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OUTED AT SCHOOL: STUDENT PRIVACY RIGHTS AND PREVENTING UNWANTED DISCLOSURES OF SEXUAL ORIENTATION

Evan Ettinghoff∗

Lesbian, gay, bisexual, transgender, and questioning (LGBTQ) individuals often identify their sexual orientation during their formative school years. During this time, they make important decisions about whether they will come out, to whom, and under what circumstances. However, some school officials have taken matters into their own hands, disclosing information about a student's sexual orientation to parents or family members without the student's permission, and without considering the student's well-being and potential consequences at home. This Note explores a student's constitutional right to privacy in their sexual orientation. It begins by examining the unique problems LGBTQ youth encounter while developing and pursuing their sexual orientation, and the potential dangers of being out at school among peers and at home with potentially rejecting parents. It then traces the Supreme Court's development of the constitutional right to privacy. Although the Supreme Court has not addressed privacy as it relates to unwanted disclosures of sexual orientation, recent lower court decisions suggest that minors and students have a privacy right in information about their sexual orientation. As this privacy right emerges, schools need to take the initiative to prevent unwanted disclosures. This Note concludes by addressing some common scenarios in which an unwanted disclosure could take place, and providing suggestions to implement changes in school policies, procedures, and training.

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I. INTRODUCTION

Charlene Nguon was a junior without a disciplinary record and in the top 5 percent of her class at Santiago High School in Orange County, California, when she was suspended for showing affection toward her girlfriend on campus.[1] The principal called a meeting with Nguon's mother and revealed Nguon's sexual orientation without her permission.[2] Nguon decided to transfer to another school midway through the second semester of the 2004–05 school year.[3] When the American Civil Liberties Union (ACLU) brought a lawsuit against the school district on her behalf, Nguon was allowed to return to Santiago for her senior year.[4] However, the ramifications of the principal revealing her sexual orientation to her mother took an emotional and psychological toll on her.[5] She considered suicide her senior year, evidenced by self-inflicted scars on her arm.[6] Her grades suffered a sharp decline, and the University of California at Santa Barbara withdrew its offer of admission.[7]

Nguon is just one of many students who struggle everyday with expressing their identity and identifying their sexual orientation during their formative school years.[8] Outing, having a person's sexual orientation publicly revealed without regard to whether that person is willing to have such information revealed,[9] exacerbates the

1. Tamar Lewin, *Openly Gay Student's Lawsuit over Privacy Will Proceed*, N.Y. TIMES, (Dec. 2, 2005), http://www.nytimes.com/2005/12/02/education/02schools.html.

2. *Id.*

3. Nguon v. Wolf, 517 F. Supp. 2d 1177, 1183–84 (C.D. Cal. 2007).

4. *See Federal Judge Rules That High Schools Cannot Out Lesbian and Gay Students*, ACLU (Dec. 1, 2005), http://www.aclu.org/content/federal-judge-rules-high-schools-cannot-out-lesbian-and-gay-students.

5. *Nguon*, 517 F. Supp. 2d at 1199.

6. *Id.*

7. *Id.* at 1180.

8. *See, e.g.*, Stephen T. Russell & Kara Joyner, *Adolescent Sexual Orientation and Suicide Risk: Evidence from a National Study*, 91 AM. J. OF PUB. HEALTH 1276, 1276–81 (2001), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1446760/pdf/0911276.pdf (finding that adolescents in grades seven through twelve who had same-sex romantic attractions or relationships were more likely to have attempted suicide than their heterosexual peers); Benoit Denizet-Lewis, *Coming Out in Middle School*, N.Y. TIMES, Sept. 27, 2009, at MM36, *available at* http://www.nytimes.com/2009/09/27/magazine/27out-t.html?pagewanted=all; Shelley Emling, *"Oddly Normal": John Schwartz Tells Poignant Tale of What Happened When His Teen Son Came Out*, HUFFINGTON POST (Nov. 12, 2012), http://www.huffingtonpost.com/2012/11/14/oddly-normal-john-schwartz_n_2124638.html.

9. RICHARD D. MOHR, GAY IDEAS 11 (1992).

struggle that students like Nguon face. Coming out is an intensely personal decision, and it accompanies years of discovering, understanding, and being comfortable with one's own sexual identity.[10] Forcing disclosure of sexual orientation not only interferes with an individual's privacy and autonomy but it potentially threatens that individual's well-being and safety.[11] However, the legal privacy rights for students like Nguon often have been obscured by a predominance of legal discourse focused on bullying[12] and free speech.[13] Nguon's story and others like it demonstrate that the right to be out should also allow for a concomitant right to not be out. Privacy is an essential right for lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ)[14] youth, and school policies need to reflect this.

This Note argues that emerging law guarantees LGBTQ students a right to privacy regarding the confidentiality of their sexual orientation. The government cannot interfere with this right, save for a compelling state interest, which, this Note argues, should only be to protect the student's health, safety, or welfare. Legislation and school policy, such as anti-bullying policies, should include guidelines that recognize a student's right to privacy concerning his or her sexual orientation. Schools should modify their parental notification policies, disciplinary procedures, and employee training to ensure

10. "Coming out" is the term used to describe the experience and process by which a person identifies himself or herself as gay, lesbian, bisexual, or transgender to friends, family, and others. DEANA F. MORROW & LORI MESSINGER, SEXUAL ORIENTATION AND GENDER EXPRESSION IN SOCIAL WORK PRACTICE: WORKING WITH GAY, LESBIAN, BISEXUAL, AND TRANSGENDER PEOPLE 130 (2006).

11. *Id.* at 140.

12. *See, e.g.*, R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58 (2011).

13. In 2009, several law review articles discussed a trend in school bans on T-shirts with pro-gay or anti-gay messages and focused on several courts' analyses of First Amendment rights. *See, e.g.*, Michael Kent Curtis, *Be Careful What You Wish For: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431 (2009); Julia Goode, Gillman v. School Board for Holmes County*: A Student's Challenge to Her High School's Ban on Pro-Gay Messages*, 18 LAW & SEXUALITY 209 (2009).

14. The acronym LGBTQ will be used throughout this Note to refer collectively to individuals who identify as lesbian, gay, bisexual, transgender, questioning, or queer. Lesbian, gay, and bisexual describe individuals who have emotional, romantic, or sexual feelings toward people of the same sex or both sexes. Transgender is a term to describe an individual who does not identify with his or her biological sex. Queer refers to individuals who either do not want to identify with any particular label or do not feel like they fit into the societal norms. Questioning refers to individuals who are still in the process of discovering their sexual orientation. Not all of the research referenced in this Note uses the same acronym.

that LGBTQ students are not outed in ways that may be detrimental to their well-being and lives.

Part II of this Note briefly traces the historical context of outing in the LGBTQ community, from the beginning of the Gay Liberation movement to the current debate on the morality of outing. Part III illustrates how outing is particularly important in the context of LGBTQ youth by examining the unique problems they encounter with developing and pursuing their sexual orientation. Part IV discusses the current Supreme Court cases on the right to privacy and the extent to which the Court has addressed sexual orientation and privacy. Part IV also analyzes lower court decisions, which have begun to recognize an emerging right to privacy for unwanted disclosures of sexual orientation, including two recent cases focused exclusively on outing in schools.[15] Part V demonstrates four common scenarios in which school policies and procedures violate student privacy rights and provides general solutions that schools can implement to prevent unwanted disclosures of sexual orientation. Part VI concludes with a summary of the current state of privacy law and a call for awareness of an emerging right among LGBTQ students.

II. THE GAY LIBERATION MOVEMENT AND THE MORALITY OF OUTING[16]

Before delving into the potential problems of outing in the school context, it is important to recognize how outing has historically shaped the gay community in positive ways. Before the gay rights movement, homosexuality was predominantly viewed as a crime and a medical illness.[17] LGBTQ individuals faced a choice to engage in one of two norms: passing (refusing to identify as homosexual) or conversion (obligatory heterosexuality).[18] The proverbial closet was the safest place to be.[19] All of this changed

15. *See* Wyatt v. Kilgore Indep. Sch. Dist., No. 6:10-CV-674, 2011 WL 6016467 (E.D. Tex. Nov. 30, 2011) *rev'd in part, vacated in part sub nom.* Wyatt v. Fletcher, 718 F.3d 496 (5th Cir. 2013); Nguon v. Wolf, 517 F. Supp. 2d 1177 (C.D. Cal. 2007).

16. This Note neither engages in a debate about whether it is good or bad for individuals to stay closeted nor does it discourage LGBTQ students from coming out. Instead, this Note focuses on how school officials should recognize the unique situation LGBTQ students face with coming out at a young age and how school policies should reflect outing's potential harms.

17. *See* Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 814 (2002).

