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CHILD, PLEASE¹ — STOP THE ANTI-QUEER SCHOOL BULLYCIDES: A MODEST PROPOSAL TO HOIST SOCIAL CONSERVATIVES BY THEIR OWN “GOD, GUNS, AND GAYS” PETARD²

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The Article you are about to read contains “foul language, adult content, satanic imagery and depictions of sexually deviant fantasies that may offend the religious right, the nonreligious left . . . metrosexuals, animal lovers, animal haters,” the past “presidential administration, and people with eyes.” STEEL PANTHER, FEEL THE STEEL (Universal Republic Records 2009); *see infra* text accompanying note 165 (discussing the value of popular culture as a means to advance rights); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1666 (1990) (questioning “whether the more intimate and . . . more widely accessible languages of . . . popular music lyrics may change minds and prompt actions.”).

This Article, therefore, includes numerous references to music lyrics to heighten the metaphor and social contextualization of its subject matter. *See, e.g.*, RISE AGAINST, *Make It Stop (September’s Children)*, on ENDGAME (Interscope Records 2011) (stating “too much blood has flown from the wrists of the children shamed for those they chose to kiss . . . Tyler Clementi, age 18. Billy Lucas, age 15. Harrison Chase Brown, age 15. Cody J. Barker, age 17. Seth Walsh, age 13. Make it stop, let this end. This life chose me, I’m not lost in sin. But proud I stand of who I am, I plan to go on living.”) (emphasis added).

1. The recent re-emergence into popular culture of the phrase “child, please” is attributed to professional football player Chad Ochocino’s repeated use on the HBO series “Hard Knocks” in the summer of 2009. *See Hard Knocks* (HBO television broadcast 2009), available at <http://www.youtube.com/watch?v=CEm5YUKsilw&feature>.

2. *See* Bennett L. Gersham, *The Most Dangerous Power of the Prosecutor*, 29 PACE L. REV. 1, 8 (2008) [hereinafter *Inspector General Investigation*] (stating that under the Justice Department’s hiring practices during the George W. Bush administration, “Republican lawyers received high marks in their job interviews because they were found to be sufficiently conservative on the core issues of ‘god, [sic] guns + gays.’” (quoting an Inspector General’s report concluding that “a partisan litmus test” existed “for Justice Department hirings,” in the Bush Justice Department “in violation of federal civil service law” and “Justice Department guidelines”) (emphasis added) (citation omitted)).

On March 2, 2011, a Kentucky state senator demonstrated that the linkage of God, guns, and gays continues today. In Kentucky, a state senator opposed a bill that would “ban[] the bullying of gay students” for fear that it would cause students who speak out and condemn homosexuality as a sin would be bullied because of their “moral or religious belief[s].” *Bill that Bans Bullying of Gay Students Stalls in Kentucky House*, WHAS11.COM (Mar. 2, 2011, 12:09 AM), <http://www.whas11.com/news/politics/Bill-that-bans-bullying-of-gay-students-stalls-in-Kentucky-House-117187813.html>. The senator has also introduced “an amendment to the bill that would allow . . . firearms on public campuses and . . . keep guns in their vehicles on school property.” *Id.*

To “hoist with your own petard” means to be “[i]njured by the device that you intended to use to injure others.” THE PHRASE FINDER, <http://www.phrases.org.uk/meanings/hoist%20by%20your%20own%20petard.html> (last visited Jan. 17, 2011).

INTRODUCTION

In September 2010, openly queer³ thirteen year-old California student Seth Walsh, wrote a note to his family that read: “I know this will bring you much pain, but I will hopefully be in a better place than this shithole. Put my body in burial and visit my body And make sure to make the school feel like shit for bringing you this sorrow.”⁴ In the final four months of 2010 alone,⁵ Seth was one of at least twelve queer teens who took their lives after suffering prolonged abuse at school.⁶ According to Seth’s attorneys,

When Seth was in the fifth grade, other students started calling him “gay.” As he got older, the harassment became more frequent and severe. By seventh grade, taunts and verbal abuse were a constant occurrence. Students regularly called him “fag”⁷ He was afraid to use the restroom or be in the boys locker room Seth’s mother and close friends report that teachers and school administrators were aware that Seth was being harassed and, in some instances, participated in the harassment

[H]is mother said “I went to Seth’s vice-principal about my concerns, and he said, ‘remind me next year.’ Seth’s

3. Because of the varied definitions of the word “queer” in legal literature, this Article uses the term to mean individuals who (a) are not heterosexual, (b) not perceived to be heterosexual by others, and/or (c) possess — or appear to possess — a non-cisgender (binary) gender role. This Article, uses “youth,” “kids,” “adolescents,” and “students” to mean persons attending school who are under eighteen years old. Due to the paucity of data regarding other features of individual identity, this Article does not imply that queer kids are interchangeable members of a collective. See, e.g., Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations: Review and Recommendations*, 58:1 J. HOMOSEXUALITY 10, 19-20 (2011).

4. *Seth Walsh 1997–2010*, ACLU (Dec. 16, 2010), <http://www.aclu.org/lgbt-rights/seth-walsh-1997-2010>.

5. Letter from Elizabeth Gill et al., ACLU California Affiliates, to Richard Swanson, Superintendent, Tehachapi Unified School District (Dec. 16, 2010), available at <http://www.aclu-sc.org/documents/view/296>.

6. This Article’s use of “school” means traditional public schools, not private or charter schools.

7. “Fag” is short for “faggot,” the etymology of which “referred to the kindling used to light the fire under a criminal sentenced to burn [often a heretic for engaging in homosexual activity].” Anthony M. Lise, Comment, *Bringing Down the Establishment: Faith-Based and Community Initiative Funding, Christianity, and Same-Sex Equality*, 12 N.Y. CITY L. REV. 129, 137 (2008).

death was an accumulation of events over years.⁸ Seth called me and said, ‘Mom, you’ve got to pick me up, some boys are trying to beat me up’⁹ I saw three boys and one girl following him, and I could tell he was very frightened. So we went home and we talked for a little while He went outside, and about ten minutes later, I went outside, and I thought he was picking plums from the tree, so I went over to go talk to him, and he was hanging from the tree.”¹⁰

This general fact pattern is not new; it has existed for decades.¹¹ New, however, was the subsequent diverse and organic uprising that called for October 20, 2010, to represent “Spirit Day,” inviting people to “wear purple in recognition of bullied gay youths following several related suicides.”¹²

Reacting to Spirit Day, Clint McCance, the Vice-Chair of the Midland, Arkansas school district,¹³ posted on his Facebook webpage:

Seriously they want me to wear purple because five queers killed themselves. The only way im [sic] wearin [sic] it for them is if they all commit suicide. I cant [sic] believe the people of this world have gotten this stupid. We are honoring the fact that they sinned and killed thereselves [sic] because of their sin. REALLY PEOPLE.¹⁴

8. See *infra* Part I.A (demonstrating that bullying is not an isolated event and requires a prolonged, cumulative pattern).

9. See *supra* note 4.

10. *Id.*

11. See *infra* Part II.A.

12. Part of New Jersey’s 2011 anti-bullying legislation mandates that a week in October be “designated as a ‘Week of Respect.’” Angela Daidone, *N.J. Has Strict Anti-Bullying Bill of Rights Just Months After Tyler Clementi Suicide*, NEW JERSEY NEWSROOM.COM (Jan. 6, 2011, 11:43 AM), <http://www.newjerseynewsroom.com/state/nj-has-strict-anti-bullying-bill-of-right-just-months-after-tyler-clementi-suicide>. See *infra* note 315 and accompanying text.

13. FWright, *Arkansas School Board V.P. Urges Gay Students to Commit Suicide: Upset Because He Was Asked to Wear Purple in Support of Them*, THE HIVE (Oct. 28, 2010, 8:59 PM), <http://thehive.modbee.com/node/21830>; *School Board Member’s Facebook Post Urged ‘Sinful’ Gay Youths to Commit Suicide*, MAIL ONLINE NEWS (Oct. 29, 2010), <http://www.dailymail.co.uk/news/article-1324450/Clint-McCances-Facebook-post-urged-gay-youths-commit-suicide.html>.

14. Neal Broverman, *School Official Wants Gays Dead*, THE ADVOCATE.COM (Oct. 26, 2010),

Responding to a commenter challenging McCance's post, McCance then wrote,

[B]eing a fag doesn't give you the right to ruin the rest of our lives. If you get easily offended by being called a fag then dont [sic] tell anyone you are a fag. Keep that shit to yourself. I dont [sic] care how people decide to live their lives They dont [sic] bother me if they keep it to thereselves [sic]. It pisses me off though that we make a special purple fag day for them. I like that fags cant [sic] procreate. I also enjoy the fact that they often give each other aids [sic] and die I would disown my kids [if] they were gay. They will not be welcome at my home or in my vicinity. I will absolutely run them off. Of course my kids will know better. My kids will have solid christian [sic] beliefs.¹⁵

McCance's remarks expose the thinking of many conservative agents of the state whose charge has been to oversee the education of *all* students, but whose behavior has compromised the safety — and lives — of queer students for decades by explicitly or implicitly: (a) claiming deeply held conservative religious beliefs on the part of the dominant majority or state monopoly;¹⁶ (b) translating that power and alleged moral superiority into claims of sinful behavior on the part of minority youth;¹⁷ (c) calling the minority youth derogatory names,¹⁸

http://www.advocate.com/News/News_Features/Arkansas_School_Board_Member_Thinks_Fags_Should_Die/.

15. *Id.*; Andy Towle, *Arkansas School Board Member Clint McCance Wants 'Fags' Dead*, TOWLEROAD (Oct. 26, 2010, 7:26 PM), <http://www.towleroad.com/2010/10/arkansas-school-board-member-clint-mccance-wants-fags-dead.html>.

