first state to pass a statewide parental consent bill, which the governor signed into law.[292] According to Georgia's law, parents do not need to sign a new consent form every time their child joins a noncurricular organization; consent is assumed.[293] However, parents may opt out and withdraw consent in writing for specific clubs.[294]

As both a normative and legal matter, students in Georgia should be able to raise the pluralism principle as a shield, defending themselves against the rights reduction that the Georgia statute embodies. The principle protects students' ability to develop and express their identities. Identity development requires exploring goals and values associated with different social categories; participating in student organizations is one way to explore such identity-forming goals and values. As discussed above,

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work.org/ (last visited Sept. 14, 2006).

[287] For background on expressive associations and the First Amendment's protection of expressive association, see FARBER, *supra* note 231, at 233–39.

[288] According to the EAA, 20 U.S.C. §§ 4071–4074 (2000), if a public secondary school receiving federal funds allows students to form noncurricular student groups at all, it generally must allow students to form any noncurricular group they want, and it must treat all noncurricular groups equally. The EAA makes exceptions, allowing schools to treat particular groups differently when necessary to (1) maintain order and discipline, (2) protect the well-being of students and faculty, or (3) prevent material and substantial interference with the orderly conduct of educational activity. *Id.* §§ 4071(c)–(f); s*ee also* Sarah Orman, Note, *"Being Gay in Lubbock": The Equal Access Act in Caudillo*, 17 HASTINGS WOMEN'S L.J. 227, 231 (2006) (explaining exceptional circumstances under the EAA).

[289] *See* Orman, *supra* note 288. *But see* Caudillo v. Lubbock Indep. Sch. Dist., 311 F. Supp. 2d 550 (N.D. Tex. 2004) (finding that the sexual content in the group's discussions and online communications threatened students' well-being and the school's order and discipline).

[290] *See* Buchanan, *supra* note 283.

[291] *Id.*

[292] For background on the Georgia law, see Merritt Melancon, *Schools: Parents Not Keeping Kids Out of Activities*, ATHENS BANNER-HERALD, Aug. 28, 2006, at 1.

[293] *See id.*

[294] *See id.*

joining student organizations is also a form of expression. Parental consent is an unjustified hurdle that blocks students' exercise of identity interests. There is no categorical harm to joining student organizations, and thus a categorical rule burdening children's access to student organizations is unjustified.

Based on the psychological literature discussed above, it is desirable for schools to provide students with a safe space to explore their identities without first having to obtain parental permission. As James Marcia pointed out, adolescents who simply adopt their parents' values and goals without exploring alternatives often fail to develop stable, mature identities.[295] That is not to say that parental guidance is not an important part of children's identity development; it is simply not the only part. The pluralism principle balances parents' influences at home with a degree of freedom for adolescents to explore their identities in the public sphere, including in their schools.

As a legal matter, consent requirements like Georgia's do not run afoul of the EAA, but they do violate students' First Amendment rights. Some might argue, problematically, that there is no Supreme Court case law that is directly on point. *Kuhlmeier* does not apply because noncurricular student groups, unlike school-sponsored newspapers, constitute public forums.[296] *Fraser* also does not apply because noncurricular student groups do not categorically involve low-value obscene or indecent speech.[297] However, *Tinker* does provide some guidance.

Advocates of the Georgia law might argue that *Tinker* can be distinguished because the school in *Tinker* barred speech entirely, rather than requiring parental consent.[298] Indeed, advocates of the Georgia statute have noted that deference to parents has traditionally played a part in American law.[299] Moreover, *Bellotti* identified deference to parents as one of the factors in its three-factor test.[300]

With that said, the notion that *Tinker* does not control is flawed and Georgia's parental consent law should be found unconstitutional. Typically, the Court has limited children's rights by deferring to parents only after finding that children were vulnerable to harms, as was the case in *Bellotti*.[301] In the past, the Court's analysis of whether children are vulnerable to harm has comported with the pluralism principle. That is to say, the Court has rejected suggestions that nonconformity with the mainstream is intrinsically harmful and instead has protected children's ability to ex-

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[295] *See supra* note 87 and accompanying text.

[296] *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

[297] For a discussion of *Fraser*, see *supra* Part III.B.1.b.