18. *Id.*

19. *Id.*

with the birth of the gay rights movement, which began in 1969 when police officers raided Stonewall Inn, a gay bar in New York, and were met with unprecedented resistance.[20] Hundreds of gay men and women rioted in the streets shouting "Gay Power!" and made themselves visible in ways they never had done before.[21] Many groups proclaimed the necessity of coming out of the closet as the first essential step toward freedom.[22]

Since Stonewall, the gay community has become polarized on the morality of outing.[23] Anti-outing individuals see involuntary outing as harmful to the gay community—an affront to individual autonomy and solidarity.[24] They view coming out as a deeply personal decision that reflects courage and conviction.[25] Other individuals believe that outing can be justified as a moral consequence of living and that privacy is often mistaken for secrecy.[26] They argue that there is no privacy interest in making public someone's sexual orientation because secrets do not invoke the protection of a right.[27]

In some situations, outing can have benefits. For instance, many believe that public and political figures should be outed, particularly when their actions in their official capacities harm the LGBTQ community.[28] In the early 1990s, the New York City magazine *OutWeek* emerged, publishing weekly articles on gay and lesbian issues.[29] Michelangelo Signorile, a gay journalist and AIDS activist, published a series of controversial articles that exposed public figures' homosexuality, such as the famous tycoon Malcolm Forbes.[30] Despite being immensely controversial for its practice of outing notable figures, *OutWeek* was one of the most influential magazines, helping bring important LGBTQ issues into the mainstream.[31] Most recently, the 2010 documentary film *Outrage*

20. *Id.* at 815.
21. *Id.*
22. *See id.* at 819.
23. *See id.* at 821.
24. *See id.*
25. *Id.*
26. *See* MOHR, *supra* note 9, at 11–16.
27. *Id.* at 13. Mohr argues that secrets encompass more than what is private, and the law cannot protect individuals who intentionally conceal facts about their lives. *Id.* at 11–14.
28. *See id.* at 22.
29. Yoshino, *supra* note 17, at 824.
30. *Id.*
31. *See id.*

identified closeted politicians and discussed their hypocrisy in promoting anti-gay legislation.[32] The film goes beyond gossip and rumor; it reveals how closeted politicians can have power to affect people's lives: by voting against hate-crime legislation, gay marriage, and funding for HIV/AIDS research.[33]

Gay activists often see outing as a source of power in numbers for the gay rights movement and express their wish that "all gays would turn blue."[34] They believe that if every individual knew someone who was part of the LGBTQ community, everyone could understand and relate to the community's struggle to deal with discrimination.[35] Furthermore, these activists argue that the closet contributes to the ignorance of homosexuality and encourages an agreement between gays and straights that perpetuates anti-gay sentiments.[36] The former "Don't Ask, Don't Tell" policy (DADT) is a prime example of this.[37] The policy allowed homosexuals to serve in the military as long as they remained closeted and discreet about their sexual orientation, effectually forcing homosexuals to stay closeted to serve in the military.[38] While the policy supposedly lifted the ban on gays in the military, it did so at the price of perpetuating homophobic attitudes and increasing anti-gay harassment and violence.[39] Once President Obama repealed DADT, studies showed that greater openness and honesty increased trust and cohesion among troops.[40] Thus, the disparity between attitudes toward LGBTQ troops in the military before and after DADT's repeal tends to support the position that the closet perpetuates homophobia.[41]

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32. *White-Hot "Outrage" over the Capitol Hill Closet*, NPR NEWS (May 8, 2009, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=103875747.

33. *Id.*

34. Yoshino, *supra* note 17, at 821. Unlike racial minorities, LGBTQ individuals do not possess any external marks that identify their sexual orientations. Thus, societal recognition of the LGBTQ community is impossible with the exception of some stereotypical characteristics or self-identification. *See id.* at 820–21.

35. *See id.*

36. *Id.* at 822.

37. *See* Emily Hecht, *Debating the Ban: The Past, Present, and Future of Don't Ask, Don't Tell*, 246-JUN N.J. LAW 51, 51 (June 2007).

38. *Id.*

39. *Id.* at 54.

40. AARON BELKINS ET AL., PALM CENTER, ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL'S IMPACT ON MILITARY READINESS 3–4 (2012), *available at* http://www.palmcenter.org/files/One%20Year%20Out_0.pdf.

41. When the president signed the repeal of DADT, he remarked, "For we are not a nation that says, 'don't ask, don't tell.' We are a nation that says, 'Out of many, we are one.'" President

Just as being out in the military has contributed positively to troop morale, coming out at a young age during school can benefit LGBTQ students.[42] Statistics have shown that LGBTQ students who are out to other students or school staff demonstrate higher levels of school belonging, higher levels of self-esteem, and lower levels of depression.[43] Likewise, students who are out contribute to a more diverse classroom setting, and knowing an LGBTQ person leads to empathy and understanding from a young age.[44]

The history of the gay rights movement and the current debate over outing is included here merely to contextualize and demonstrate the limited scope of privacy issues among LGBTQ students. This Note does not address privacy rights with regard to the sexual orientation of military personnel, political figures, or even adults in general, because the situations they face can differ greatly from those of youth in schools. Without aiming to encourage or discourage youth from coming out at school or to their families, this Note merely illustrates the complexity of privacy issues among LGBTQ students and the unique problems they face with being open about their sexuality at young ages.

III. THE UNIQUE PROBLEMS LGBTQ YOUTH ENCOUNTER WHILE DEVELOPING AND PURSUING THEIR SEXUAL ORIENTATION

Despite the benefits of outing, LGBTQ youth face unique predicaments in developing their sexual identity that are not present in the context of LGBTQ adults.[45] Children face significant hurdles to forming a strong sexual identity because they are more vulnerable to assimilation demands.[46] Since heterosexuality is the norm in our society, straight youth have an easier time achieving a sense of

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Barack Obama, Remarks by the President and Vice President at Signing of the Don't Ask, Don't Tell Repeal Act of 2010 (Dec. 22, 2010), *available at* http://www.whitehouse.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a.

42. *See* JOSEPH G. KOSCIW ET AL., GAY, LESBIAN, & STRAIGHT EDUC. NETWORK , THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 43 (Sept. 5, 2012), *available at* http://glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf (reporting that "students who were out to their peers and/or school staff reported better psychological well-being").

43. *Id.*

44. *Id.* at 60.

45. Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 369–72 (2007).

46. *Id.* at 318.

sexual identity than LGBTQ youth.[47] Further, adults often discourage youth from exploring homosexual conduct, making it more difficult for LGBTQ youth to ascertain their sexual goals and identity values.[48]

A recent Human Rights Campaign study asked LGBT and non-LGBT youth to describe the most important problem facing them.[49] The top three problems for LGBT youth were (1) non-accepting families, (2) school/bullying problems, and (3) fear of being out or open with their sexuality.[50] In contrast, non-LGBT youth identified as their top three problems (1) classes/exams/grades, (2) college/career, and (3) financial pressures related to college or job.[51]

Although LGBTQ students such as Charlene Nguon often find school to be a safe space to be open about their sexuality or to be in an intimate relationship, they may not be out in other contexts, such as with their families.[52] As illustrated by the study mentioned above,[53] not all families accept LGBTQ children.[54] A 2006 study by the National Gay and Lesbian Task Force Policy Institute and the National Coalition for the Homeless showed that "50 percent of gay teens experienced a negative reaction from their parents when they came out and 26 percent were kicked out of their homes."[55] Almost all organizations providing services to homeless youth (including drop-in centers that provide information and services, street outreach programs, and housing programs) serve LGBTQ children and teens, who make up approximately 40 percent of all homeless youth.[56]

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47. *Id.* at 332.

48. *Id.*

49. HUMAN RIGHTS CAMPAIGN, GROWING UP LGBT IN AMERICA: KEY FINDINGS, *available at* http://www.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf.

50. *Id.* at 2.

51. *Id.*

52. Yoshino, *supra* note 17, at 820–21.

53. *See* HUMAN RIGHTS CAMPAIGN, *supra* note 49.

54. *See* NICHOLAS RAY, NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST. & THE NAT'L COAL. FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 2 (2006), *available at* http://www.thetaskforce.org/downloads/HomelessYouth.pdf.

55. *Id.*

56. LAURA E. DURSO & GARY J. GATES, WILLIAMS INST. WITH TRUE COLORS FUND & PALETTE FUND, SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICES PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 3, *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf.

Sixty-eight percent of these youth report experience with family rejection, and 54 percent experience abuse in their families.[57] Our society has clearly not reached a point of tolerance of the LGBTQ community that makes it safe for all LGBTQ children to be out with their families.

On the other hand, the situation that LGBTQ students face at school can also be tenuous. Many LGBTQ youth are subjected to hostile school environments, in which anti-gay bullying has become a national problem.[58] In 2010, several LGBTQ junior high and high school students' suicides generated significant attention to the problem of anti-gay bullying.[59] The Gay, Lesbian and Straight Education Network (GLSEN) conducted the National School Climate Survey (the "GLSEN Survey"), which showed that in 2011, 81.9 percent of LGBTQ students in grades 6 through 12 were verbally harassed (called names or threatened) and 38.3 percent were physically harassed (pushed or shoved) because of their sexual orientation.[60] The study found that most students did not report the incident to school staff because they believed little or no action would be taken or because they believed the situation would become worse.[61] Thus, school may even be a more unwelcoming environment than home.

Because of the potentially hostile environment waiting for openly out LGBTQ individuals, the fear of being out is pervasive in the LGBTQ community.[62] The average age of identification of sexual orientation is about age fourteen.[63] However, the process of developing comfort with one's sexual identity and committing to

57. *Id.* at 4.

58. *See* R. Kent Piacenti, *Toward a Meaningful Response to the Problem of Anti-Gay Bullying in American Public Schools*, 19 VA. J. SOC. POL'Y & L. 58, 59 (2011) (noting the elevated rates of suicide amongst LGBT students across the country).

59. Three suicides took place in 2010. Thirteen-year-old Seth Walsh hanged himself outside his home in Tehachapi, California, after he was teased and bullied for years for being gay. *Id.* Fifteen-year-old Billy Lucas hanged himself in Indiana after constant abuse from his classmates. *Id.* at 59–60. Thirteen-year-old Asher Brown shot himself in the head in Houston, Texas, the same day he told his stepfather he was gay. *Id.* at 60.

60. KOSCIW ET AL., *supra* note 42, at xiv.

61. *Id.* at xv.

62. STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS, at xiv (2010).

63. Anthony R. D'Augelli et al., *Gender Atypicality and Sexual Orientation Development Among Lesbian, Gay, and Bisexual Youth: Prevalence, Sex Differences, and Parental Responses*, 12 J. GAY & LESBIAN MENTAL HEALTH 121, 129 tbl.1 (2008).

coming out differ vastly for each individual.[64] The Trevor Project, an LGBT youth counseling organization, recently conducted a survey of teenagers all over the country asking them to tell their stories about coming out.[65] The responses showed that many youth only come out to themselves or to selected groups of people, such as trusted friends or family members.[66] This is often termed the "selective closet," based on the idea that individuals can be openly gay to pro-gay individuals around whom they feel comfortable while remaining closeted to anti-gay individuals.[67] Others come out to their entire families or communities, only to realize they lack adequate support.[68] Finally, for some, denial overcomes identity, and they remain closeted for their entire life.[69]

The fear of being out is not confined to school grounds and does not end with graduation. Cyber-bullying—attacks that include electronic distribution of humiliating photos, information, or harassment—has become an extreme concern for LGBTQ youth.[70] An Iowa State University study found that 54 percent of youth reported being cyber-bullied about their sexual identities or identification with LGBT people.[71] The results of this type of bullying can be fatal, as evidenced by the 2010 suicide of Tyler Clementi, a student at Rutgers University who committed suicide after his roommate secretly used a webcam to stream his romantic encounter with another male student over the Internet.[72] As more and more LGBTQ youth gain access to the Internet through smart phones and use websites such as Facebook, Instagram, and Twitter, they will likely encounter increased harassment and bullying in the form of electronic communication.[73]

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64. BIEGEL, *supra* note 62, at xiv (explaining that coming out and being out can have developmental, social-responsibility, political, and religious components).