16. Schools are a government monopoly by any neoclassical economic standard, particularly for those students who lack the financial resources to attend private, parochial, or home schools. See generally JAMES A. BRICKLEY ET AL., *MANAGERIAL ECONOMICS AND ORGANIZATIONAL ARCHITECTURE* 170 (Bret Gordon et al., 4th ed. 2007) (explaining that monopolies exist when sector and entity demand curves are identical); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95 (1988) (stating that people who possess more relative choices control more social capital and asserting that a student's cultural status and social capital are critical factors in educational outcomes).

17. *N.J. Teacher Under Fire for Alleged Anti-Gay Comments On Facebook*, CBSNEWYORK (Oct. 13, 2011), <http://newyork.cbslocal.com/2011/10/13/union-high-school-teacher-under-fire-for-alleged-anti-gay-comments-on-facebook/>; see also Andy Birkey, *Anoka-Hennepin Teachers Accused of Harassment Put On Leave*, MINN. INDEP. (Sept. 2, 2009), <http://minnesotaindependent.com/43432/anoka-hennepin-teachers-accused-of-harassment-put-on-leave>.

18. See, e.g., *supra* note 15.

(d) assuming an inability of queer people to procreate;¹⁹ (e) associating queer children's identities with the deadly AIDS virus;²⁰ (f) vowing to disown one's own child, should that child be queer;²¹ and (g) explicitly or implicitly calling for death to queer people.²²

Because the Inspector General Investigation identified a litmus test consisting of a troika of core conservative issues (God, guns, and gays), this Article applies that analytic to its use of "conservative." The term thus refers to individuals and groups whose beliefs broadly: (i) embrace fundamentalist, evangelical; or orthodox Judeo-Christian religious teachings; (ii) support an individual's right to bear arms; and (iii) accept government as a means to create and extend programs and benefits for non-queer persons to the exclusion of queer persons. While constituents of the first two prongs may not agree on all issues, they are sufficiently comfortable with the overall arrangement that they acquiesce or actively participate in the third prong.²³ This Article thus excludes capitalist or free market ideas from its use of "conservative."²⁴

While Mr. McCance's comments are vile, they only facially represent the thoughts of one school board member. Nonetheless, the systematic failure to defend bullycidal queer students,²⁵ of which Mr. McCance is a component, is disheartening. Bullycide "represents the

19. See, e.g., Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN. 1, 3 (2009) (stating that courts have held that queer people "were excluded from marriage because they could not procreate.").

20. See *infra* note 186; see also Paul Gibson, *Gay and Lesbian Youth Suicide*, in REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE 110-42 (Marcia R. Feinleib ed., 1989); EVE KOSOFSKY SEDGWICK, *Queer and Now*, TENDENCIES 1, 2 (1993).

21. See Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 193, 270-72 (1996) (stating that "one youth gay man out of four was forced to leave home when his parents found out he was gay" referencing Gary Remafedi, *Male Homosexuality, The Adolescent's Perspective* (1985) (unpublished manuscript) (cited in SEDGWICK, *Queer and Now*, *supra* note 20, at 2)). See also Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127:1 PEDIATRICS 49, 50 (2010) (describing the familial violence and homelessness that often accompanies disclosing a queer identity).

22. See *infra* notes 138-139 and accompanying text.

23. See generally JAMES A. BRICKLEY ET AL., *supra* note 16, at 645-648 (discussing the neoclassical economic "Baptists and bootleggers" theory that emphasizes coalition forming as a means to influence government regulation of inter alia social issues).

24. This Article excludes capitalist and free market ideas from its definition of "conservative" because the Inspector General Investigation revealed that the Bush administration's litmus test evidenced social, not economic, conservatism.

25. See *infra* Parts I-IV.C.2. and accompanying text.

ultimate response of a school-age child when bullying²⁶ is either undetected or is ineffectively dealt with by adults when it is detected,” and “is the term used when children kill themselves because they cannot face one more day of being bullied.”²⁷ Because our language currently lacks a lexical unit that describes the type of bullying that occurs either on school property or when students are in the course and scope of school-related activities, this Article uses “Hostile Schoolground Violence” (“HSV”) to describe such bullying.²⁸ Any discussion of bullycide in this Article denotes HSV as a fulfilled condition precedent and excludes non-school-related bullying.

Concerned with the systematic failures to defend queer students from bullycide, this Article contends that because queer youth (and law review editors) do not deserve another thirty years of rehashed queer scholarship,²⁹ a moral imperative compels developing novel legal approaches to defend queer students from HSV and bullycide. Professor Lucinda Finley stated,

Law is . . . a language . . . and a system through which meanings are reflected and constructed and cultural practices organized. Law is a language of power, a particularly authoritative discourse [Legal language] . . . reinforces certain world views and understandings of events [L]aw has the power to silence alternative meanings — to suppress other stories.³⁰

Thus, language matters in law. Evidencing that language also matters in religious discussions, St. Augustine “tells us it is often easier to have fellowship with one’s dog than with someone whose

26. See *infra* Part I.A.

27. MARGARET R. KOHUT, *THE COMPLETE GUIDE TO UNDERSTANDING, CONTROLLING, AND STOPPING BULLIES AND BULLYING: A COMPLETE GUIDE FOR TEACHERS AND PARENTS* 113–14 (Tracie Kendziora ed., 2007); see also NEIL MARR & TIM FIELD, *BULLYCID: DEATH AT PLAYTIME* 27–28 (2001).

28. See *infra* Part I.A.

29. See Nancy K. Ota, *Queer Recount*, 64 ALB. L. REV. 889, 892 (2001) (asking “[i]s it surprising that the papers presented over twenty years ago bear some resemblance to the papers presented here and to contemporary issues facing the LGBT community?”).

30. Lucinda M. Finley, *Breaking Women’s Silence in the Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989) (footnotes omitted).

language one does not understand.”³¹ Similarly, social scientists claim that a precondition to a minority group’s meaningful foray into cultural legitimacy is the minority culture’s acquiescence to accept and speak the language of the dominant majority.³² This Article thus enters the legal, religious, and cultural debate concerning the rights of queer students to enjoy the education owed to them under each state’s constitution³³ by shifting the pro-queer legal argument from its historic place in the failed margins of the anti-capitalist liberal zone of queer and critical legal theory³⁴ to a conservative archetype. This Article

31. Jean Bethke Elshtain, *The Just War Tradition and Natural Law*, 28 *FORDHAM INT’L. L. J.* 742, 749 (2005) (referencing AUGUSTINE, *CITY OF GOD AGAINST THE PAGANS* 476, 861 (Henry Bettenson trans., 1972)).

32. See Jeanne H. Ballantine & Joan Z. Spade, *Getting Started: Understanding Education Through Sociological Theory*, in *SCHOOLS AND SOCIETY: A SOCIOLOGICAL APPROACH TO EDUCATION* 9-11 (Jeanne H. Ballantine & Joan Z. Spade eds., 3d ed. 2008) (outlining Emile Durkheim’s nineteenth century assertion that schools perpetuate a society’s moral values through a “socialization” process in which schools serve as “training ground[s] for learning . . . the ‘rules’ of the larger society,” and stating that “in multicultural societies . . . school socialization helps to integrate immigrants by teaching them the language and customs and by working to reduce inter-group tensions.”); Mari Firkatian, *Retaining Ethnic Identity: The Armenians in Bulgaria*, in *CULTURAL EDUCATION—CULTURAL SUSTAINABILITY: MINORITY, DIASPORA, INDIGENOUS, AND ETHNO-RELIGIOUS GROUPS IN MULTICULTURAL SOCIETIES* 170, 186 (Zvi Bekerman & Ezra Kopelowitz eds., 2008) (stating that “[t]he dominant culture by its very prevalence exerts an irrefutable pressure to conform and adapt . . . [and] learn the dominant language quickly”); see also Edward J. Brantmeier, ‘*Speak Our Language . . . Abide by Our Philosophy*’: *Language & Cultural Assimilation at a U.S. Midwestern High School*, *F. ON PUB. POL’Y ONLINE* (Spring 2007), <http://forumonpublicpolicy.com/archivespring07/brantmeier.rev.pdf>.

33. See Avidan Y. Cover, *Is “Adequacy” a More “Political Question” than “Equality?”: The Effect of Standards-Based Education on Judicial Standards for Education Finance*, 11 *CORNELL J.L. & PUB. POL’Y* 403, 404 & n.6 (2002) (stating that every state constitution contains an education clause, but noting that there is some debate whether the Mississippi constitution has such a clause); see also *MISS. CONST.* art. VIII, § 201.

34. See, e.g., Ming-Yu Bob Kao, Books Note, 22 *BERKELEY J. GENDER L. & JUST.* 274, 276–77 (2007) (reviewing *TRANSGENDER RIGHTS* (2006) (stating “Dean Spade’s piece . . . focuses on . . . the poor, who have been victims of capitalism. This piece exemplifies the mandate of the *Berkeley Journal of Gender, Law & Justice*.”) (first and second emphasis added); see also Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 *AM. U. L. REV.* 1187, 1211 (2004) (blaming imperial capitalism for the “subordination of persons of color,” the “decimation of Native Americans, the enslavement of Africans, the exploitation of Asian ‘immigrant’ labor, and the conquest of Latinos” that cause “race and class domination,” instead of accusing exclusively imperialism, which is, by definition, anti-capitalist); AYN RAND, “*The Roots of War*,” in *CAPITALISM: THE UNKNOWN IDEAL* 35, 35–44 (1986) (excoriating as incompatible with capitalism “men with political pull” who seek “special advantages by government action in their own countries” and “special markets by government action abroad,” to “acquire fortunes by government favor . . . which they could not have acquired on a free market.”); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 6–21 (1962) (asserting that government interventions in markets restrict peoples’ freedom to engage generally in the conduct they desire, while capitalism allows people those freedoms); FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 88–100 (1944) (arguing that government control

demonstrates that the dominant majority's socio-legal system is undergirded by conservative language, theology, and socialization³⁵ that help explain the systematic failure to defend queer students from HSV or bullycide. Thus, kids attempting to live in such a system require the construction of a legal theory largely based on the conservative language, teachings, and legal hypotheses that the dominant majority has legitimized.