[298] Students who join student organizations are "speaking" in the sense that they are expressing themselves through association. *See* FARBER, *supra* note 231, at 233–39.

[299] *See* Buchanan, *supra* note 283.

[300] *See* Bellotti v. Baird, 443 U.S. 622, 634 (1979).

[301] *See supra* notes 176–177 and accompanying text.

plore and express unpopular and unorthodox identities. The Court has only reduced children's rights upon a finding of the cognizable harms narrowly defined in Part II.C. Accordingly, Georgia's categorical requirement of parental consent is unconstitutional. Certainly, parents may wish to forbid their children from participating in after-school programs. They are free to take it upon themselves to withdraw their children from the programs. However, as discussed above, the state is not allowed to pass any laws to facilitate such parental wishes.[302]

B. Hate Speech

Another area of unsettled law involves hate speech in childhood contexts. First Amendment jurisprudence protects adults' right to espouse hate speech.[303] However, the Supreme Court has not yet addressed whether hate speech spoken by children to other children should be protected. As described below, lower courts have reached divergent conclusions. Under the pluralism principle, hate speech among children should not be protected because, even though the speech may further the speaker's sense of identity, it does so at the expense of her target's identity interests. Hate speech creates a cognizable harm by undermining other students' identity development.[304] In cases involving hate speech in schools, the state legitimately can require child speakers to put down the shield of the pluralism principle, because doing so prevents harms to others.

It is worth emphasizing at the outset that this Article only legitimizes regulation of children's hate speech in school contexts where children can harm other children. Children's constitutional rights have never been coextensive with those of adults. Accordingly, adults can have a right to espouse hate speech while children do not have a similar right.[305]

In *Harper v. Poway Unified School District*, the Ninth Circuit held that Poway High School did not violate a student's First Amendment rights when it stopped the student from publicly condemning homosexuality.[306] The school required the student to refrain from wearing T-shirts that amounted to "verbal assaults" against gay and lesbian students.[307] One T-shirt bore the slogans, "I WILL NOT ACCEPT WHAT GOD HAS CON-

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[302] *See supra* Part II.C.2.a.

[303] *See* FARBER, *supra* note 231, at 107–17.

[304] Hate speech in school denigrates other students as being inferior, which compromises those students' identity development. For a more detailed theory of the cognizable harms created by hate speech, see *supra* Part III.B.2.

[305] Outside the context of hate speech, the Court already has given the government discretion to shield children from other forms of speech, even when the speaker is an adult. *See* FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (rejecting a First Amendment challenge to the FCC's programming schedule, even though it relegated certain programs to late nights because the FCC deemed the programs' content unsuitable for children).

[306] 445 F.3d 1166, 1171 (2006).

[307] *See id.* at 1178.

DEMNED" and "HOMOSEXUALITY IS SHAMEFUL."[308] The second T-shirt bore the slogans, "BE ASHAMED, OUR SCHOOL HAS EMBRACED WHAT GOD HAS CONDEMNED" and "HOMOSEXUALITY IS SHAMEFUL."[309] The student wore these shirts in response to his high school's "Day of Silence," which was intended to "teach tolerance of others, particularly those of a different sexual orientation."[310] The Ninth Circuit held that the student's freedom of expression could be limited because his expression infringed the rights of other students "to be secure and let alone" and, thus, became unprotected speech under *Tinker*.[311]

Courts in other federal circuits have reached opposite conclusions in similar cases. Most directly oppositional is *Nixon v. Northern Local School District Board of Education*,[312] in which a high school disciplined a student for wearing a T-shirt bearing the slogans, "Homosexuality is a sin!," "Islam is a lie!," and "Abortion is murder!"[313] The district court held that the school violated the First Amendment because the student's T-shirt did not collide with the rights of other students to be secure and to be let alone.[314]

In another case, *Hansen v. Ann Arbor Public Schools*, a district court held that a school violated the First Amendment when it barred speakers from condemning homosexuality on a Diversity Week panel discussion.[315] Because the panel was a school-sponsored event, the court analyzed the case under *Kuhlmeier* instead of under *Tinker*.[316] In other words, the court held that the school could limit student speech if it was "reasonably related to legitimate pedagogical concerns."[317] The court acknowledged that "to provide a safe and supportive environment for gay and lesbian students" was a legitimate pedagogical goal.[318] However, the court determined that the school's actions were not reasonably related to that goal.[319]

The Ninth Circuit opinion in *Harper* comports with the pluralism principle, while the latter two cases do not. The Ninth Circuit's opinion made history; it was the first reported opinion to restrict student speech

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[308] *Id.* at 1171.