65. Sarah Kramer, *"Coming Out": Gay Teenagers, in Their Own Words*, N.Y. TIMES (May 20, 2011), http://www.nytimes.com/2011/05/23/us/23out.html.

66. *Id.*

67. Yoshino, *supra* note 17, at 820–21.

68. Kramer, *supra* note 65.

69. BIEGEL, *supra* note 62, at xv.

70. Elizabeth Armstrong Moore, *Cyberbullying Hits LGBTQ Youth Especially Hard*, CNET NEWS (Mar. 9, 2010, 3:40 PM), http://news.cnet.com/8301-27083_3-10466220-247.html.

71. *Id.*

72. Lisa Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010, at A1.

73. *See, e.g.*, Stephen Hull, *Facebook and Twitter Bullying Is at "Epidemic" Levels Says Leading Charity*, HUFFINGTON POST UK (Sept. 26, 2011), http://www.huffingtonpost.co.uk

Violence and hate crimes also plague the minds of LGBTQ youth. In 1998, the murder of Matthew Shepard, a twenty-one-year-old student at the University of Wyoming, became a horrific example of the hate that, even to this day, instills fear in many LGBTQ youth. Two boys met Shepard at a bar, pretended to be gay, and then lured him into a truck where they brutally whipped and beat him.[74] They tied him to a fence and left him to die in near-freezing temperatures.[75] Incidents like this are not isolated. The FBI reported that in 2010 almost 20 percent of hate crimes were motivated by a sexual orientation bias.[76] Discrimination against LGBTQ individuals is also prevalent in the workplace,[77] at which only two-thirds of LGBT employees report being out to their coworkers.[78] In spite of significant political and legal advances in the LGBTQ community,[79] the feeling of isolation and exclusion is inevitable for LGBTQ youth.

LGBT students from rural areas likely face even more problems with coming out than those from urban areas.[80] Rural areas tend to be more ideologically conservative, and religious institutions often dominate social norms and expectations.[81] Furthermore, a culture of sameness emerges in rural areas because of minimal access to diverse lifestyles, educational information, and modern technology.[82] Unlike individuals in more highly populated urban areas, who enjoy a sense of anonymity, rural LGBT individuals may avoid coming out because they fear hyper-visibility and heightened isolation.[83] Despite the belief that all sexual minorities leave their rural hometowns to

/2011/09/26/facebook-and-twitter-bull_n_980854.html.

74. SIMON GAGE ET AL., QUEER 92 (2002).

75. *Id.*

76. U.S. DEP'T OF JUSTICE: FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2010 1 (2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims.pdf.

77. *See* Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012).

78. *Id.* at 723.

79. For example, in 2009 President Obama signed the Matthew Shepard & James Byrd Jr. Hate Crime Prevention Act, which creates a federal hate crime for violence based on sexual orientation and gender identity. Rachel Weiner, *Hate Crimes Bill Signed Into Law 11 Years After Matthew Shepard's Death*, HUFFINGTON POST (Mar. 18, 2010, 6:12 AM), http://www.huffingtonpost.com/2009/10/28/hate-crimes-bill-to-be-si_n_336883.html.

80. *See* Luke Boso, *Urban Bias, Rural Sexual Minorities, and Courts' Role in Addressing Discrimination*, 60 UCLA L. REV. 562 (2013).

81. *Id.* at 572.

82. *Id.* at 573-74.

83. *See id.* at 599.

live in urban cities, many prefer to stay because of economic realities, family attachments, or lifestyle preferences.[84] Thus, the decision to come out also depends on location and sociocultural factors.

Youth face extraordinary pressures at home, at school, on the Internet, and in their own minds as they try to conceptualize and develop their sexual identities. LGBTQ youth internalize these social pressures in different ways, becoming comfortable with their sexual orientations at different stages in their lives.[85] When LGBTQ youth are inadvertently outed, not only are they subjected to potential dangers at home and at school but their autonomy and privacy is invaded. Accordingly, the law needs to guarantee them a right to privacy against disclosure of their sexual orientations. However, as the next part illustrates, while the current law guarantees LGBTQ individuals some constitutional protections for their privacy, it does not clearly protect against unwanted disclosures of their sexual orientations.

IV. THE LEGAL LANDSCAPE FOR UNWANTED DISCLOSURES OF SEXUAL ORIENTATION

The Supreme Court has yet to expressly recognize a right protecting against unwanted disclosure of sexual orientation. However, in recent years the Court has expanded the constitutional right to privacy to include the right of autonomy in decision-making and confidentiality of information.[86] As lower court decisions suggest, there is an emerging recognition of privacy rights against unwanted disclosure of sexual orientation, especially in school settings.[87] However, with the Supreme Court's hesitance to recognize new privacy rights and the deference courts often give to school officials,[88] this area of the law remains unclear. In the face of this

84. *Id.* at 565-66.

85. BIEGEL, *supra* note 62, at xv.

86. *See* Whalen v. Roe, 429 U.S. 589 (1977).

87. *See* Nguon v. Wolf, 517 F. Supp. 2d 1177 (C.D. Cal. 2007); *see also* Wyatt v. Kilgore Indep. Sch. Dist., No. 6:10-CV-674, 2011 WL 6016467 (E.D. Tex. Nov. 30, 2011) *rev'd in part, vacated in part sub nom.* Wyatt v. Fletcher, 718 F.3d 496 (5th Cir. 2013) (denying a motion for summary judgment when coaches had revealed a player's sexual orientation to her mother).

88. For example, courts provide deference to schools for certain First Amendment issues. Morse v. Frederick, 551 U.S. 393, 410 (2007) (allowing a school to prohibit a student from waving a banner that stated, "BONG HiTS [sic] 4 JESUS"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 260 (1988) (allowing a school to excise an article from the school's newspaper).

ambiguity, further steps need to be taken in legislation and in school policies to ensure adequate protection for the realities facing LGBTQ youth.

A. Supreme Court Right-to-Privacy Jurisprudence

In 1965, the Supreme Court first recognized a liberty interest in privacy in *Griswold v. Connecticut*.[89] There, the Court held that there are "zones of privacy"[90] that cannot be intruded upon save for a compelling government interest.[91] Accordingly, it invalidated a Connecticut law that prohibited the use of contraceptives by married couples because the law impermissibly interfered with the zone of privacy accorded to marital relationships.[92] The Supreme Court has since extended the *Griswold* holding to various other zones of privacy, including nonmarital relationships,[93] a woman's decision to have an abortion,[94] and a family's living arrangements.[95]

The Court next considered the extent of an individual's privacy rights in *Whalen v. Roe*.[96] At issue in *Whalen* was the constitutionality of a New York statute that required the state to collect and store a patient's information and drug prescriptions.[97] While the Court ultimately found the law constitutional, it expanded the definition of privacy rights to include two interests: (1) an autonomy interest in making important decisions independent of government influence, and (2) a confidentiality interest in avoiding disclosure of personal matters.[98] Whereas *Griswold* involved a married couple's decision to use contraception (autonomy interest),[99] *Whalen* concerned disclosure of patients' private medical

89. 381 U.S. 479 (1965).

90. *Id.* at 484.

91. *Id.* at 497.

92. *Id.* at 485.

93. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (declaring unconstitutional a Massachusetts law that made it a felony to give anyone other than a married person contraceptive materials).

94. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (holding a Texas law violated the Fourteenth Amendment when the law prohibited a person from assisting a woman to get an abortion).

95. *See* Moore v. City of East Cleveland, 431 U.S. 494, 505–06 (1977) (declaring unconstitutional a city housing ordinance that limited the occupancy of a single-family home).

96. 429 U.S. 589 (1977).

97. *Id.* at 591.

98. *Id.* at 599–600.

99. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

information (confidentiality interest).[100] The Court found the statute in *Whalen* was constitutional because the state had adequate security provisions and safeguards to protect against unwarranted disclosures.[101]

Both privacy interests identified in *Whalen*—autonomy and confidentiality—are particularly at issue in the context of outing LGBTQ individuals. While the choice to engage in conduct that relates to someone's sexual orientation (e.g., coming out to one's parents) triggers the autonomy interest, the status or information identifying one's sexual orientation triggers the confidentiality interest. An unwanted disclosure of one's sexual orientation could potentially fit in either interest. It potentially involves an autonomy interest because a person should have the capacity to choose when, where, and to whom to come out. It potentially involves a confidentiality interest because sexual orientation is an identity that prescribes a particular status and information about a person's attraction to the opposite or same sex. The autonomy interest protects conduct—the decision to come out; the confidentiality interest protects information—one's sexual orientation status. However, the Court has not held this way, let alone addressed whether an unwanted disclosure of sexual orientation would violate either of the interests identified in *Whalen*.