This Article advances a legal paradigm, underpinned in large part by enduring conservative Judeo-Christian deontological³⁶ teachings (God), consistent with the Supreme Court's recent Second Amendment 5-4 conservative majority opinions (guns), to defend bullycidal queer students (gays). Specifically, this Article demonstrates that bullycidal queer kids' interest in living,³⁷ coupled with a systematic failure to defend them from HSV, justifies a right to exert defensive lethal force against bullies. Legitimizing a legal framework that endorses a student's right to take another human life demands a deep dive into the nature of HSV and the history and milieu of the material component parts that comprise the socio-legal system that has failed to reduce queer students' risk of succumbing to bullycide.

Part I scaffolds the concept of HSV by defining and describing the prolonged and specific nature of, and motivations behind, conduct that constitutes the term "bullying." This Part demonstrates the psychological and physical damage that bullying causes and asserts that a new phrase, HSV, better describes the bullying that occurs specifically at school or in the course and scope of school-related activities. Next, this Part evidences the traumatic stress disorders that anti-queer HSV causes. Part I then references the numerous studies that demonstrate links between anti-queer HSV and bullycidal tendencies, concluding by contextualizing those links.

Parts II and III document a historiography of a decades-long systematic failure to defend students from HSV and bullycide. Part II analyzes the system's material non-governmental components,

of economic decision-making ultimately leads to tyranny, oppression, and individual serfdom).

35. See *supra* note 32.

36. "Deontology is the theory of moral obligation, and, by connotation, encompasses moral theories that emphasize rights and duties." Tim Stelzig, *Deontology, Governmental Action, and the Distributive Exemption: How the Trolley Problem Shapes the Relationship between Rights and Policy*, 146 U. PA. L. REV. 901, 907 (1998); see *infra* note 330.

37. See generally MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 45-50 (2002) (explaining the morality of self-ownership); JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (Peter Laslett ed., 1988) (1690) (stating that everyone "has a *Property* in his own *Person*.").

including the legal academy, parents, conservative leaders of Judeo-Christian faiths, and the popular media. Part II concludes that these non-governmental components have failed as potential supports to defend queer youth from HSV. Part III analyzes the system's material governmental components that can defend — or torment — queer students through the coercive threat, or use, of state power. This Part demonstrates that, despite the ability and obligation of governmental structures to use state force to defend students from anti-queer HSV, those components unleashed or acquiesced to the use of violent force against non-violent queer youth. Part III evidences that the state components of schools, the justice system, and legislatures have all failed to defend students from anti-queer HSV.

Parts I through III thus establish that HSV is a problem linked to bullycide, and a systematic failure to defend queer students from HSV and bullycide has occurred. Consequently, Part IV begins by asserting that if bullycidal queer students feel compelled to take a bully's life to save their own, deontological justifications that include conservative Judeo-Christian teachings and the Model Penal Code's lesser evil doctrine³⁸ underpin a legitimate right to do so. Part IV argues that the recent 5-4 conservative Supreme Court opinions in *District of Columbia v. Heller*³⁹ and *McDonald v. City of Chicago*⁴⁰ reflect these students' centuries-old natural and fundamental rights to bear arms in self-defense at school. Finally, this Part discusses the need to recognize a syndrome defense permitting expert testimony to help jurors understand the bullycidal queer student's state of mind at the time of killing a bully.

This Article concludes by positing that until meaningful socio-legal systematic risk reduction occurs, bullycidal queer students possess a legitimate legal option to take a bully's life.

I. DESCRIBING THE PROBLEM: BULLYING, HSV, AND BULLYCID

A. *Bullying's Ubiquitous Nature and Link to Queer Student Bullycide*

A popular misconception exists that bullying is the same as being "picked on." Kids "are picked on for a specific personal difference, usually for a limited period of time until perpetrators grow

38. MODEL PENAL CODE § 3.02(1) (1981).

39. *District of Columbia v. Heller*, 554 U.S. 570, 570 (2008).

40. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

bored with their own game”⁴¹ In contrast, bullying is prolonged, “can continue for years with no let-up by the tormentors,”⁴² and reflects three broad themes. First, an “element of bullying that cannot be overemphasized is the *power differential* between the bully and the victim. The bully is . . . more *socially adept* than the victim” and “[t]he bully’s actions are *tolerated* by the rest of the peer group because the bully is in some way *superior . . . to the victim*.”⁴³ An anti-queer bully’s superiority and power differential exist because the dominant majority’s laws and customs view queer people as inferior.⁴⁴ Anti-queer bullies’ actions are both tolerated and socially adept because they help to maintain existing dominant social norms. For instance, when witnessing a bullying act, most of the dominant majority’s “bystanders believe that the bully’s behavior is despicable”⁴⁵ But, when made aware of an act of anti-queer bullying, they tolerate the bullying because of queer students’ social inferiority.⁴⁶ Unlike the generic bully who targets a generic student, the dominant culture perfunctorily bestows upon an anti-queer bully four essential components of bullying: a power differential, cultural superiority, toleration of the behavior, all of which enable a bully to be socially adept.

41. KOHUT, *supra* note 27, at 13.

42. *Id.*

43. *Id.* at 25 (emphasis added).

44. *See, e.g.*, COLO. CONST. art. II, §30(b) (preventing state entities from passing laws, policies, etc. that allow homosexuals “to have or claim any minority status, quota preferences, protected status or claim of discrimination”); CINCINNATI, OH., CITY CHARTER art. XII (targeting people based on their queer status to remove and isolate them from participating in the political process via majority vote); OHIO CONST. art. XV, § 11 (denying queer people not only marriage rights but also any “legal status for relationships of unmarried individuals that intends to *approximate the design, qualities, significance* or effect of marriage” in the state’s constitution, accomplished via simple majority vote) (emphasis added).

45. KOHUT, *supra* note 27, at 56.

46. *See, e.g.*, CBS News: *Life Lessons: Addressing School Bullying* (CBS television broadcast Jan. 9, 2011) (asking a student’s mother if she was proud that her daughter taunted another student with anti-queer epithets and the mother responding, “[e]xactly, you have to stand up for themselves [sic], you know? In society, really, I don’t think anyone would really pick on her”), available at <http://www.cbsnews.com/stories/2011/01/09/sunday/main7227783.shtml>; Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN’S L.J. 159, 159 (1999) (stating that after a sixteen year-old suffered two years of anti-queer taunting, the principal responded that the student “made a bad choice to be Gay . . . ‘Kids will be kids.’”) (emphasis added) (citation omitted); Morgan v. Bend-La Pine Sch. Dist., No. CV-07-173-ST, 2009 U.S. Dist. LEXIS 9443, at *11-12 (2009) (describing how, over a three-year span, students called another student “gay,” fingered her vagina, forced her to give hand jobs, with teachers responding that “boys will be boys”) (emphasis added).

Second, bullies want to “publicly humiliate” the target for simply “being a target,”⁴⁷ and the dominant majority has historically targeted queer people in general.⁴⁸ Specific examples of non-queer students targeting queer students include: (a) verbally harassing, throwing items at, and spitting on a student who formed a Gay Student Association (“GSA”);⁴⁹ (b) placing death threats in a student’s locker, believing she was queer;⁵⁰ and (c) shooting and killing — during school hours — a fifteen year-old queer classmate “who frequently came to school wearing ‘high-heeled boots, makeup, jewelry and painted nails’” and who recently asked the killer to be the deceased’s Valentine.⁵¹

Third, the “most damaging . . . bullying consists of social isolation” of the target, resulting in the target “being completely

47. See Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1082 (2008) (asserting that gender expression is a contributing factor to becoming a target of anti-queer bullying and that queer males who attempted suicide were “more likely to be feminine . . . and less likely to be masculine . . .”); see also *infra* note 51 and accompanying text.

48. See, e.g., *supra* note 43; see also Valerie Jenness, *Social Movement Growth, Domain, Expansion, and Framing Processes: The Gay/Lesbian Movement and Violence Against Gays and Lesbians as a Social Problem*, 42 SOCIAL PROBLEMS 145, 149 (1995) (asserting that “violence motivated by homophobia and heterosexism represents the most frequent, visible, violent, and culturally legitimated type of bias-motivated conduct”).

49. Kelley Pearce, *School Gay Club Allowed to Stay: Gilbert Organization Unique in Valley*, THE ARIZ. REPUBLIC (PHOENIX), Feb. 25, 1999, at B1 (describing how student counsel sought to prevent the formation of the GSA but eventually decided against it). “GSA” is a typical acronym for a “gay student association” or a “gay straight alliance.” See also *infra* Part III.C.1.

50. Bettina Boxall & Duane Noriyuki, *Abuse of Gay Students Brings Increase in Lawsuits; Harassment: Victims, Once Silent or Ignored, Now Strike Out Against a Favorite Form of Campus Torment*, L.A. TIMES, May 28, 1999, at A1.

51. Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 221-22 (2008) (citing Gregory W. Griggs, *Student Is Declared Brain Dead: Lawrence King, 15, Was Shot and Wounded at an Oxnard Campus Tuesday. A Classmate Faces Murder Charge*, L.A. TIMES, Feb. 14, 2008, at 2). See also Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL’Y REV. 446, 448 (1986) (stating that “effeminate boys or girls with ‘masculine’ traits inspire the cruelest and most frequent abuse.”). See generally RIKI WILCHINS & TANEIKA TAYLOR, GENDER PUBLIC ADVOCACY COALITION, 50 UNDER 30 MASCULINITY AND THE WAR ON AMERICA’S YOUTH (2005) (detailing the murders of sixteen gender non-conforming teens); *Ellen DeGeneres on 15-Year-old Boy, Larry King, Killed for Being Gay*, YOUTUBE (May 8, 2008), <http://www.youtube.com/watch?v=PeM9w3L4H6I&feature=youtu.be>; Jennifer L. Pozner, *Ellen DeGeneres Decries Murder of Gay 15-year-old (But Why is That “Not Political?”)*, HUFFINGTON POST (Mar. 1, 2008), http://www.huffingtonpost.com/jennifer-l-pozner/ellen-degeneres-decries-m_b_89357.html.

ignored and excluded from a peer group.”⁵² Queer kids may experience this rejection indirectly, as “many gay and lesbian youth observe the treatment of peers and clearly understand what could happen to them if they appear to be, or are known to be, different.”⁵³

A lack of integration into the dominant culture is “one of the major reasons people kill themselves.”⁵⁴ And negative reactions to queer kids by peers are a sufficiently material risk factor for suicide attempts that require comprehensive professional intervention.⁵⁵ If left untreated, anti-queer abuse in childhood creates an increased risk for suicide throughout life.⁵⁶ Beyond simply displaying risk factors, youth who are subjected to anti-queer bullying “experience chronic trauma, a series of repetitive, daily assaults upon their physical and emotional integrity,” which can lead to post-traumatic stress disorder (“PTSD”).⁵⁷ PTSD “may follow the experience *or witnessing* of anti-gay violence.”⁵⁸ Moreover, bullying can lead to arousal, fear, shock, denial, and avoidance in the target, which constitute the key symptoms of pediatric medical traumatic stress, and the core symptoms of acute stress disorder.⁵⁹ Kids may respond to such trauma by “feeling guilty for being . . . bullied.”⁶⁰ Such guilt is a belief that the target individual somehow caused or contributed to the bullying, even though “the child may often not know *how* he or she caused it.”⁶¹ “Unresolved guilt may lead to . . . suicidal feelings,”⁶² and the verbal and psychological abuse

52. KOHUT, *supra* note 27, at 29; *accord* *Romer v. Evans*, 517 U.S. 620, 628–29 (1996); *see also infra* notes 53, 292, 301; *cf. infra* Part III.C.1. (describing legislative attempts to socially isolate queer students by attempting to prevent them from joining GSAs).

53. John C. Gonsiorek, *Mental Health Issues of Gay and Lesbian Adolescents*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN AND GAY MALE EXPERIENCES* 473 (Linda D. Garnets & Douglas C. Kimmel eds., 1993). *Cf. infra* note 231 and accompanying text (describing how queer students know to stay away from school or drop out based on peer perceptions) and ELLEN C. PERRIN, *SEXUAL ORIENTATION IN CHILD AND ADOLESCENT HEALTH CARE* 86–7 (2002) (demonstrating that witnessing anti-queer violence may lead to post-traumatic stress disorder).

54. Linda L. Morrison & Jeff L’Heureux, *Suicide and Gay/Lesbian/Bisexual Youth: Implications for Clinicians*, 24 *J. ADOLESCENCE* 39, 39 (2001).

55. Anthony R. D’Augelli & Scott L. Hershberger, *Lesbian, Gay, and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems*, 21 *AM J. CMTY. PSYCHOL.* 421, 444 (1993).

56. D’Augelli & Hershberger, *supra* note 55, at 439–42, 445. The mental health profession, however, is generally unprepared to treat the needs of queer kids.

57. KOHUT, *supra* note 27, at 50.

58. PERRIN, *supra* note 53, at 86 (emphasis added).

59. RONALD M. DOCTOR & FRANK N. SHIROMOTO, *THE ENCYCLOPEDIA OF TRAUMA AND TRAUMATIC STRESS DISORDERS* 66 (2009).

60. *Id.* at 66. *See also infra* Part IV.C (discussing learned helplessness).

61. DOCTOR & SHIROMOTO, *supra* note 59, at 66; *see also infra* Part IV.C.

62. DOCTOR & SHIROMOTO, *supra* note 59, at 66.

associated with physical bullying often correlates with suicide.⁶³ Studies demonstrate that twenty to forty percent of queer kids report attempting suicide,⁶⁴ while “studies of the general high school population” report a materially lower “rate of suicide attempts that range from six to thirteen percent.”⁶⁵

Having described the general contours of bullying, how and why queer kids become socially acceptable targets for bullying, the ensuing psychological trauma that bullying can cause, and the resulting correlation with suicidal behavior, this Part next discusses bullying in the context of schools, HSV. First, this Article focuses on school bullying because kids who face hostility at school are “much more likely to attempt suicide than children who do not face a hostile school environment.”⁶⁶ Second, numerous studies⁶⁷ demonstrate that “school is one of the most intensely and often violently anti-gay sites in our culture”⁶⁸ and is “the primary setting” for anti-queer violence.⁶⁹ Third, in 2011, Dr. Ann Haas and twenty-five other researchers stated in a landmark meta-study, “a nationally representative U.S. survey and

63. Ritch C. Savin-Williams, *Reactions of Gay and Lesbian Youth to Verbal and Physical Harassment*, HUM. ECOLOGY F., Winter at 12, 13–14 (1990); see also Tracie L. Hammelman, *Gay and Lesbian Youth: Contributing Factors to Serious Attempts or Considerations of Suicide*, 2 J. GAY & LESBIAN PSYCHOTHERAPY 77, 79, 82–83 (1993) (identifying verbal abuse and physical violence directed at a child’s sexual orientation as strong precursors for suicide attempts among queer youth).

64. Savin-Williams, *supra* note 63, at 266.

65. Amy Lovell, Comment, “*Other Students Always Used to Say, ‘Look at the Dykes’*”: *Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 627, 618 (1998) (citation omitted).

66. Katie Feiock, Comment, *The State to the Rescue: Using State Statutes to Protect Children from Peer Harassment in School*, 35 COLUM. J. L. & SOC. PROBS. 317, 320 (2002).

67. See generally Joseph J. Wardensky, Comment, *A Minor Exception?: The Impact of Lawrence v. Texas on LGBT Youth*, 95 J. CRIM. L. & CRIMINOLOGY 1363, 1378 (2005) (indicating that “nearly 90 percent have ‘sometimes or frequently hear[d] homophobic remarks’ in school.” (quoting *LGBTQ Youth Statistics*, HETRICK-MARTIN INST. (2005), <http://www.hmi.org/>)); Valentine, *supra* note 47, at 1085 (referencing a study showing that “over a third of students report experiences of physical harassment and two-thirds report experiences of sexual harassment during school.”); Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 GOLDEN GATE U. L. REV. 67, 75 (1994) (stating that twenty percent of queer students in a New York study “reported being beaten because of his [or her] homosexuality,” and other “statistics show that eighty percent of the perpetrators of all hate crimes against gays are teen-agers.”); Christopher Kendall & Sonia Walker, *Teen Suicide, Sexuality and Silence*, 23 ALT. L. J. 216, 217 (1998) (stating that “[a] survey by the National Gay and Lesbian Task Force found that 45% of gay men and 25% of lesbians reported being harassed or attacked in high school because they were perceived to be lesbian or gay.”).

68. Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 271 (1996).

69. Andi O’Conor, *Who Gets Called Queer in School? Lesbian, Gay, and Bisexual Teenagers, Homophobia, and High School*, in *THE GAY TEEN* 95, 98 (Gerald Unks ed., 1995).

several nonrandom studies in the United States and abroad have linked suicidal behavior in LGB adolescents to school-based harassment, bullying or violence because of sexual orientation.”⁷⁰ A link thus exists between HSV that targets queer students and bullycidal behavior.

B. Contextualizing the Link between Anti-Queer HSV and Bullycidal Behavior

This Part, unlike the foregoing clinical definitions, studies, and examples of targeting queer kids for HSV, contextualizes the link between HSV and bullycide by way of example. While Ohio high school student Eric Mohat did not self-identify as gay, his peers perceived him as queer.⁷¹ Some people speculated that he was targeted because “[h]e may have looked éffeminate, was in theater, and would wear bright clothes.”⁷² Students harassed him with typical anti-queer slurs, such as “‘fag,’ ‘queer,’ and ‘homo,’” and also physically abused him.⁷³ After enduring a constant, prolonged, and cumulative barrage of psychological and physical abuse that often occurred in the presence of school employees, another student said to Eric during class, “[w]hy don’t you go home and shoot yourself, no one will miss you.”⁷⁴ That day after school, Eric went home, “took a legally registered gun from his father’s bureau drawer, locked himself in his room and shot himself in the head.”⁷⁵

The day before queer Houston student Asher Brown’s bullycide, another student tripped Asher while on a staircase, kicked Asher’s fallen books, and then “kicked Asher down the remaining flight of stairs”⁷⁶ Despite prior parental complaints to the school about anti-queer HSV targeting their son (including classmates performing mock gay sex acts on the thirteen year-old in class), the

70. Haas et al., *supra* note 3, at 34.

71. Susan Donaldson James, *Teen Commits Suicide Due to Bullying: Parents Sue School for Son’s Death*, ABC NEWS (Apr. 2, 2009), <http://abcnews.go.com/Health/MindMoodNews/story?id=7228335&page=1>.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. Peggy O’Hare, *Parents Say Bullies Drove Their Son to Take Life. They Claim School District Took No Action*, HOUSTON CHRON., Sept. 28, 2010, at B1, available at <http://www.chron.com/disp/story.mpl/metropolitan/7220896.html>.

school failed to provide a safe learning environment, and Asher ultimately took his stepfather's pistol and shot himself.⁷⁷

After enduring anti-queer HSV, last September, classmates told fifteen year-old Indiana student Billy Lucas to kill himself; after school that day, he went home and surrendered to the bullycidal tendencies.⁷⁸ Despite Georgia student Jaheem Herrera's mother having met with school personnel at least seven times about the anti-queer HSV targeted at her eleven year-old child, in early 2009, Jaheem succumbed to bullycide. His mother said, "the people who were supposed to take care of him didn't do it They failed him."⁷⁹ Her comments segue the discussion from understanding the link between HSV and bullycidal behavior to analyzing the components comprising the systematic failure to defend queer kids from HSV, leading countless queer kids to submit to bullycide.