[309] *Id.*

[310] *Id.*

[311] *Id.* at 1178. The Eleventh Circuit has taken another approach to preventing hate speech. It has held that a school banning hate speech, in the form of the confederate flag, did not violate the First Amendment because *Fraser* permits schools to regulate civility in schools broadly. *See* Denno v. Sch. Bd. Volusia County, Fla., 218 F.3d 1267, 1275 (11th Cir. 2000). However, combating hate speech through *Fraser* is problematic because it stretches the reasoning in *Fraser* too far. *See supra* notes 213–222 and accompanying text.

[312] 383 F. Supp. 2d 965 (S.D. Ohio 2005).

[313] *Id.* at 967.

[314] *See id.* at 974. The court also held that the student's T-shirt did not cause substantial disruption under *Tinker* and was not impermissible under *Fraser*. *See id.* at 971, 973.

[315] 293 F. Supp. 2d 780, 792–803 (E.D. Mich. 2003).

[316] *Id.* at 793.

[317] *Id.* at 796.

[318] *Id.* at 802.

[319] *See id.*

by relying on *Tinker*'s rights-of-others exception.[320] The fact that the Ninth Circuit was trailblazing does not mean that its decision was wrong.

The Supreme Court has not explicitly elaborated what it means to interfere with the rights of other students "to be secure and to be let alone." To discern a meaning for those rights, jurists must look at children's rights jurisprudence generally, which I have demonstrated is guided by the pluralism principle.[321] As discussed above, assimilation demands inflict psychological wounds,[322] and hate speech is an assimilation demand because it sends the message that an individual will be despised and denied respect unless she abandons or changes her identity.[323] The Ninth Circuit was correct to conclude that students' right "to be free and to be let alone" includes a right to develop their identity free of psychological attacks in the form of assimilation demands.[324] This reasoning was used in *Harper*: "Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[325]

Giving schools the authority to protect students from hate speech grants them discretionary power, but that discretion is not atypical. Schools already have discretion when it comes to protecting children from other harms. For example, they have more leeway in determining what types of searches and seizures are "reasonable" in school contexts.[326] Schools are also afforded considerable discretion in determining whether student speech would lead to substantial disruption that justifies limiting student speech.[327] Hate speech regulations simply put identity-related wounds on par with physical wounds. Part I, which discussed the gravity of harm caused by assimilation demands, suggests that this parity makes sense, especially in childhood contexts. Children's psychological wounds can lead to consequences as grave as depression and suicide, wounds that may never heal. In contrast, a physical bruise, which schools already have discretion to prevent, might heal in a matter of weeks.

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[320] *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (noting that "the precise scope of *Tinker*'s 'interference with the rights of others' language is unclear"); Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) ("[T]he [c]ourt is not aware of a single decision that has focused on [the rights-of-others exception] in *Tinker* as the sole basis for upholding a school's regulation of student speech."); Cindy Lavorato & John Saunders, *Public High School Students, T-Shirts, and Free Speech: Untangling the Knots*, 209 EDUC. LAW REP. 1, 9 (2006) (noting that the rights-of-others exception in *Tinker* "has been analyzed very little").

[321] *See supra* Part III.B.1.

[322] *See supra* Part I.

[323] Above, I defined hate speech as statements sending the message that others "are to be despised and denied respect because of their identity." *See supra* notes 163–164 and accompanying text.

[324] *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006).

[325] *Id.*

[326] *See* New Jersey v. T.L.O., 469 U.S. 325, 741 (1985).

[327] *See supra* notes 249–250 and accompanying text.

The district courts in *Nixon* and *Hansen* erred because they did not take affronts to identity interests seriously. They both offered perfunctory and conclusory assertions that the psychological harms of hate speech do not affect students' security.[328] Both courts seemed to imply that only physical security matters.[329] However, such a determination would be at odds with both the pluralism principle and emerging patterns in Supreme Court jurisprudence.