The Court has only framed its discussion of sexual orientation generally in relation to autonomy. The Court first ruled on the constitutionality of state sodomy laws that criminalized consensual sexual intimacy of homosexuals in their own homes.[102] In 1986, the Court in *Bowers v. Hardwick* upheld a Georgia statute making it a criminal offense to engage in sodomy.[103] By framing the issue narrowly, the Court asked whether homosexuals had a fundamental right to engage in sodomy rather than a general right to privacy.[104] The Court upheld the sodomy law as constitutional.[105]

Until it was overruled, *Bowers* had a devastating effect on LGBTQ individuals' legal rights because it attached a presumption

100. Whalen v. Roe, 429 U.S. 589, 591 (1977).
101. *Id.* at 607.
102. Lawrence v. Texas, 539 U.S. 558 (2003); Bowers v. Hardwick, 478 U.S. 186 (1986).
103. *Bowers*, 478 U.S. at 196.
104. *Id.* at 190.
105. *Id.* at 196.

of criminality to their identities.[106] Seventeen years later, in 2003, the Supreme Court overruled *Bowers* in *Lawrence v. Texas*,[107] which declared a Texas sodomy law similar to the law at issue in *Bowers* unconstitutional.[108] The Texas statute made it a crime for two persons of the same sex to engage in intimate sexual conduct,[109] leading to the arrest of two adult men engaged in private consensual sex.[110] Unlike in the *Bowers* decision, the Court in *Lawrence* reframed the issue broadly as "whether the petitioners were free as adults to engage in the private conduct [at issue]."[111] The majority held that the private, consensual conduct of homosexuals in their own homes was a realm of personal liberty that the government could not enter.[112] The Court reasoned:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[113]

Thus, the statute was declared unconstitutional, as it impinged on homosexuals' right to liberty under the Due Process Clause.[114]

Many individuals in the LGBTQ community saw *Lawrence* as the seminal case removing stigmatization of gays and lesbians from U.S. law.[115] However, its impact on the right to privacy for LGBTQ youth remains unclear. First, the *Lawrence* Court never stated that private sexual intimacy between homosexuals is a "fundamental

106. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 136 (2000) (explaining how legislators, employers, police officers, and courts use sodomy laws to create a criminal class of gay men and lesbians and legitimize violence, harassment, and discrimination).

107. *Lawrence*, 539 U.S. at 578.

108. *Id.* at 578–79.

109. *Id.* at 562 (explaining that the law at issue in *Lawrence* specifically targeted homosexual conduct, unlike *Bowers*, which involved a gender neutral anti-sodomy law).

110. *Id.* at 563.

111. *Id.* at 564.

112. *Id.* at 578.

113. *Id.*

114. *Id.*

115. *See, e.g.*, *High Court Busy as Term Ends*, CBS NEWS (Feb. 11, 2009, 8:40 PM), http://www.cbsnews.com/2100-280_162-556319.html ("For the gay community, Lawrence is their Brown v. Board of Education, their major civil rights case." (quoting Georgetown University Law Center Professor Richard Lazarus)).

right" under the Due Process Clause.[116] Thus, some courts have been hesitant to infer new fundamental liberty interests based on *Lawrence*.[117] Nevertheless, courts have been more willing to grant fundamental liberty interests in cases involving the freedom of choice in matters of family life.[118] Unwanted disclosure of a student's sexual orientation can seriously disrupt family life, as previously discussed, given the realities of family rejection among LGBTQ youth. The autonomy interest in deciding when and if to come out is thus a potential fundamental right that courts have yet to confirm.

Second, the *Lawrence* Court explicitly limited its holding to privacy between consenting adults, stating, "[t]he present case does not involve minors."[119] However, the right to privacy has been extended to minors before,[120] and at least one court has extended the holding in *Lawrence* to a situation involving minors.[121] Furthermore, disclosures of information regarding a student's sexual orientation do not involve sex or relationships, and thus cannot be grouped with this assertion. Finally, in the privacy context the Supreme Court has been more likely to strike down laws if they involve criminal prohibitions that intrude upon individuals' liberty interests, which is not an issue with disclosures incidental to school disciplinary actions.[122]

While the existing Supreme Court case law does not adequately address the issue of protecting LGBTQ youth from unwanted disclosure of sexual orientation, there is some indication from lower courts that they are willing to expand privacy rights to address this problem.

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116. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

117. *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 815–16 (11th Cir. 2004) (refusing to extend the *Lawrence* decision to a right to adopt for gay and lesbian parents).

118. *See* Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 842 (1977).

119. *Lawrence*, 539 U.S. at 578.

120. Carey v. Population Servs. Int'l, 431 U.S. 678, 693 (1977) ("[T]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.").

121. *See* State v. Limon, 122 P.3d 22 (Kan. 2005) (declaring a statute that punished sodomy between adults and children of the opposite sex less severely than sodomy between adults and children of the same sex unconstitutional under an equal protection analysis).

122. *See Lofton*, 358 F.3d at 809 ("[A]doption law is unlike criminal law, for example, where the paramount substantive concern is not intruding on individuals' liberty interests . . . .").

B. Constitutional Right to Privacy and Sexual Orientation

While the Supreme Court has not addressed whether an unwanted disclosure of sexual orientation violates an individual's right to privacy, at least one lower court decision pre-dating *Lawrence* found a right against unwanted disclosure, despite the holding in *Bowers*.[123] This case suggests that courts may be even more willing to grant this right after *Lawrence*.[124]

The Third Circuit in *Sterling v. Borough of Minersville*[125] decided not to extend *Bowers* to informational privacy concerning one's sexual orientation.[126] There, two police officers approached eighteen-year-old Marcus Wayman and a seventeen-year-old male friend as they were parked suspiciously in an empty parking lot near a beer distributor in Minersville, Pennsylvania.[127] Concerned about previous burglaries in the area, the officers decided to ask the boys what they were doing there.[128] The officers discovered alcohol and condoms during a search and arrested both boys for underage drinking.[129] They were taken to the police station, where one officer told them the Bible forbids homosexual activity and threatened to divulge Wayman's sexual orientation to his grandfather.[130] After being released from custody, Wayman committed suicide in his home.[131] Wayman's mother subsequently filed a suit against the borough of Minersville and the chief of police, claiming the police

123. 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.").

124. Only one court twenty years ago held that there is no privacy interest in the confidentiality of one's sexual activity. In *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990), an employee of the city police department was discharged after she refused to answer a background questionnaire that asked whether she ever had sexual relations with a person of the same sex. *Id.* at 190. The court recognized that the government does not have a legitimate interest in asking questions concerning an applicant's off-duty sexual relations or history of abortion. *Id.* at 193 (citing Thorne v. City of El Segundo, 726 F. 2d 459 (9th Cir. 1983)). However, finding the holding in *Bowers v. Hardwick* to be controlling, the court held that information about the employee's homosexual activity was not entitled to privacy protection. *Id.* After *Lawrence*, however, this case would arguably have been decided differently.

125. Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000).

126. *Id.* at 195 (refusing to read *Bowers* as limiting privacy protections on one's sexual orientation).

127. *Id.* at 192.

128. *Id.*

129. *Id.*

130. *Id.* at 192–93.

131. *Id.* at 193.

violated her son's right to privacy.[132]

The court held that Wayman's sexual orientation was an intimate aspect of his personality entitled to privacy protection, noting, "It is difficult to imagine a more private matter than one's sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity."[133] Thus, the court held that the threat of disclosure constituted a violation of Wayman's right to privacy.[134] The conclusion in *Sterling*, that sexuality is a private matter,[135] is directly in line with the reasoning in *Lawrence*, which held that sexual intimacy is a private matter.[136] However, while *Sterling* took an expansive approach to recognizing this right, *Lawrence* was arguably a step back as it refused to recognize a fundamental right in sexual identity.[137] Nevertheless, *Sterling* seems to be affecting this area of the law, as recent trial courts have adopted the *Sterling* court's approach to LGBTQ students' privacy regarding their sexual orientations.[138]

C. Students and the Right to Privacy Regarding Sexual Orientation

Following the *Sterling* decision, two recent federal district court decisions have recognized that primary and secondary students do have privacy rights in the unwanted disclosure of their sexual orientations.[139] These recent cases shed light on the difficulty of proving such a claim, given that there may be a legitimate government interest in communicating with parents about students' conduct and the requirements for municipal liability.[140]

1. *Nguon v. Wolf*

The first case dealing with unwanted disclosure after *Lawrence*, *Nguon v. Wolf*,[141] involved a principal outing a student to her mom in

132. *Id.*
133. *Id.* at 196.
134. *Id.*
135. *Id.* at 192.
136. Lawrence v. Texas, 539 U.S. 558, 577–78 (2003).
137. *Id.* at 578.
138. *See* Nguon v. Wolf, 517 F. Supp. 2d 1177 (C.D. Cal. 2007); *see also* Wyatt v. Kilgore Indep. Sch. Dist., No. 6:10-CV-674, 2011 WL 6016467 (E.D. Tex. Nov. 30, 2011) *rev'd in part, vacated in part sub nom.* Wyatt v. Fletcher, 718 F.3d 496 (5th Cir. 2013) (recognizing that there is a right to privacy regarding one's sexual orientation).
139. *Wyatt*, 2011 WL 6016467; *Nguon*, 517 F. Supp. 2d 1177.
140. *Wyatt*, 2011 WL 6016467; *Nguon*, 517 F. Supp. 2d at 1195.
141. 517 F. Supp. 2d 1177 (C.D. Cal. 2007).

conjunction with discipline he imposed for on-campus conduct related to her sexual orientation.[142] During her junior year at Santiago High School, Charlene Nguon began holding hands with, hugging, and kissing her girlfriend on campus.[143] When a parent complained to the principal, Ben Wolf, that the girls were making out in front of her younger children, Wolf responded by warning them that their conduct was inappropriate.[144] After a number of subsequent incidents involving inappropriate public displays of affection (IPDA), Principal Wolf imposed Saturday school and a one-day suspension on Nguon.[145] He eventually met with Nguon's mother, told her that her daughter was seen kissing another girl, and suggested that she transfer to a different school.[146]

Relying exclusively on *Sterling*, without any further discussion, the court found that Nguon had a legally recognized privacy interest in her sexual orientation.[147] Then the court presented three issues to consider: (1) whether a reasonable expectation of privacy existed, (2) whether there was an actual disclosure, and (3) whether there was a compelling state interest in making the disclosure.[148]

As to the first issue, the court found that Nguon had a reasonable expectation of privacy *at home*.[149] Even if she were openly gay at school, her home was an "insular environment."[150] Her parents were immigrants from Southeast Asia, had a limited grasp of English, and rarely went to her high school.[151] Moreover, Nguon never brought her girlfriend home to visit.[152] By considering Nguon's behavior inside and outside of school and her family's culture and background, the court essentially recognized that coming out is unique to each individual, and thus a personal choice that must be respected.