II. THE FAILURE OF NON-GOVERNMENTAL ACTORS TO DEFEND QUEER KIDS

Theoretically, non-governmental actors exist outside of the majoritarian electorate that has the advantage of using force, if needed, to reinforce the dominant culture's collective views and values. However, when the hostility against queer kids is so pervasive, the line between government and non-government actors at times becomes blurred, and non-governmental actors can have deleterious effects on queer kids.⁸⁰ This Part thus documents how non-governmental systematic components, including the legal academy, family, faith, and popular media outlets, have failed to defend queer kids from anti-queer HSV.

77. *Id.*

78. Kara Brooks, *Bullied Greensburg Student Takes His Own Life*, FOX 59.COM (Sept. 13, 2010, 4:26 PM), <http://www.fox59.com/news/wxin-greensburg-student-suicide-091310,0,1101685.story>.

79. Alex Tresniowski et al., *Two Boys, Two Towns, Two Tragedies: Bullied to Death?*, PEOPLE, May 18, 2009, at 76.

80. See Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1481 (1992) (indicating, "state power cannot always be determined solely (or even primarily) by reference to its formal agency; the state power in contemporary American society can be seen not only in the force relations involving public officials and private citizens, but in those among citizens as well").

A. The Legal Academy

Legal academics possess a profound ability to be agents of social change by creating novel legal strategies that advance needed causes and provide courts with important sources of legal scholarship.⁸¹ Yet, for more than thirty years, the legal academy has failed to advance the cause of legal issues facing queer youth in a meaningful way. Most authorities credit Professor Rhonda R. Rivera with publishing the germinal law review article that created the legal discipline known as queer law in 1979.⁸² The article barely mentioned queer youth, and it entirely ignored HSV.⁸³ Seven years later, Professor Donna Dennis and Ruth Harlow wrote the first law review article addressing the need for legal structures to defend youth from anti-queer HSV and bullycidal behavior.⁸⁴ The authors stated, “[m]ost urgently, courts should prevent schools from continuing to enforce disciplinary codes in a way that condones taunting and violence against gay youth.”⁸⁵ The authors’ salient takeaway was that, in the mid-1980s, “for gay teenagers, the failure of school officials to provide protection from peer harassment and violence stands out as *the* predominant feature of the discriminatory public school environment.”⁸⁶ The authors found that in “most American school districts . . . the outlook for gay teenagers [was] bleak.”⁸⁷

Addressing that concern, the authors structured the first framework in legal scholarship to protect students from anti-queer HSV. Specifically, Dennis and Harlow proposed a litigation strategy under state constitutions’ equal protection and education clauses.⁸⁸ The

81. See, e.g., Christopher R. Leslie, *The Evolution of Academic Discourse on Sexual Orientation and the Law: An Introduction to Festschrift in Honor of Jeffrey Sherman*, 84 CHI.-KENT L. REV. 345, 367, 370–71 (2009) (evidencing how legal scholarship has influenced many queer rights cases).

82. See, e.g., *id.* at 367 (explaining that Professor Rivera laid the foundation for the new field of legal scholarship known as Sexual Orientation and the Law that dealt with issues “other law professors . . . were afraid to discuss.”). Professor Arthur S. Leonard’s scholarship has been considered the other pioneering work in queer law. See Rhonda R. Rivera, *Our Straight Laced Judges: Twenty Years Later*, 50 HASTINGS L. J. 1179, 1184 n.28 (1999) (stating “Art Leonard . . . is the father” of Sexual Orientation Law).

83. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L. J. 799, 924–34 (1979) (limiting the discussion to First Amendment’s association rights).

84. See Dennis & Harlow, *supra* note 51, at 446–47 (stating that they “propose a litigation strategy to . . . enforce gay students’ right to an equal, integrated education.”).

85. *Id.* at 469 (emphasis added).

86. *Id.* at 450 (emphasis added).

87. *Id.* at 456.

88. *Id.* at 459.

authors believed that courts could equitably fashion remedies, because “where a public institution fosters widespread and systematic violations . . . the plaintiffs need more extensive relief.”⁸⁹ They also predicted that “when courts learn that current school actions often force gay students to drop out of school . . . [or] severely hamper the basic education of gay students who remain enrolled, the courts are likely to find that this discrimination . . . curtails a primary state interest.”⁹⁰ The authors wrote that

[u]nless a judge ignores legal rules and relies solely on his own view that homosexuality is immoral or antisocial, the schools will have great difficulty meeting this burden of proof . . . and a court should not accept . . . the argument that discrimination against gay youth will decrease the number of homosexuals.⁹¹

Despite Dennis’ and Harlow’s identification of a “most urgent” need to address anti-queer HSV and publications in non-legal periodicals acknowledging the issue,⁹² no legal scholarship directly addressed anti-queer HSV for the following eight years, until a student comment implored, “the suicide . . . rate[] . . . [is a] cr[y] from our nation’s gay youth which can no longer morally be silenced.”⁹³ Despite the comment’s well intentioned ideas, its strategies, just as

89. *Id.* at 468. The remedies discussed in 1986 included faculty workshops, student workshops, a more inclusive curriculum, special rules that forbade the harassment of queer kids, separate policies that prohibited abuse of “gay teenagers,” and an oversight panel. *Id.* at 469, 471. *Cf. ACLU Letter to Tehachapi Unified School District Re: Seth Walsh*, *supra* note 5, at 5–7 (asking the school in essence to implement much of what Dennis & Harlow demanded twenty-four years earlier).

90. Dennis & Harlow, *supra* note 51, at 463.

91. *Id.* at 465. *See Bowers v. Hardwick*, 478 U.S. 186, 196 (1985) (rejecting respondent’s argument that majority sentiment’s view that homosexuality is immoral and unacceptable is not enough to satisfy rational basis standard).

92. *See A. Damien Martin, Learning to Hide: The Socialization of the Gay Adolescent*, 10 ANNALS OF AM. SOC’Y FOR ADOLESCENT PSYCHIATRY 52, 57 (1982) (asserting, “[f]or most, hiding and attempts to change are the strategies used to cope with [queer adolescents’] stigmatized status); Del Stover, *The At-Risk Students Schools Continue to Ignore*, 57 EDUC. DIGEST 36 (1992); Andrew Kurtzman, *Gay Teens Harassed in New York Schools; Advocates Say Homophobia is the Last Form of Intolerance Allowed to Flourish*, ATLANTA J. & CONST., May 5, 1992, at D6 (stating that almost half of gay male students involved in one study had attempted suicide); John C. Roth, *Gay Teens are Driven to Suicide by a Hostile Environment*, ST. PETERSBURG TIMES, July 4, 1991, at 2 (“[o]ur schools . . . ignore [high school gay youth and] . . . provide a very hostile and condemning peer environment, with verbal and frequently physical abuse, and rejection and isolation.”).

93. Armstrong, *supra* note 67, at 97.

Dennis' and Harlow's, have proven ineffective.⁹⁴ Two years later, another student note stated: "[t]he disproportionate number of queer teens who are . . . suicide victims . . . should send a red flag to the legal system that these young people are experiencing severe emotional trauma."⁹⁵ Nonetheless, throughout the mid-to-late 1990s, academic scholarship analyzing bias-motivated violence ignored anti-queer HSV.⁹⁶ Academics whose scholarly agendas generally focused on queer-related issues addressed matters facing the adult queer community and often ignored anti-queer HSV and bullycide.⁹⁷ Noting this trend, private practitioner Teemu Ruskola⁹⁸ stated that "[f]ew items rank below the protection of gay and lesbian children on anyone's agenda for justice and social reform"⁹⁹

After the landmark decision in *Nabozny v. Podlesny*,¹⁰⁰ which represented the first meaningful monetary sum paid by a school to a queer student who both suffered HSV and attempted bullycide several times, authors felt more empowered to address the issue of anti-queer HSV. These publications, however, remained primarily student comments and practitioner notes that made bold predictions and proposed weak structural frameworks, based largely on § 1983,¹⁰¹ Title IX,¹⁰² personnel training, inclusive curricula, and GSAs.¹⁰³

94. See *infra* Parts II–III.

95. Sonia Renee Martin, Note, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 180 (1996).

96. See Lu-in Wang, *The Complexities of "Hate,"* 60 OHIO ST. L.J. 799 (1999); Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875 (1992); Thomas, *supra* note 80, at 1431.

97. See, e.g., William B. Rubenstein, *In Communities Begin Responsibilities: Obligations at the Gay Bar*, 48 HASTINGS L.J. 1101 (1997); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993); William E. Adams, *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny, and Direct Democracy*, 55 OHIO ST. L.J. 583 (1994).