C. Equal Protection and Privacy

Another current controversy is the pending case of high school student Charlene Nguon, who has brought an equal protection claim against her high school for suspending her after she and her girlfriend held hands, hugged, and kissed on school grounds.[330] According to Nguon, her school never punished opposite-sex couples for similar displays of affection.[331] In addition, Nguon claims that her school violated her constitutionally protected right to privacy by outing her to her parents without her consent.[332]

If children's rights were coextensive with adult's rights, Nguon's claims would be straightforward as a matter of law. In *Romer v. Evans*, the Supreme Court stated that animus towards gays and lesbians cannot be the rational basis for any government policy that treats gays and lesbians differently than straights.[333] If Nguon's school simply wanted to assimilate her to a heteronormative environment, that would amount to nothing more than mere animus toward gays and lesbians.[334] However, since children's rights and adult's rights are not coextensive, the school may try to argue that it may reduce children's rights to equal protection because it has an interest in instilling majoritarian community values at school.[335] Reading

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[328] *See* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005) ("[T]here is no evidence that [Nixon's] silent, passive expression of opinion interfered with the work of Sheridan Middle School or collided with the rights of other students to be let alone."); Hansen v. Ann Arbor Pub. Sch., 293 F. Supp. 2d 780, 802 (E.D. Mich. 2003) ("Defendants fail to show why gays would be threatened or be made less 'safe' by allowing the expression of . . . [a] viewpoint [condemning homosexuality].").

[329] A student in *Harper* similarly argued that only physical assault can infringe other students' right to be secure and let alone. *See Harper*, 445 F.3d at 1177. This narrow reading of the rights-of-others exception is problematic not only because psychological attacks produce deep wounds, but also because it would be redundant with *Tinker*'s other exception; physical assaults would almost always amount to "substantial disruptions" of school procedures.

[330] *See* C.N. v. Wolf, 410 F. Supp. 2d 894 (C.D. Cal. 2005) (granting in part and denying in part defendants' motion to dismiss); *see also* Mehta, *supra* note 8. As this Article goes to publication, the decision in this case is pending.

[331] *See C.N.*, 410 F. Supp. 2d at 896.

[332] *See id.*

[333] 517 U.S. 620, 632 (1996).

[334] *See* YOSHINO, *supra* note 5, at 69–79 (discussing similar scenarios in the employment context and concluding that pressure to conform to heterosexual norms derives from animus toward gays and lesbians).

[335] A well-known equal protection case on sexual orientation-based bullying in schools

children's rights jurisprudence in light of the pluralism principle suggests that the school should not prevail with this argument.

The Court has only reduced children's rights in cases where the state showed that children were vulnerable to harm.[336] Comporting with the pluralism principle, the Court has not viewed nonconformity as a cognizable harm.[337] Moreover, the Court has protected children's rights to explore various identities.[338] Thus, Nguon's school would have difficulty justifying its alleged disparate treatment by asserting that it sought to enforce students' conformity to specific social values.[339]

A more difficult question is whether Nguon has a valid privacy claim. Her case would be easier if she had been entirely closeted, but she had already disclosed her sexual orientation at school. At least one lower court has held that the right to privacy includes a right not to be outed by state actors.[340] However, in that case, there was no evidence that the outed party had ever disclosed his sexual orientation to anyone other than his apparent sexual partner.[341]

An adult who has disclosed her sexual orientation to as many people as Nguon had would likely have no valid privacy claim. The Supreme Court has recognized that individuals' constitutional right to privacy includes "the individual interest in avoiding disclosure of personal matters."[342] It has also recognized that "the fact that 'an event is not wholly private does not mean that an individual has no interest in limiting disclosure or dissemination of information.'"[343] However, adults' rights to privacy cease to exist once their "expectation of privacy" is no longer "reasonable."[344] Some

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offers little guidance because the school in that case did not allege that it had a legitimate state interest in discriminating on the basis of sexual orientation; it simply claimed that it did not discriminate in the first place. *See* Nabozny v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996).

[336] *See supra* Part III.B

[337] *See supra* Part III.B.1.

[338] *See supra* Part III.B.1.