The court next found that there was actual disclosure, despite

142. *Id.* at 1182–84.
143. *Id.* at 1183.
144. *Id.*
145. *Id.* The court noted that the school neither disciplined on a discriminatory basis toward same-sex displays of affection nor was indifferent regarding heterosexual couples' involvement with IPDA. *Id.* at 1187.
146. *Id.* at 1184.
147. *Id.* at 1191.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*

there being some confusion as to when Wolf met with Nguon's mother and what exactly was said.[153] Even though the mother testified that Wolf had never used the word "gay" or "lesbian," because he had said that Nguon was seen kissing another girl, Nguon's mother could easily infer Nguon's sexual orientation.[154] The court recognized disclosure of same-sex *conduct* as tantamount to disclosure of one's *status* as homosexual.[155]

The court then weighed Nguon's privacy interest against the existence of a compelling state interest,[156] the pivotal component for constitutional invasion of privacy claims.[157] The court found that under the California Education Code and school district policies, the principal had a statutory duty to notify parents whenever a student is suspended and provide an explanation for the suspension.[158] The court noted a meaningful explanation that would allow a parent an opportunity to discuss and protest the sanction would require disclosure of facts "beyond an abstract description of the conduct."[159] Accordingly, the court reasoned that Wolf's disclosure of Nguon's inappropriate public displays of affection were necessary to provide Nguon's mother with an adequate explanation of the conduct leading to Nguon's suspension.[160]

However, in dicta, the court noted, "If [Nguon's] expressions of her sexuality had not risen to the level of [inappropriate public displays of affection], clearly Wolf could not have gratuitously told her parents that she was gay or that she was engaging in displays of affection, within appropriate bounds, with another girl."[161] The court's conclusion suggests that while an explanation of a student's

153. *Id.* at 1192.
154. *Id.* at 1192–93.
155. *Id.* 1192.
156. *Id.* at 1194–95.
157. The constitutional right to privacy is not absolute. *See* Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1375, 1385–88 (2007). The government is required to show that it has a compelling state interest to justify an invasion of protected information. *Id.* Courts differ on what constitutes a compelling state interest, and because it is a balancing test, it often depends on the nature of the privacy interest at stake. *Id.*; *see also* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 578 (3d Cir. 1980) ("[P]ublic health or other public concerns may support access to facts an individual might otherwise choose to withhold.").
158. CAL. EDUC. CODE § 48911(d) (West 2006); *Nguon*, 517 F. Supp. 2d at 1193–94.
159. *Nguon*, 517 F. Supp. 2d at 1194.
160. *Id.*
161. *Id.* at 1195.

same-sex conduct might be necessary if connected to disciplinary procedures for public displays of affection, a "gratuitous" disclosure of a student's sexual orientation or same-sex conduct would not be tolerated.[162] Finding that the state had a legitimate interest in invading Nguon's privacy, the court never reached the issue of municipal liability.[163]

2. *Wyatt v. Kilgore Independent School District*[164]

The second case addressing unwanted disclosure, *Wyatt v. Kilgore Independent School District*, involved a coach outing a player to her mother in relation to her off-campus relationship with another girl.[165] There, two high school softball coaches, Cassandra Newell and Rhonda Fletcher, called an unscheduled meeting with one of their players, Skye Wyatt.[166] The coaches questioned Wyatt about her relationship with an eighteen-year-old female, Hillary Nutt.[167] Coach Fletcher also accused Wyatt of spreading a rumor that Nutt was Coach Newell's ex-girlfriend.[168] The coaches then prohibited Wyatt from playing softball until they could tell her mother that she was having a sexual relationship with a woman.[169] Shortly thereafter, the coaches met with Wyatt's mother and told her Wyatt was dating a girl.[170] Wyatt's mother did not know that her daughter was gay.[171]

Wyatt brought a § 1983 claim against the school district for violating her constitutional privacy rights.[172] Upon the school district's motion for summary judgment, the district court held that there was a constitutional right to prevent unauthorized disclosure of one's sexual orientation.[173] Citing *Whalen*, the court said that government actors cannot disclose private facts about the government's citizens in matters in which the government does not

162. *Id.*
163. *Id.*
164. No. 6:10-CV-674, 2011 WL 6016467 (E.D. Tex. Nov. 30, 2011) *rev'd in part, vacated in part sub nom.* Wyatt v. Fletcher, 718 F.3d 496 (5th Cir. 2013).
165. *Id.*
166. *Id.*
167. *Id.* at *1–2.
168. *Id.* at *1.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at *3.
173. *Id.* at *4.

have a legitimate and proper concern.[174] Unlike *Nguon*, the court discussed extensively why it believed Wyatt was entitled to privacy protection for her sexual orientation.[175] First, the court noted that *Lawrence* guaranteed an individual the right to make decisions regarding intimate personal relationships and conduct.[176] Then, citing *Sterling*, the court noted that most circuits found information involving a person's sexuality to be intrinsically private.[177]

The district court then turned to whether a legitimate government interest justified the coaches' actions.[178] The court rejected the coaches' argument that the disclosure was warranted because there was potential that Wyatt was involved in an illegal relationship in violation of Texas's statutory rape laws.[179] The court noted that neither of the coaches had any personal knowledge of Wyatt's relationship with Nutt, and concluded that Fletcher was clearly retaliating against Wyatt for spreading a rumor about her.[180] Here, the court focused on what the coaches' true motivations were for disclosing Wyatt's sexual orientation to determine whether they had violated her constitutional right to privacy.[181] Rejecting the school district's argument that the coaches' conduct was motivated by any legitimate government interest, the court found that Wyatt's privacy interest prevailed.[182]

The Court of Appeals for the Fifth Circuit reversed the district court's decision and held that the coaches were entitled to qualified immunity.[183] Cases in the Fifth Circuit did not clearly establish a privacy right in the nondisclosure of one's sexual orientation, especially in the school context.[184] In regards to case authority

174. *Id.*

175. *Id.* at *5–6.

176. *Id.* at *5.

177. *Id.* at *6 (identifying cases from the Second, Third, Sixth, Ninth, and Tenth Circuits that have held information concerning sexuality was private). In a footnote, the court recognized the Fourth Circuit's decision in *Walls*, but emphasized that in that case the court had relied on *Bowers*, which was overturned by *Lawrence*. *Id.* at *8 n.3.

178. *Id.* at *7.

179. *Id.*

180. *Id.* at *7–8.

181. *Id.* at *8.

182. *Id.*

183. Wyatt v. Fletcher, 718 F.3d 496, 510 (5th Cir. 2013). "The doctrine of qualified immunity protects government officials from civil damages liability when they reasonably could have believed that their conduct was not barred by law, and immunity is not denied unless existing precedent places the constitutional question *beyond debate*." *Id.* at 503.

184. *Id.* at 508.

outside the Fifth Circuit, the court distinguished *Sterling* on the basis that it did not involve a minor.[185] It then held that other cases establishing a privacy interest in "sexual matters" did not take place in the school context, and thus did not clearly establish a constitutional right in forbidding school officials from discussing a student's sexual orientation with a parent.[186]

In addition to the coaches' liability, the district court also had considered the school district's liability. In determining whether Wyatt adequately had stated a § 1983 claim to survive summary judgment, the court turned to the issue of whether Wyatt had raised substantial questions of material fact as to whether the school district had an official policy to disclose its students' sexual orientation.[187] To establish municipal liability under § 1983, a plaintiff must prove the defendant was a policymaker; the challenged conduct was an official policy; and "a violation of constitutional rights whose 'moving force' is the policy or custom."[188] The court found that the school district was potentially liable under two theories: that it had enforced an unconstitutional policy of requiring educators to disclose students' sexual orientation to their parents, and that it had failed to train its employees on how to treat LGBTQ students.[189]

According to the district court, a school policy need not be in writing, and even a single course of action could constitute a policy.[190] A school official's decision or action can be evidence of a school policy, subject to the stated reasons for taking the action in question and the official's credibility.[191] While this was enough to ultimately justify denying the school district's motion for summary judgment, the district court also noted that the district had never disclosed sexual orientation information to parents when sixteen-year-old students had heterosexual relationships with eighteen-year-olds.[192]

The "failure to train" claim required Wyatt to show that (1) the training policies were inadequate, (2) the training policy was the

185. *Id.* at 509.
186. *Id.* at 509–10.
187. *Wyatt*, 2011 WL 6016467, at *9.
188. *Id.* (citing Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001)).
189. *Id.* at *9–13.
190. *Id.* at *9.
191. *Id.* at *11.
192. *Id.*

"'moving force' in causing violation of the plaintiff's rights," and (3) the district showed deliberate indifference in adopting the training policy.[193] Deliberate indifference required a showing of "either a pattern of similar violations of students' privacy rights regarding their sexual orientation," or an "obvious" need to provide training to avoid a "highly predictable consequence" of violating these rights.[194] The court was convinced that there was a triable issue of fact as to whether the district was liable for deliberate indifference in adopting training policies[195] because the superintendent had made a statement implying that he did not care about sexual orientation training,[196] and the staff was confused on how to approach issues with LGBTQ students at school events.[197]

These two cases indicate that post-*Lawrence*, courts are more willing to recognize a privacy right in a minor's sexual orientation. They also illustrate the uphill battle LGBTQ students face in gaining sufficient protection, given the competing state interests of communication with parents and school officials' autonomy. Nevertheless, Part V argues that most inadvertent disclosures in a school setting would violate a student's constitutional right to privacy.