98. Teemu Ruskola is now a law professor at Emory University School of Law. *Teemu Ruskola Faculty Page*, EMORY LAW, <http://www.law.emory.edu/faculty/faculty-profiles/teemu-ruskola.html> (last visited Sept. 29, 2011).

99. Ruskola, *supra* note 68, at 330.

100. 92 F.3d 446 (7th Cir. 1996) (representing the first meaningful monetary sum paid by a school to a queer student who both suffered HSV and attempted bullycide several times). As of February 2011, at least 210 law review articles, comments, and notes discussed this case. Given that broad treatment, no need exists to further Nabozny's analysis here, beyond a reference to the case as a landmark anomaly favoring a bullycidal queer student. Compare Nabozny (allowing a § 1983 claim for money damages) with *infra* note 256 and accompanying text (admitting that despite "strikingly similar" facts to Nabozny, the court rejected the queer student's § 1983 claim).

101. 42 U.S.C.S.A § 1983 (West 2010) [hereinafter § 1983].

102. 20 U.S.C.S.A § 1681 (West 2010) [hereinafter Title IX].

The lopsided ratio of student and practitioner publications to faculty scholarship reflects the trend regarding queer scholarship generally,¹⁰⁴ and suggests that the absence of academic scholarship on queer issues was not the decision of law review editorial boards, but rather of academics who ignored the problems their students saw. Student and practitioner scholarship

ultimately proved persuasive and useful to courts in upholding the rights of gay litigants. Courts cited student scholarship in criminal law cases that struck down sodomy laws and invalidated anti-gay solicitation statutes. In family law, courts found student scholarship helpful Courts cited student scholarship in cases rejecting employment discrimination against gay workers . . . in preventing universities from discriminating against gay student groups . . . in immigration cases . . . and in one of the few successful challenges to the military's anti-gay policies.¹⁰⁵

103. See Ruskola, *supra* note 68, at 327 (erroneously predicting that Nabozny combined with Massachusetts' anti-discrimination laws could structure a workable framework); Martin, *supra* note 95, at 192–95 (proposing a “statutory recognition of the psychological abuse of queer teens in order to help represent the interests of these youths generally and in the contexts of child custody, guardianship and adoption, and emancipation.”); Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 138–39 (2000) (proposing “a federal law that supersedes state law and local politics, to ensure that school officials will not only be allowed to address the needs of gay students, but will be required to do so” and recognizing that while “liability under Title IX would not go so far to require tolerance training, it would at least impose a duty on school officials to respond to complaints of sexual harassment from gay students, regardless of the school officials’ own biases”); Feiock, *supra* note 66, at 319, 329–30, 337–38 (advocating for “both a private right of action and an administrative remedy” and naively believing that California's Education Code and its civil rights statute known as the Unruh Civil Rights Act and Vermont's anti-bullying statutes were models for other states to implement, despite gruesome bullying and bullycides in both states in the years since the comment); Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429 (1998); Mari J. Matsuda, *Foreword: Homophobia as Terrorism*, 1 GEO. J. GENDER & L. 1, 3 (1999) (stating that HSV directed at queer students was “homophobic terrorism directed at children” but proposing little more than using Title IX and implementing non-discrimination policies).

104. See Leslie, *supra* note 81, at 364 n.102 (stating “[i]f student scholarship were included in the count [of queer law publications], articles by law professors would represent a minor fraction — around 10% — of the total scholarship in the area.”). Historically, it has only been students who have written about gay legal issues. *Id.* at 348–49 (sodomy laws), 353 (discriminatory military regulations), 358 (universities' attempts to exclude queer student organizations), 360 (gay custody issues), 362 (same sex marriage).

105. Leslie, *supra* note 81, at 370–71 (citations omitted).

Noticeably missing from that list was the mortal issue of anti-queer HSV and bullycide. And while students and practitioners have continued to make admirable efforts to address these problems,¹⁰⁶ the academy, as a meaningful component of the socio-legal system that could provide a defense from HSV for queer students, so far has failed to produce the theoretical scholarship to frame a practical legal solution.

B. Parents

Parents' anti-queer feelings contribute to continued anti-queer HSV, and parents' failures to accept their queer children play crucial roles in contributing to their kids' mental health risks.¹⁰⁷ Some parents physically abuse their child even when those parents only *suspect* that the child may be queer.¹⁰⁸ One study revealed that a significant percentage of parents forced their children to leave home when those parents discovered the child's queer identity.¹⁰⁹ For other queer kids who believe that their parents will accept their queer identity and thus disclose their queer identity to their parents, doing so still often results in their parents evicting them from home.¹¹⁰

106. See, e.g., Jeffrey I. Bedell, Note, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829 (2003); Daniel Greene, "You're So Gay!": *Anti-Gay Harassment In Vermont Public Schools*, 27 VT. L. REV. 919 (2004); Ann-Yu Wang, Note, *Flores v. Morgan Hill Unified School District: Behind the Specter of Qualified Immunity — Applying the Appropriate Standard for Summary Judgment Under Equal Protection*, 13 L. & SEXUALITY REV. 753 (2004); Toni Wehman, Comment, *Not Part of the Game Plan: School District Liability for the Creation of a Hostile Athletic Environment*, 77 U. COLO. L. REV. 767, 794–97 (2006); Asaf Ott, Note, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN'S RTS. L. REP. 117 (2008); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147 (2009); Jason A. Wallace, Note, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735 (2011).

107. See Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 205, 210 (2010); Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 PEDIATRICS 346, 346 (2009).

108. See Valentine, *supra* note 47, at 1078 (stating that a child was a victim of child abuse when his father verbally abused him because he thought the child was gay, even though the child "adamantly denied the father's allegations.") (citing *In re Shane T.*, 453 N.Y.S.2d 590, 593 (N.Y. Fam. Ct. 1982)).

109. Ruskola, *supra* note 68, at 301 (indicating that parents evicted approximately one-quarter of queer males upon learning of the children's queer identity).

110. See, e.g., Emery S. Hetrick & A. Damian Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. HOMOSEXUALITY 25, 35 (1987).

As a result of familial abuse and evictions, “nonheterosexual youth are more likely than other adolescents to run away from home”¹¹¹ Compounding the problem for queer kids evicted from home, some homeless shelters still refuse entry to queer people,¹¹² and in metropolitan areas such as San Francisco, Los Angeles, and New York City, estimates indicate that half of the homeless youth self-identify as queer.¹¹³ Other queer kids who are neither directly abused nor evicted by their parents are instead institutionalized.¹¹⁴ For instance, beginning at age fourteen, Daphne Scholinski spent years in a psychiatric hospital for, among other things, “lacking signs of being a ‘sexual female’”¹¹⁵ and displaying signs of “pre-homosexuality.”¹¹⁶ After four years of institutionalized physical, sexual, and psychological abuse, she was released after her eighteenth birthday, once her insurance coverage expired.¹¹⁷

A connection therefore exists between parents’ evicting or institutionalizing (or both) their queer children and parents’ failure to defend queer students from HSV. Because queer kids likely have heard similar stories of parents abusing, institutionalizing, and evicting other kids suspected or confirmed to be queer,¹¹⁸ queer students would not “want their parents . . . to know that they have been victims of sexual orientation harassment [at school] for fear that these adults will learn or assume they are gay.”¹¹⁹ Because queer students fear the potential repercussions that may accompany their parents suspecting or learning of their queer identities, “[o]ne cannot assume that parents will always support their children” or “assist them in gaining help from school officials.”¹²⁰ As a result, parents are often another

111. Himmelstein & Brückner, *supra* note 21, at 54.

112. Alison Flowers, *House of Mercy: No ‘Practicing’ Gays Allowed*, WRBL NEWS 3 (Jan. 13, 2011), <http://www2.wrbl.com/news/2011/jan/13/house-mercy-no-practicing-gays-allowed-ar-1339817/>.

113. See Higdon, *supra* note 51, at 218. Other studies show that in Los Angeles the rate is between 25% and 35%. *Id.* In Seattle the rate is estimated to be 40%. *Id.* at 218 n.133.

114. Sarah E. Valentine, *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 19 YALE J.L. & FEMINISM 449, 451 (2008) (asserting “[q]ueer kids are frequently institutionalized or placed in private treatment programs because of their gender nonconformity or their perceived sexuality.”) (citations omitted). See also SHANNAN WILBER ET AL., CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOU IN OUT-OF-HOME CARE (Julie Gwin ed., 2006).

115. Daphne Scholinski, *After-Wards*, 48 HASTINGS L.J. 1195, 1195 (1997).

116. *Id.* at 1196.

117. *Id.* at 1198.

118. See, e.g., *supra* notes 53, 58 and accompanying text; *infra* note 231 (describing adolescents’ capacity to observe, appreciate, and internalize peers’ negative consequences).