[339] Indeed, the principal in *C.N. v. Wolf* has focused on disputing the facts of the case instead of making this rather weak legal argument. *See* Kelley-Anne Suarez, *Passions Fill O.C. Court in Trial Over Student Rights*, L.A. TIMES, Dec. 13, 2006, at 1.

[340] *See* Sterling v. Borough of Minersville, 232 F.3d 190, 192 (3d Cir. 2000) (holding that police officers violated a seventeen-year-old's right to privacy by threatening to disclose his sexual orientation to his parents—a threat which precipitated the boy's suicide); *see also* Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998) (noting that public disclosure of information regarding sexuality compromises one's privacy interests); Eastwood v. Dep't of Corr., 846 F.2d 627, 631 (10th Cir. 1988) (noting that the right to privacy "is implicated when an individual is forced to disclose information regarding personal sexual matters").

[341] *See Sterling*, 232 F.3d at 192–93.

[342] Whalen v. Roe, 429 U.S. 589, 599 (1997); *see also In re* Crawford, 194 F.3d 954, 958–59 (9th Cir. 1999); Barry v. City of New York, 712 F.2d 1554, 1559 (2d Cir. 1983); Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

[343] U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 770 (1989) (internal quotation marks omitted) (quoting Justice William Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures at the University of Kansas Law School (Sept. 26–27, 1974)).

[344] Although the Supreme Court has never applied the "reasonable expectation of pri-

commentators believe that, as a general rule, once an individual is bold enough to display same-sex affection in public, it is unreasonable for that person to expect people not to disclose her sexual orientation to others.[345] But children should not be—and have not been—subject to the same general rules developed for adult contexts.

The privacy rights of children should be distinguished from those of adults since a special right is sometimes necessary for childhood contexts.[346] To discern whether children require a different legal test, jurists must ask what principle is animating the right to privacy and whether furthering that principle in childhood contexts requires heightening children's privacy rights.[347] The common view among courts and commentators is that the principle of self-determination animates the right to privacy, specifically the right to informational privacy.[348] Taking self-determination seriously requires affording individuals the ability to determine when to disclose sensitive facts about themselves, facts that, upon disclosure, may inhibit individuals' ability to develop themselves. As Daniel Solove has pointed out, "disclosure [of sensitive personal information] can prevent people from engaging in activities that further their own self-development . . . . Disclosure can inhibit people from associating with others, impinging upon freedom of association, and can also destroy anonymity, which is sometimes critical for the promotion of free expression."[349]

To maintain fidelity to the notion of privacy rights, then, courts should extend special rights of privacy to children when it is necessary to protect their identity development.[350] Youth are particularly vulnerable to the harms of assimilation demands. By disclosing one's sexual orientation, an individual becomes more susceptible to assimilation demands. For example, youth who are outed to their parents may receive added pressure from their parents to cease exploring their sexual identity. Indeed, courts have noted

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vacy" test—which originated in Fourth Amendment jurisprudence—to informational privacy cases, numerous circuit courts have done so. *See, e.g.*, Walls v. City of Petersburg, 895 F.2d 188, 192 (4th Cir. 1990) ("Personal, private information in which an individual has a reasonable expectation of confidentiality is protected by one's constitutional right to privacy."); Kimberlin v. U.S. Dep't of Justice, 788 F.2d 434, 438 (7th Cir. 1986) ("Whether or not Kimberlin has a privacy interest in the information . . . depends upon whether he has a reasonable expectation of privacy in the information.").

[345] *See* Tamar Lewin, *Openly Gay Student's Lawsuit Over Privacy Will Proceed*, N.Y. Times, Dec. 2, 2005, at A21; *cf.* Katz v. United States, 389 U.S. 347, 351 (1967) (opining in a Fourth Amendment case that "[w]hat a person knowingly exposes to the public" is no longer subject to constitutionally based privacy protections).

[346] *See supra* note 281 and accompanying text.

[347] *See supra* note 281 and accompanying text.

[348] *See* Neil M. Richards, *The Information Privacy Law Project*, 94 Geo. L.J. 1087, 1095–120 (2006); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. Pa. L. Rev. 477 (2006).

[349] Solove, *supra* note 348, at 532.