V. COMMON SCENARIOS IN WHICH UNWANTED DISCLOSURES MIGHT OCCUR AND SOLUTIONS SCHOOLS CAN IMPLEMENT TO GUARANTEE PRIVACY PROTECTIONS FOR LGBTQ STUDENTS

While the lower court decisions in *Nguon* and *Wyatt* do not definitively establish a student's privacy right in his or her sexual orientation, the decisions do suggest that such a right is emerging. However, even if that right is fully recognized, it is likely that the right may still be intruded upon regularly by school officials who may, or may not, be acting in accordance with a legitimate government interest—namely, for the safety and well-being of the

193. *Id.*

194. *Id.* at *12.

195. *Id.* at *13.

196. The plaintiff alleged that the superintendent had claimed that if the district had offered training on policies specifically protecting sexual orientation, "there's going to be 10 or 12 other groups that want a specific thing they have." *Id.* at *12–13 (quoting from Superintendent Clements's deposition).

197. Kilgore Independent School District teachers prohibited Skye from entering the prom when she arrived with a female date, although the superintendent stated that the district always had allowed same-sex couples to attend prom. *Id.* at *12.

student. Therefore, to minimize harm to the student, schools need to implement carefully crafted procedures to disclose sexual orientation information.

A. Common School Policies and Procedures That May Violate Students' Constitutional Privacy Rights

Regardless of whether the school's outing of a student furthers a legitimate government interest, the danger of involuntary outing is always present because the disclosure of sexual orientation in schools is likely to arise in four common scenarios: (1) parental notification of a disciplinary procedure (as in *Nguon*), (2) a school official's independent decision (as in *Wyatt*), (3) parental notification of bullying issues, and (4) parental permission for student group involvement.

1. Parental Notification of Disciplinary Procedures

Unwanted disclosures can take place because of a school policy requiring parental notification in disciplinary actions.[198] Notifying a parent of a student's sexual orientation during a disciplinary procedure interferes with the autonomy interest of privacy.[199] Much like the married couple in *Griswold* who were prohibited from making a decision about the use of contraception,[200] in *Nguon*, a student was prohibited from making a decision about when and if to come out to her parents.[201] Not only does parental notification interfere with a student's decision to come out, it forces a family to address an intensely personal and potentially controversial issue without considering the willingness or readiness of the individuals in that family to discuss the matter.

The *Nguon* court acknowledged that even when the discipline was related to a school policy, disclosing same-sex sexual conduct was equivalent to disclosing a student's sexual orientation.[202] Accordingly, *Nguon* held that the state never has an interest in

198. *See, e.g.*, Nguon v. Wolf, 517 F. Supp. 2d 1177, 1194 (C.D. Cal. 2007).

199. *See supra* Part IV.A (discussing the autonomy and confidentiality interests in *Whalen*).

200. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

201. In *Griswold*, the Court was concerned with the government interfering in the "zone of privacy" of a marital relationship. *Id.* The Court has since extended the "zone of privacy" to include family relationships, specifically parent-child relationships. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 842 (1977).

202. *Nguon*, 517 F. Supp. 2d at 1192.

"gratuitous" disclosures involving discipline unrelated to the student's sexual orientation or same-sex sexual conduct.[203] Thus, when a policy requires an explanation of a minor rule infraction to parents, there is rarely a need to disclose the student's sexual orientation or same-sex sexual conduct. While the rule infraction in *Nguon* was not minor, the disclosure should have been gratuitous because the principal could have easily avoided disclosing Nguon's same-sex partner when he explained she had violated a school rule against inappropriate displays of affection. In a situation like the one in *Nguon*, a school official should avoid gratuitous disclosure by referring to the student's partner in nonspecific terms, such as "another student." Even if the parent asks about the other student's identity, the principal could respond that he or she cannot disclose that information and encourage the parent to discuss those details with his or her child at home. While school officials may be responsible for informing parents about disciplinary issues at school, information about a student's sexual orientation need not be a part of the discussion because it is a topic that students should discuss with their families on their own time and in their own way.

2. Independent Action of School Official

Disclosure can also take place without a school policy, as an independent action by school staff or administrators.[204] In *Sterling*, the Third Circuit reaffirmed the idea that individuals have an interest in avoiding divulgence of highly personal information under *Whalen*.[205] Just as a police officer's threat to disclose a teenager's sexual orientation to his grandfather was found to interfere with privacy,[206] a school official's unilateral decision to disclose a student's sexual orientation to a family member interferes with privacy.

In the fall of 2007, a Memphis high school principal allegedly posted a list of couples, including two gay boys, in her office.[207] The

203. *Id.* at 1195.

204. *See* Wyatt v. Kilgore Indep. Sch. Dist., No. 6:10-CV-674, 2011 WL 6016467, at *1 (E.D. Tex. Nov. 30, 2011), *rev'd in part, vacated in part sub nom.* Wyatt v. Fletcher, 718 F.3d 496 (5th Cir. 2013).

205. 232 F.3d 190, 194 (3d Cir. 2000).

206. *Id.* at 192–93.

207. Emily Friedman, *Principal Allegedly Outs Gay Students*, ABC NEWS (May 2, 2008), http://abcnews.go.com/US/story?id=4773381&page=1.

principal also called and notified the parents of these couples to let them know of the public affection she was receiving complaints about.[208] Independent actions by school officials such as this implicate both of the privacy interests identified in *Whalen*. The principal violated the gay students' confidentiality interest by disclosing information about the students' attraction to the same sex, and thus the status of their sexual orientation. This is important because students may want to keep their sexual orientation confidential to avoid bullying or other harassment from peers. Furthermore, as in *Nguon*, *Wyatt*, and *Sterling*, their autonomy interests were violated because they were unable to come out to their parents on their own terms, interfering with the zone of privacy of family relationships.

As *Wyatt* suggests, school officials must have a genuine, legitimate interest in a student's well-being before they disclose his or her sexual orientation.[209] In line with the *Nguon* court's idea that "gratuitous" disclosures are never warranted, the *Wyatt* court held that a sport coach's self-serving motivations of retaliation against a student for spreading a rumor could not justify disclosure.[210] The coach also did not have a legitimate interest in notifying Wyatt's family about her potentially inappropriate or illegal relationship.[211] The court suggested that because the coach clearly was motivated neither by a desire to protect Wyatt nor out of concern for her welfare, there was no legitimate state interest.[212] Accordingly, school staff members should be required to show that disclosing a student's sexual orientation is for the child's health, safety, or welfare. Disclosure might be necessary, for example, if a child confides suicidal thoughts to a teacher or school staff member.

3. Parental Notification of Bullying Incidents

Bullying often endangers students' health and safety.[213] In April 2009, an eleven-year-old boy hanged himself by an extension cord at

208. *Id.*
209. *Wyatt*, 2011 WL 6016467, at *4.
210. *Id.* at *8.
211. *Id.* at *7.
212. *Id.* at *8.
213. *See, e.g.*, Susan Donaldson James, *When Words Can Kill: "That's So Gay"*, ABC NEWS (Apr. 14, 2009), http://abcnews.go.com/Health/MindMoodNews/story?id=7328091#.UJWktsVJOAg.

home, despite his mother's attempts to address bullying problems at his school.[214] For months, Carl Joseph Walker-Hoover was teased and repeatedly called "gay" by his sixth-grade classmates.[215] Responding to Walker-Hoover's suicide,[216] the Massachusetts Legislature passed a law mandating that schools adopt plans to address bullying prevention and intervention, including a procedure to promptly notify the parents or guardians of a bullying victim.[217] Several LGBT advocacy groups, including a local branch of Parents, Families and Friends of Lesbians and Gays (PFLAG), expressed concern with the parental notification requirement because it could inadvertently out LGBT students.[218]

In response to these concerns, Massachusetts issued a policy guidance memo to school employees recognizing some of the problems with the notification requirement and its potential to harm LGBT students.[219] The memo noted that sharing information with a parent about a student's sexual orientation "might endanger the mental or physical health and safety of the student" and result in family rejection.[220] It acknowledged that parents do not necessarily have the desire or ability to discuss sexual orientation or gender identity issues at home, and may not be ready to provide adequate support for their child.[221] Likewise, it stated that students are less likely to report bullying or participate in bullying investigations reported by others if they know that their parents would be notified, especially if their parents are non-accepting.[222]

Parental notification requirements for bullying may give rise to privacy claims because they again interfere with a student's

214. *Id.*

215. *Id.*

216. Fred Contrada, *Massachusetts Anti-Bullying Bill, Passed in Response to Suicides of Phoebe Prince and Carl Walker Hoover, Touted as "Gold Standard"*, REPUBLICAN (May 3, 2010, 9:07 PM), http://www.masslive.com/news/index.ssf/2010/05/massachusetts_anti-bullying_bi.html.

217. MASS. GEN. LAWS ch. 71, § 37O(d) (2010).

218. *Anti-Gay Bullying Guidance Issued by Massachusetts Department of Elementary and Secondary Education*, GREATER BOSTON PFLAG, http://www.gbpflag.org/Bullying (last visited Nov. 4, 2012).

219. *Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression: Implementation of 603 CMR 49.05*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC., http://www.doe.mass.edu/bullying/PNguidance.html (last updated Feb. 8, 2011) [hereinafter *Policy Guidance*].

220. *Id.*

221. *Id.*

222. *Id.*

autonomy interest in coming out to his or her family independently.[223] However, the situation differs with anti-bullying laws because they are enacted specifically to protect student health and safety.[224] Unlike the plaintiffs in *Sterling*, *Nguon*, and *Wyatt*, who were outed for innocuous reasons, bullied LGBTQ students may need to be outed for safety reasons, since parents play a major role in watching for suicidal tendencies at home.[225] Nevertheless, courts should look to see whether disclosures are conducted in the "least intrusive" manner, so as not to cause greater harm or confusion than is necessary.[226]

The Massachusetts school district adopted a special procedure for students that were bullied because of their actual or perceived sexual orientation.[227] The district recommended that schools "designate a staff person who is proficient in these topics" and "design an appropriate parental notification process for these situations."[228] The process would include a consultation between the student, guidance staff, and the designated staff member.[229] The goal would be to develop a "notification plan," discussing how the parents would be notified, an assessment of the student's safety, and resources to support the student and his or her family.[230] Finally, the state's recommendation emphasized that "the student should be supported in his or her decision to disclose his or her sexual orientation or gender identity/expression to family members on his or her own terms."[231]

Some form of this "notification plan" procedure should be

223. *See supra* Part IV.A.