119. Eisemann, *supra* note 103, at 149–50.

120. *Id.* at 150 (footnote omitted).

component part in the systematic failure to defend queer youth from HSV.¹²¹

C. *Judeo-Christian Religious Institutions and Leaders*

Modern prominent leaders of conservative Judeo-Christian faiths have instilled a fear that a queer identity is sinful and immoral and iniquitously support policies seeking to sustain a school environment that embraces anti-queer HSV. For instance, in the midst of the numerous queer bullycides during October 2010,¹²² New York Republican gubernatorial candidate Carl Paladino attempted to court the Jewish vote by addressing concerns relative to queer people, children, and schools with the influential Orthodox Jewish rabbinate. In securing their endorsement, Paladino told the rabbis that a queer life was “not the example that we should be showing our children,” because children should not be “brainwashed into thinking homosexuality is an equally valid and successful option . . .”¹²³ and “that’s not the example that we should be showing our children. Certainly not in our schools.”¹²⁴ After this dialogue with nationally renowned rabbis Noson Leiter and Yehuda Levin became public, a media firestorm ensued, and Paladino apologized for his “poorly chosen words,” in an attempt to save his campaign.¹²⁵

When the media asked for the rabbinate’s response to Paladino’s apology, the rabbinate revoked its endorsement of

121. See Parts II–III. A broader discussion of parents’ roles is beyond the scope of this Article, but for more detailed information on this matter see generally Himmelstein & Brückner, *supra* note 21 (describing a 2010 longitudinal study of queer youth that includes parents’ failures to support queer children); Haas et al., *supra* note 3, at 22 (stating “one especially powerful stressor for LGB youth is rejection by parents and other family members” and referencing a 2009 study finding that queer youth “who experienced frequent rejecting behaviors by their parents or caregivers during adolescence were over eight times more likely to report making a suicide attempt than those with accepting parents.”).

122. See Simone Weichselbaum & Kenneth Lovett, *Carl’s Nay on Gays Sez Don’t ‘Brainwash’ Kids to Think It’s OKAY*, N.Y. DAILY NEWS, Oct. 11, 2010, at 5 (stating that Paladino’s comments followed “a recent wave of anti-gay incidents, including a stunning revelation that nine members of a sadistic Bronx gang tortured a gay man and two gay 17-year-olds.”).

123. Adam Lisberg et al., *Carl Rages Against Guys in Speedos, Gay Grinding*, N.Y. DAILY NEWS, Oct. 12, 2010, at 4.

124. Frank James, *Carl Paladino: Gay ‘Option’ Not ‘As Valid’ As Straight*, NPR BLOG, (Oct. 11, 2010, 10:08 AM), <http://www.npr.org/blogs/itsallpolitics/2010/10/11/130487561/carl-paladino-gay-life-not-as-valid-as-straight>.

125. Elizabeth A. Harris, *Rabbi Breaks with Paladino Over Apology For Remarks on Gays*, N.Y. TIMES, Oct. 14, 2010, at A31.

Paladino¹²⁶ and used the media attention to gratuitously criticize the state legislature's recent enactment of curricular changes in schools that included "instruction in . . . tolerance . . . respect for others . . . [and] sensitivity . . . [in matters pertaining to, inter alia,] sexual orientation, genders, and sexes . . ."¹²⁷ These actions by prominent rabbis demonstrate how the leaders of Orthodox Jewry continue to participate in the demonization of queer people in general and oppose even small measures intended to defend queer students.

Discussing the failure of Judeo-Christianity to defend queer kids from HSV requires analyzing the actions of prominent Christian leaders as well.¹²⁸ For decades, as agents of the Catholic Church sexually abused minors (often of the same sex as the abuser),¹²⁹ the Church consistently denigrated queer people for being "intrinsically disordered" with "major sin"¹³⁰ and asserting that leaving a queer life was a "conversion from *evil*."¹³¹ In late 2010, Belgian Archbishop André-Joseph Léonard, who asserted that AIDS constituted "justice" for queer people who contracted it, maintained that priests who sexually molested prepubescent boys should "go unpunished."¹³² Current Pope Benedict XVI, who chose Archbishop Léonard for his

126. *Id.*

127. Rabbi Yehuda Levin, *Transcript of Rabbi Yehuda Levin's Remarks Outside the Greenwich Village Homosexual Club*, RABBI LEVIN.COM (Oct. 28, 2010), <http://www.rabbilevin.com/2010/10/transcript-of-rabbi-yehuda-levins.html>.

128. While this Article focuses on broader conservative Christian religions such as the Catholic church and evangelical Protestants, to view an example of how the Church of Jesus Christ of Latter Day Saints (the Mormon church) treats children who self-identify as queer watch: *THE MORMON PROPOSITION: EQUALITY FOR SOME* (David v. Goliath Films 2010) (describing how the church influences parents to evict queer children from their homes, leading to a community of homeless queer youth living in Salt Lake City sewers).

129. See, e.g., Nicholas R. Mancini, Note, *Mobsters in the Monastery? Applicability of Civil RICO to the Clergy Sexual Misconduct Scandal and the Catholic Church*, 8 ROGER WILLIAMS U. L. REV. 193, 193–94 (2002); Matthew Kauffman, *Church's Secrets Spill Out; CT Stories of the Decade 2000–2009*, HARTFORD COURANT, Dec. 26, 2009, at B1 (stating "[f]or decades, it was the Catholic Church's darkest secret. But over the past decade . . . church leaders in Connecticut and beyond were forced to acknowledge the devastating legacy of pedophile priests.").

130. Letter from United States Conference of Catholic Bishops, United States Conference of Catholic Bishops 1, 22 (Nov. 17, 2009), available at <http://www.usccb.org/issues-and-action/marriage-and-family/marriage/love-and-life/upload/pastoral-letter-marriage-love-and-life-in-the-divine-plan.pdf>.

131. Cardinal Joseph Ratzinger, Address at the Congregation for the Doctrine of the Faith (Oct. 1, 1986) (emphasis added), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html.

132. Robert Wielaard, *Conservative Belgian Archbishop in Eye of Storm*, USA TODAY (Nov. 11, 2010), http://www.usatoday.com/news/religion/2010-11-11-belgium11_ST_N.htm.

current position,¹³³ also stated that “saving humanity from homosexual or transsexual behavior was just as important as saving the rainforest from destruction.”¹³⁴ Beyond his equating queer behavior to the earth’s destruction, Pope Benedict’s Catholic Church indicated that civil recognition of civilly created and civilly conferred same-sex marriage rights “harms both the intrinsic dignity of every human person and the common good of society.”¹³⁵

Perhaps believing that the Catholic Church’s position was inadequate, James Dobson — a founder of the global Protestant Christian ministry Focus on the Family (FOF) and “the Christian right’s most powerful leader”¹³⁶ in recent years — equated the civil recognition of same-sex marriage rights to the deaths of over two-thousand U.S. citizens during the bombing of Pearl Harbor.¹³⁷ Dobson’s language linking the recognition of queer civil marriage rights with an unprovoked violent act severe enough to trigger the last constitutionally recognized war of the past seventy years helps ensure that violent imagery permeates any discussion of queer rights. Although civil recognition of queer marriage rights is a step towards peace, since it restricts the state’s ability to forcibly confiscate and redistribute the property of queer couples, FOF’s use of violent language in the midst of a popularly described “culture war”¹³⁸ could convince FOF’s parishioners that queer people deserve the violent response due any wartime enemy. Or, taken to its extreme, FOF’s comments may persuade parishioners that queer people are to be treated like the country that Dobson equated to queer people — the country that necessitated the deontological response of killing approximately 150,000 civilians with a nuclear weapon to ensure the survival of the U.S. culture.¹³⁹

Specific to queer students, FOF claimed that the intent of anti-bullying initiatives is not to defend queer kids from HSV, but instead

133. *Id.*

134. *Pope Benedict Criticizes Homosexual Behavior*, N.Y. TIMES (Dec. 22, 2008), <http://www.nytimes.com/2008/12/22/world/europe/22iht-23popo.18872459.html>.

135. United States Conference of Catholic Bishops, *supra* note 130, at 26.

136. Jacob Heilbrunn, *The Gospel of Dobson*, N.Y. TIMES, May 27, 2007, at 17.

137. Michael Crowley, *James Dobson: The Religious Right’s New Kingmaker*, SLATE (Nov. 12, 2004, 3:00 PM), http://www.slate.com/articles/news_and_politics/assessment/2004/11/james_dobson.html.

138. James Dobson is widely regarded to be engaged in fighting a “culture war.” See generally DAN GILGOFF, *THE JESUS MACHINE: HOW JAMES DOBSON, FOCUS ON THE FAMILY, AND EVANGELICAL AMERICA ARE WINNING THE CULTURE WAR* (2007).

139. See *infra* text accompanying note 164 (describing a conservative Christian ethicist’s claim that “[s]uch discussions may inflame the less discerning in the pews and lead them toward hateful and contemptuous . . . behavior.”).

is “to introduce the viewpoint that homosexuality is normal.”¹⁴⁰ Questioning the legitimacy of HSV itself, Linda Harvey, the President of Mission America, a Christian public policy organization,¹⁴¹ claimed that (a) queer advocacy groups were to blame for queer student bullycides, (b) “stand[ing] up against sexual deviance” in schools was not bullying,¹⁴² and, despite the inherent structural and power differentials that exist in anti-queer HSV,¹⁴³ (c) it is no different than “any other instance of bullying.”¹⁴⁴

Advocating for FOF’s and Mission America’s statements, the Traditional Values Coalition (TVC), lead by the ethically questionable Rev. Louis P. Sheldon,¹⁴⁵ serves as the “largest non-denominational, grassroots church lobby” in the U.S.¹⁴⁶ TVC “speaks on behalf of over 43,000 churches and like-minded patriots,” it admittedly “believe[s] in ‘discrimination,’”¹⁴⁷ and continues to pursue anti-queer lobbying efforts.¹⁴⁸ A recent example of TVC’s anti-gay bias occurred when TVC turned Congress’ response to the murder of queer teen Matthew Shepard into an opportunity to further the cause of TVC’s constituents by questioning the intent behind school anti-bullying legislation. TVC asserted, “there is an ever-increasing effort among homosexual

140. *Focus on the Family: Gay Groups Use Bullying Issue to Push Agenda*, KDVR DENVER (Aug. 29, 2010, 10:19 AM), <http://www.kdvr.com/news/kdvr-bullying-schools-txt,0,4777448.story>.