[350] *Cf.* James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 Hastings L.J. 645, 698–704 (1985) (proposing a similar Fourth Amendment test, under which privacy rights are protected on the basis of "needs" instead of "expectations").

that disclosure of information regarding one's sexual identity can greatly alter one's relationship with others, including one's family.[351]

Because children are uniquely vulnerable to the harms of being outed, there should be a categorical rule unique to children: the government should not out gay and lesbian youth unless the government shows that doing so prevents cognizable harms. For example, a public school might legitimately out a lesbian student to her parents if doing so was part of a plan to intervene in the student's imminent suicide attempt. The government should never assume that a child's being out in one social context (school) means that the same child is out in another social context (home); such assumptions do not comport with research showing that youth are often out to friends but not to family.[352] A special categorical rule for children would not be novel. In contexts such as capital punishment, the state already has extended special categorical protections to children.[353] Moreover, special privacy rights for children comport with both the purpose of privacy rights and the pluralism principle.

In terms of implementation, the categorical rule for children would be easier to administer than the privacy test for adults. The inquiry for adults' informational privacy involves two difficult questions: is the relevant information sensitive enough to trigger privacy interests and, if so, has the adult relinquished her reasonable expectation of privacy by beginning a process of disclosure? Under the categorical rule for children, the first question is the only important one, except in rare cases where the state has an interest in preventing cognizable harms.

One might contend that the categorical rule is nonetheless difficult to implement because a school may need to disclose a student's sexual orientation to explain a rule infraction to parents. For example, if Charlene and her girlfriend violated a globally enforced rule against kissing (which did not implicate equal protection), how should the school explain the infraction to Charlene's parents? If the rule were generally against kissing, there would be no need to disclose information about Charlene's partner's sex,[354] just as there would be no need to disclose the partner's race or religion. Quite simply, there will rarely be a need to disclose sexual orientation. So long as a school rule does not hinge on sexual orientation, sexual

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[351] *See supra* note 340.

[352] *See* SAVIN-WILLIAMS, *supra* note 107; *see also* Todd Brower, *Of Courts and Closets: A Doctrinal and Empirical Analysis of Lesbian and Gay Identity in Courts*, 38 SAN DIEGO L. REV. 565, 567–68 (2001).

[353] *See* Roper v. Simmons, 543 U.S. 551 (2005).

[354] Attorneys for Charlene Nguon made this point during oral arguments. *See* Suarez, *supra* note 339. Certainly, parents may be curious as to whom their child was kissing. They should be encouraged to discuss those details with their child. Consider this analogy: if a parent knows that her daughter chronicles her romantic life in a key-lock diary that she keeps in her school locker, the parent should not be able to demand that the school confiscate the diary, break the lock, and disclose her daughter's secrets. Schools should not be allowed to serve as an instrument used by parents to learn about their children's secrets, unless the child is at risk of cognizable harm.

orientation does not need to be disclosed; meanwhile, any rule that hinges on sexual orientation would implicate equal protection.

CONCLUSION

Assimilation demands are harmful to everyone, but they are particularly harmful to children. Therefore, the pluralism principle proposed in this Article carries normative weight on its own. The fact that Supreme Court jurisprudence supports the pluralism principle only furthers the principle's persuasiveness.

The pluralism principle has been lurking right beneath the surface of the Court's opinions on children's rights. Going forward, courts should implement the principle in a more self-aware, explicit, and systematic manner.

This Article only applied the pluralism principle to current controversies regarding the rights of gay and lesbian youth. The principle can also guide how courts address issues involving other social categories. For example, ethnic minority youth have unsuccessfully argued that schools' grooming codes violated their First Amendment right to express ethnic identity.[355] Others have argued unsuccessfully that students should be protected against hate speech targeting religious minorities.[356] This Article aims to prompt policymakers, courts, and other commentators to reconsider the reasoning behind those cases and to approach similar cases in the future with the pluralism principle in mind.

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[355] *See* New Rider v. Bd. of Educ., 480 F.2d 693 (10th Cir. 1973) (rejecting a First Amendment challenge to a school grooming code with a hair-length requirement that prohibited Pawnee students from wearing traditional Native American hairstyles).

[356] *See, e.g.*, Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) (holding that a school violated a student's First Amendment rights by prohibiting the student from wearing to school a T-shirt that denigrated homosexuality and Islam).