224. Anti-bullying laws began to arise in response to the 1999 Columbine High School shootings in Colorado. David Crary, *Columbine School Shooting Spawned Effective Anti-Bullying Programs: Study*, HUFFINGTON POST (Mar. 3, 2010, 5:21 PM), http://www.huffingtonpost.com/2010/03/03/columbine-school-shooting_n_484700.html. Likewise, in 2010 Massachusetts passed anti-bullying legislation in response to student suicides. Emily Bazelon, *Bullies Beware: Massachusetts Just Passed the Country's Best Anti-Bullying Law*, SLATE (Apr. 30, 2010, 4:13 PM), http://www.slate.com/articles/life/bulle/2010/04/bullies_beware.html.

225. Harold S. Koplewicz, *Combating Gay Teen Suicide: What Parents Can Do*, HUFFINGTON POST (Oct. 14, 2010, 9:38 AM), http://www.huffingtonpost.com/dr-harold-koplewicz/gay-teen-suicide_b_760093.html.

226. *See* Caitlin M. Cullitan, *Please Don't Tell My Mom! A Minor's Right to Informational Privacy*, 40 J.L. & EDUC. 417, 422 (2011).

227. *Policy Guidance*, *supra* note 219.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

adopted in all states requiring parental notification of bullying. Not only does the plan recognize a student's right to privacy by emphasizing that it is ultimately his or her decision to disclose his or her sexual orientation, it minimizes any potential harm by providing the student and family with helpful resources. However, this plan could be adjusted in the following ways to better address the needs of LGBTQ students.

First, when the school designates a staff member "proficient in these topics," it should seriously consider designating an openly LGBTQ teacher or a staff member who is supportive of LGBTQ students. The GLSEN Survey found that three in five LGBT students had positive or helpful conversations with school personnel if they were teachers.[232] Teachers usually have the most contact with students,[233] and LGBTQ teachers are likely to be more responsive to worried students because they can identify with their struggle and understand best what they are going through. Second, the staff member should be trained to be aware that not all victims of bullying are LGBTQ and not everyone who is bullied has identified his or her sexual orientation. For example, bullying based on gender nonconformity is not exclusively targeted at LGBT youth.[234] Third, the "notification plan" should also include guidelines for the discussion that will take place with the parents, which should focus on addressing the bullying issue, not the victim's sexual orientation. Fourth, while the plan advocates supporting a student in his decision to come out,[235] the staff member should recognize it is equally important to support a decision to not come out. Lastly, it should be made clear that no student should be pressured or forced to come out or discuss his or her sexual orientation in the meeting.

4. Parental Permission for Student Group Participation

Finally, disclosure can take place when student group participation requires parental permission.[236] Student groups and

232. KOSCIW ET AL., *supra* note 42, at 51.

233. *Id.*

234. *See* Susan M. Swearer Napolitano et al., *"You're So Gay!": Do Different Forms of Bullying Matter for Adolescent Males?*, 37 SCH. PSYCHOL. REV. 160, 162 (2008), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1152&context=edpsychpapers.

235. *Policy Guidance*, *supra* note 219.

236. *See* KOSCIW ET AL., *supra* note 42, at 46 (discussing the implications of requiring parental permission to join GSAs).

clubs focused on fostering welcoming environments for LGBTQ students, often called Gay-Straight Alliances (GSAs), have become more prevalent in high schools over the years.[237] Students at schools with a GSA reported higher levels of school belonging and were less likely to miss school because they felt unsafe.[238] The Equal Access Act requires public schools to allow these types of groups to "exist alongside other non-curricular student groups."[239] However, some schools have tried to restrict access to GSAs by requiring students to obtain parental permission before participating in student-based clubs.[240] These parental consent policies are generally pretextual attempts to out students to their parents and dissuade students who are not out to their families from participating.[241]

There is no legitimate state interest in requiring parental consent to participate in GSAs. School officials often argue that students should not participate in clubs based on sex without parental permission;[242] however, GSAs are not about sex. In *Colin ex rel. v. Orange Unified School District*,[243] a California district court recognized that GSAs are not devoted to having sex or even discussing sex and are instead dedicated to discussing issues of tolerance, homophobia, and prejudice.[244] Likewise, because GSAs are not curriculum-related, the court noted parental notification of sexual education would not be warranted.[245] The court issued an injunction requiring a high school to allow the formation of a GSA, recognized the importance of GSAs in reducing teen suicides, and

237. During the 1998–99 school year, GSA Network started working with forty GSAs in San Francisco. By 2005, the GSA Network began operating programs across the nation. *History and Accomplishments*, GSA NETWORK, http://gsanetwork.org/about-us/history (last visited Mar. 15, 2013).

238. KOSCIW ET AL., *supra* note 42, at 46.

239. *Id.* In February 2013, a central Florida school district considered banning all extracurricular student clubs in an effort to circumvent the Equal Access Act and prevent a GSA from being formed at a local middle school. Cavan Sieczkowsi, *Lake County School Board May Slash All Student Clubs to Blockade Gay-Straight Alliance*, HUFFINGTON POST (Feb. 7, 2013, 11:47 AM), http://www.huffingtonpost.com/2013/02/07/florida-school-board-student-clubs-gay-straight-alliance_n_2638124.html?utm_hp_ref=gsa.

240. KOSCIW ET AL., *supra* note 42, at 46.

241. *See id.* (stating that only 28.4 percent of students who had not yet come out to their parents had permission to join their GSAs).

242. Ian Vandewalker, *Of Permission Slips and Homophobia: Parental Consent Policies for School Club Participation Aimed at Gay-Positive Student Groups*, 19 B.U. PUB. INT. L.J. 23, 23 (2009).

243. 83 F. Supp. 2d 1135 (C.D. Cal. 2000).

244. *Id.* at 1144.

245. *Id.* at 1150.

stated, "As any concerned parent would understand, this case may involve the protection of life itself."[246] Other courts have followed suit, striking down attempts to restrict the formation of GSAs at school.[247]

Parental rights do not trump a school's right to protect students from harm,[248] and should not trump a student's right to join an organization in which he or she is protected from harm. Unlike the situations in *Nguon* and *Wyatt*, in which the student conduct violated school rules or seemingly violated state law, participating in a GSA is a harmless activity. Requiring parents to consent to their child's participation in a GSA also goes beyond the gratuitous disclosure of sexual orientation prohibited in *Nguon*—it allows parents to interfere with their child's own identity development and pursuit of his or her sexual orientation.[249] Schools that require parental permission for

246. *Id.* at 1151.

247. *See* Gonzalez v. Sch. Bd. of Okeechobee Cnty., 571 F. Supp. 2d 1257 (S.D. Fla. 2008); Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., 483 F. Supp. 2d 1224 (S.D. Fla. 2007); Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd Cnty., Ky., 258 F. Supp. 2d 667 (E.D. Ky. 2003).

248. The Supreme Court has held that parents do have a right to direct the upbringing and education of their children by having the ability to choose a specific educational program. *See* Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510 (1925) (striking down a state statute requiring public school attendance because it prevented parents from choosing to send their children to a parochial school, or any school, of their choice); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a state law forbidding instruction in certain foreign languages). However, parental rights have been largely limited in the school context, in which the doctrine of "parens patriae" gives the state temporary rights over their children's upbringing. For example, the Ninth Circuit, in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), held that parents do not have a right to control their children's exposure to sexual matters at school. *Id.* at 1211 (holding that a psychological survey that includes questions about sex in an elementary school was constitutional). Likewise, the First Circuit, in *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), held that parents cannot dictate the school curriculum at a public school to which they have chosen to send their children. *Id.* (holding that a compulsory school assembly at a sexually explicit AIDS awareness assembly did not violate parental privacy rights).

249. In a New York family court case, *In re Lori M.*, 130 Misc. 2d 493 (Fam. Ct. 1985), a court held that a child's sexual orientation and choices in pursuit thereof are protected within her constitutional right to privacy. *Id.* There, a mother filed a petition with the family court to have her fifteen-year-old daughter end her relationship with a twenty-one-year-old lesbian. *Id.* at 493–94. The court analogized the facts of this case to other New York cases that held that children, at a certain age and maturity, could choose their own religious beliefs, even if they conflicted with the views of their parents. *Id.* at 496 (citing Martin v. Martin, 308 N.Y. 136 (1954)); Hehman v. Hehman, 13 Misc. 2d 318 (1958)). Impressed with the daughter's maturity, the court dismissed the mother's petition and found that the daughter had a constitutionally protected right of privacy to decide and pursue her own sexual orientation. *Id.* at 496–97. This logic should be directly translated to parental rights claims in the context of GSA formation—parents should not be able to interfere with their child's ability to pursue their sexual orientation by joining a club of similarly minded people.

GSAs are simply asserting their moral and political viewpoints at the expense of marginalizing LGBTQ students and potentially creating more harm at home.

B. Other Policies, Procedures, and Training That Should Be Implemented to Protect LGBTQ Students from Unwanted Disclosures of Sexual Orientation

In addition to the common scenarios discussed above, school districts need to take initiative to prevent what happened to students like Nguon and Wyatt. Schools need to implement policies, procedures, and training so that students, parents, and school officials are aware of the issues and potential harms before any unwanted disclosures take place.

School officials need to acknowledge that LGBTQ students exist and that they may be at different stages in identifying their sexual orientations. Teachers and administrators often ignore LGBTQ students as a whole by turning a blind eye to complaints of harassment and school climate issues.[250] They often refuse to take reports of harassment or to hold students accountable for anti-gay bullying.[251] But in addition to recognizing openly LGBTQ students who are bullied because of their sexual orientations or gender identities, schools need to acknowledge that students may be closeted or partially closeted about their sexual orientations. Students who are out at school are not necessarily out at home,[252] and not all students have identified their sexual orientation.[253]

Schools need to educate students, parents, teachers, administrators, and other staff about the legal rights of LGBTQ students, including their right to privacy. Education about LGBTQ students and their rights will enable schools to address the problem of unwanted disclosures with minimal harm to the students because parents and school officials will be informed before situations arise. Moreover, access to this type of education is readily available. Several organizations have developed resources schools can use to

250. *See* MICHAEL BOCHENEK & A. WIDNEY BROWN, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN THE U.S. 2 (Human Rights Watch ed. 2001), *available at* http://www.hrw.org/sites/default/files/reports/usalbg01.pdf.

251. *Id.*

252. *See* Kramer, *supra* note 65.

253. *See supra* Part I.

learn about rights guaranteed to LGBTQ students.[254] GLSEN, the national organization dedicated to developing positive school climates, publishes and sends schools resource documents that provide practical guidance on student rights and school responsibilities.[255] The ACLU has also drafted a model letter to school administrators explaining that there is a legal obligation to implement policies and procedures that maintain the privacy of LGBTQ students.[256] Information is easily accessible; it is just not being utilized.[257]

Schools need to adjust their policies and procedures so that the right to privacy is protected. Comprehensive policies that specifically enumerate characteristics such as sexual orientation and gender identity have been found to be most effective at ensuring student safety.[258] Students in schools with comprehensive policies are more likely to say that reporting to school staff was effective at combating bullying and harassment.[259] In addition to expressly including protections for LGBTQ students, policies and procedures should explicitly address how to deal with potential disclosures of a student's sexual orientation. The special procedure adopted in Massachusetts for notifying parents of LGBT bullying is a good example; however, notification procedures could also be applied to other situations involving LGBTQ students.[260]

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254. *Library: LGBT Youth & Schools Resources & Links*, AM. CIVIL LIBERTIES UNION, http://www.aclu.org/LGBT-rights_hiv-aids/library (last visited Mar. 19, 2013).

255. *Guide to Legal Matters*, GLSEN (Jan. 12, 2007), http://www.glsen.org/cgi-bin/iowa/all/library/record/1742.html.

256. Letter from James D. Esseks, Director of American Civil Liberties Union, to School Administrators (Apr. 12, 2012), *available at* http://www.aclu.org/files/assets/model_letter_-_schools_privacy_letter_4_6_2012.pdf.

257. *2004 State of the States Report: The First Objective Analysis of Statewide Safe Schools Policies*, GLSEN (Apr. 1, 2005), http://www.glsen.org/cgi-bin/iowa/all/news/record/1687.html (demonstrating several states that have laws specifically prohibiting positive portrayal of LGBTQ issues or people in schools).

258. *See* KOSCIW ET AL., *supra* note 42, at xvii.

259. *See id.* at 70 Figure 1.52.

260. Similar policies should be enacted to protect the privacy of transgender students. "Transgender" is an umbrella term that includes gay men, lesbians, and bisexuals whose appearance, behavior, or other personal characteristics differ from traditional gender norms. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392 (2001). While some transgender individuals find it important to be out and open as transgender, others seek only to be seen as members of their identified gender. The right to privacy for transgender students entails a right to be called by a name and pronoun that corresponds to their correct gender identities. *See id.* at 399–400 n.37. For example, a transgender student should have the right to work with school

All staff should receive training about revealing confidential information concerning a student's sexual orientation. The court in *Wyatt* held that a school could be liable for inadequate training policies if it exhibited deliberate indifference to adopting a training policy.[261] To avoid the situation in *Wyatt*, in which numerous teachers and staff were confused about how to deal with situations involving a student's sexual orientation,[262] schools need to provide comprehensive training to the entire school staff. The GLSEN Survey found that while over half of the students felt comfortable talking about LGBT issues with a school-based mental health professional or a teacher, significantly fewer students felt comfortable talking with athletic coaches, resource staff, and school safety officers.[263] Thus, coaches for sports teams, proctors, and lunchtime supervisors should all receive training, not just administrators and teachers.

Training school officials on privacy issues can be incorporated into a more comprehensive training course about LGBTQ students. However, the training should address several important points. First, students have a right to privacy regarding their sexual orientation and inadvertent disclosure could potentially cause substantial harm to the student. Second, disclosing a student's sexual orientation should only take place when the student's health, safety, or welfare is at stake. Consistent with *Nguon*, gratuitous disclosures are never acceptable.[264] Third, permission or consent should be always sought from the student before disclosing his or her sexual orientation. Having a teacher designated to handle LGBTQ issues act as a liaison between the administration and staff is a helpful way to avoid confusion, and ultimately, the school's liability.

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administrators to ensure that his or her official school name is changed if needed. Teachers' roll calls and students' ID cards should reflect their preferred names that match their gender identities.

261. Wyatt v. Kilgore Indep. Sch. Dist., No. 6:10-CV-674, 2011 WL 6016467, at *11 (E.D. Tex. Nov. 30, 2011), *rev'd in part, vacated in part sub nom.* Wyatt v. Fletcher, 718 F.3d 496 (5th Cir. 2013).

262. *Id.* at *13.

263. KOSCIW ET AL., *supra* note 42, at 49.

264. Nguon v. Wolf, 517 F. Supp. 2d 1177, 1195 (C.D. Cal. 2007).

VI. CONCLUSION

For LGBTQ persons, coming out to a parent or family is an incredibly special and memorable moment. It was a moment that was likely preceded by years of confusion, doubt, and reconciliation with a part of that person's identity. It probably involved profound thought and deep feelings about when and how to come out, taking into account each parent or family member's beliefs and views. And it had powerful short-term and long-term effects on that person's relationships and self-esteem. LGBTQ students face unique challenges in coming to terms with their sexual orientations because of the extraordinary pressures at home, at school, and in society in general. While being out at a young age can have positive social effects on a child's wellbeing and feelings of belonging in school, being forced out prematurely can also have substantial negative effects including rejection from family members and increased confusion.

While the Supreme Court has not yet addressed the issue of unwanted disclosures, cases such as *Whalen*, *Lawrence*, and *Griswold* suggest a constitutional right to privacy, including autonomy with familial decision making and confidentiality with highly personal information. Unwanted disclosures of a student's sexual orientation interfere with privacy rights by preempting a student's decision to come out independently to his or her parents or family members and to reveal highly personal and confidential information. Lower courts in *Sterling*, *Nguon*, and *Wyatt* have begun to recognize this emerging privacy right among minors who have been outed by government officials. Despite the unsettled law in this area, school officials need to know the potential dangers of outing and take affirmative steps to prevent unwanted disclosures from taking place.

No child should have to go through what Charlene Nguon or Skye Wyatt went through. Rather than being outed unexpectedly to their respective families, Nguon could have focused on her schoolwork and gone on to UCSB, and Wyatt could have continued playing softball. With the training and procedures recommended in this Note, Nguon's principal and Wyatt's coach would have been trained on the potential harms of outing, and there would be clear prerequisites and procedures set in place before disclosing their sexual orientations. As more information about this topic evolves,

school officials will begin to realize what policies need to be put in place so that unwanted disclosures do not cause unwanted liabilities.

While laws in the area of LGBTQ rights—such as those pertaining to marriage, military service, and employment—gradually progress,[265] so do laws affecting LGBTQ students and privacy rights. Efforts to pass anti-gay legislation in schools have been largely unsuccessful.[266] Most notably, in 2013, the infamous Tennessee "Don't Say Gay" bill was reintroduced into the state legislature with a new provision requiring teachers to refrain from any discussion of homosexuality in the classroom and to counsel and notify parents and legal guardians about their child's sexuality.[267] Not only did this bill raise concerns about whether LGBTQ issues should be discussed in schools, it raised significant privacy issues with teachers outing students they suspected were engaging in "inappropriate" sexual behavior. If passed, this bill could have resulted in harmful consequences for students with intolerant families or parents.

Also in 2013, California passed Assembly Bill 1266, which guarantees transgender students equal access to school sports teams and gender-segregated facilities that correspond with the student's gender identity.[268] Opponents to the bill claimed that allowing transgender students to use facilities along with students of the opposite sex threatened their children's privacy rights.[269] Efforts to repeal the bill failed, and it has now become the law in California.[270]

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265. *See Timeline: Milestones in the American Gay Rights Movement*, PBS, http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/ (last visited Mar. 20, 2013).

266. *"No Promo Homo" Laws*, GLSEN, http://glsen.org/learn/policy/issues/nopromohomo (last visited Mar. 20, 2013).

267. *See* S.B. 234, 108th Gen. Assemb., 1st Reg. Sess. (Tenn. 2013). The bill states that in pre-K through eighth grade levels, any "course materials or other informational resources that are inconsistent with natural human reproduction shall be classified as inappropriate . . . and, therefore, shall be prohibited." *Id.* at 1. It also authorizes school counselors, nurses, principals, or assistant principals to counsel students who are engaging in "behavior injurious to the physical or mental health and well-being of the student" so long as the parents are notified that such counseling has occurred. *Id.* at 2; *see also* Meredith Bennett-Smith, *Tennessee "Don't Say Gay" Bill Is Back, Now Requires Teachers to Tell Parents If Child Is Gay*, HUFFINGTON POST (Jan. 30, 2013, 7:36 PM), http://www.huffingtonpost.com/2013/01/30/tennessee-dont-say-gay-bill_n_2582390.html.

268. CAL. EDUC. CODE § 221.5 (West 2014).

269. *PJI Announces New Resource for Parents to Fight Back Against Bathroom Bill*, PAC. JUSTICE INST. (Aug. 18, 2013), http://www.pacificjustice.org/press-releases/pji-announces-new-resource-for-parents-to-fight-back-against-bathroom-bill.

270. Parker Marie Mallory, *Calif. Trans Student Law Survives Repeal Effort*, ADVOCATE.COM (Feb. 24, 2014, 9:46 PM), http://www.advocate.com/politics/transgender/2014/02/24/breaking-calif-trans-student-law-survives-repeal-effort.

While laws in the area of privacy rights for LGBTQ students change, local communities can take steps to ensure the safety and well-being of students. School officials need to update policies and procedures accordingly so that LGBTQ students can worry about one less thing as they come to terms with their sexual orientations.