141. See *What is Mission: America?*, MISSION: AMERICA, <http://www.missionamerica.com/> (last visited Feb. 11, 2011).

142. See Linda Harvey, *Is ‘Gay’ Agenda to Blame for Teen Suicide?*, AM. FAM. ASS’N OF PA. (Oct. 10, 2010, 1:00 AM), <http://afaofpa.org/archives/is-gay-agenda-to-blame-for-teen-suicides/>. See also Wayne Besen, *The Most Homophobic Woman in America*, HUFFINGTON POST (Nov. 2, 2011, 4:08 PM), http://www.huffingtonpost.com/wayne-besen/linda-harvey-homophobic_b_1033469.html?ref=gay-voices.

143. See *supra* Part I.A.

144. *Supra* note 143.

145. See, e.g., Susan Schmidt & James V. Grimaldi, *How a Lobbyist Stacked the Deck; Abramoff Used DeLay Aide, Attacks on Allies to Defeat Anti-Gambling Bill*, WASH. POST, Oct. 16, 2005, at A1.

146. *About TVC*, TRADITIONAL VALUES COALITION, <http://www.traditionalvalues.org> (last visited Oct. 1, 2011).

147. *Traditional Values Defined*, TRADITIONAL VALUES COALITION, <http://www.traditionalvalues.org/defined.php> (last visited Oct. 1, 2011). TVC helped convince California’s State Board of Education to reject curricular changes regarding queer related issues, and it attempted to preserve sodomy laws in California. *Traditional Values Coalition*, RIGHT WING WATCH, <http://www.rightwingwatch.org/content/traditional-values-coalition> (last visited Oct. 1, 2011). When California addressed curricular changes regarding queer issues in 1992, Rev. Sheldon, TVC’s founder, fought against the inclusion of gay and lesbian issues information in the California public school curriculum. See David Tuller, *Debate Rages Over Gay References in Public School Curriculum*, S. F. CHRON., Dec. 8, 1992, at A17.

148. See *supra* note 143.

organizations to target public school children” via anti-bullying and other measures, because queer people are no different than, in TVC’s opinion, “pedophiles.”¹⁴⁹

Anecdotal evidence from a single school district in Minnesota demonstrates how these broad directives by the conservative Judeo-Christian leaders and their political lobbyists impact events at the granular level. By way of prologue, in 2009, in front of a student audience, several Anoka-Hennepin school district teachers directed anti-queer statements toward students, compared a queer (but self-identified heterosexual male) student to a Wisconsin man who had sexually engaged with a dead deer.¹⁵⁰ The teachers claimed the student’s “fence swings both ways,” asserted that the student had a “thing for older men,” and “enjoy[ed] wearing women’s clothes.”¹⁵¹ The Minnesota Department of Human Rights validated harassment claims against the teachers, and the district settled for a five-figure sum.¹⁵²

While the settlement evidences the district’s knowledge of anti-queer statements in its schools and the potential for future problems, the school implemented no material structural changes.¹⁵³ Some Minnesotans claimed that the district failed to make meaningful changes because the district was “worried about offending some socially conservative religious leaders in the area, who want to keep any mention of homosexuality, even if it relates to anti-bullying, verboten on high school campuses.”¹⁵⁴ At the behest of Parents Action League (PAL), a local faction whose website contains links to Mission

149. *The Homosexual Movement and Pedophilia*, TRADITIONAL VALUES COALITION, <http://www.traditionalvalues.org/homosexual-movement-and-pedophilia/> (last visited Nov. 1, 2010) (screenshot on file with author), available at <http://www.jesus-is-savior.com/Evils%20in%20America/Sodomy/pederasts.htm>. See generally Andrea Lafferty, *Congress Must Reject Pro-Pedophile, Anti-Christian 'Hate Crime' Bill*, GETTING IT RIGHT (Apr. 29, 2009), available at <http://site.pfaw.org/pdf/traditional-values-hate-crime-pr.pdf>; Rev. Louis P. Sheldon, *Homosexuals Target Public School Children*, TRADITIONAL VALUES (Traditional Values Coalition, D.C.), Vol. 18 No. II.

150. Andy Birkey, *Anti-Gay Harassment Costs Taxpayers \$25,000*, MINN. INDEP. (Aug. 13, 2009), <http://minnesotaindependent.com/41827/anti-gay-harassment-costs-taxpayers-25000>.

151. *Id.*

152. Andy Birkey, *Anoka-Hennepin Teachers Accused of Harassment Put On Leave*, MINN. INDEP. (Sept. 2, 2009), <http://minnesotaindependent.com/43432/anoka-hennepin-teachers-accused-of-harassment-put-on-leave>.

153. *Id.*

154. Michael Jones, *Why is the Anoka-Hennepin School Board Doing Nothing About LGBT Suicide?*, CHANGE.ORG (Aug. 31, 2010), http://gayrights.change.org/blog/view/why_is_the_anoka-hennepin_school_board_doing_nothing_about_lgbt_suicide.

America, Linda Harvey's group,¹⁵⁵ the district implemented a sexual orientation "neutrality policy"¹⁵⁶ in 2009 that PAL claimed was consistent with PAL's mission to condemn homosexuality.¹⁵⁷

Evidencing "what is past is prologue,"¹⁵⁸ in 2010, *three* queer students in the Anoka-Hennepin district succumbed to bullycide.¹⁵⁹ A mother of one of the deceased queer kids cited the neutrality policy that PAL advocated as a contributing factor in her child's bullycide.¹⁶⁰ Nonetheless, despite three anti-queer bullycides, citing the neutrality policy, the district initially refused to meet with queer groups offering assistance with anti-bullying education.¹⁶¹ Two queer students from the prior year's graduating class attended the subsequent school board meeting, stating:

When experiencing these problems, you can't go to your parents, where you face rejection from those you love the most You can't go to your church if you are in condemnation from a religion you've always embraced.

. . . .

[The neutrality policy] says that it is better for students to go to their home or their community or their church. I can't go to any of those. I go home and my parents tell

155. PARENTS ACTION LEAGUE, <http://www.parentsactionleague.org/articles/> (last visited Feb. 12, 2011).

156. ANOKA-HENNEPIN SCHOOL DISTRICT 11, SEXUAL ORIENTATION CURRICULUM POLICY (2009), *available at* <http://www.anoka.k12.mn.us/education/components/docmgr/default.php?sectiondetailid=223568&fileitem=48585&catfilter=15049> (stating "Anoka-Hennepin staff, in the course of their professional duties, shall remain neutral on matters regarding sexual orientation including but not limited to student led discussions. If and when staff address sexual orientation, it is important that staff do so in a respectful manner that is age-appropriate, factual, and pertinent to the relevant curriculum.").

157. See Andy Birkey, *Anti-gay Group Organizes in Anoka-Hennepin Schools as Community Deals with Gay Suicides*, THE MINN. INDEP., Aug. 26, 2010, <http://minnesotaindependent.com/64047/anti-gay-group-organizes-in-anoka-schools-as-community-deals-with-gay-suicides>.

158. WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc 1.

159. See Jones, *supra* note 154.

160. *Mother: Anoka-Hennepin School Policy Contributed to Gay Son's Suicide*, THE COLU.MN (Aug. 27, 2010), <http://thecolu.mn/4484/mother-anoka-hennepin-school-policy-contributed-to-gay-sons-suicide>.

161. *Minnesota: Anti-gay Group Fights Bullying Efforts After Teen Suicide*, JOE.MY.GOD.BLOG (Sept. 1, 2010), <http://joemygod.blogspot.com/2010/09/minnesota-anti-gay-group-fights.html>.

me I am cursed. I go to my church and I am rejected and condemned. I go to my community? What community do I have to go to?¹⁶²

Thus completes the cycle. High-level national and global conservative ministries propagate anti-queer material claiming that anti-bullying efforts are not intended to stop HSV but are instead a means for queer adults to recruit kids into a queer lifestyle or pedophiles to infiltrate schools. Following the lead of these national religious figures, local conservative factions regurgitate the ministries' claims as bases to impose policies at the local district level that restrict the district's ability to defend queer students. Lacking these potential defense structures, a number of queer students suffer HSV and succumb to bullycide. Left without a child, parents of queer students who fell to bullycide understand that the policies advocated by religious conservatives contributed to their children's deaths.

In sum, the actions of prominent conservative Judeo-Christian religious institutions and leaders demonstrate another component in the systematic failure to defend queer youth from HSV. Perhaps conservative Baptist minister and Distinguished University Professor of Christian Ethics, Dr. David Gushee of Mercer University, a school whose values "arise from a Judeo-Christian understanding of the world,"¹⁶³ best analyzed Christians' moral failures relative to Christians' treatment of queer people, when Dr. Gushee asserted:

As an evangelical Christian . . . I must say I find it scandalous that the most physically and psychologically dangerous place to be (or even appear to be) gay or lesbian in America is in the most religiously conservative families, congregations and regions of this country. Most often these are Christian contexts
This marks an appalling Christian moral failure.

. . . .

In contrast to the love and mercy that Jesus exemplified, Christian communities offer young lesbians and gays hate and rejection. Sometimes that rejection is declared directly from the pulpit. But even

162. Birkey, *supra* note 157.

163. *About Mercer*, MCAFEE SCHOOL OF THEOLOGY, MERCER UNIVERSITY, <http://www.mercer.edu/about/> (last visited Feb. 12, 2011).

when church leaders attempt to be more careful . . . the love gets lost . . . Such discussions may inflame the less discerning in the pews and lead them toward hateful and contemptuous attitudes and behavior.¹⁶⁴

Jay Michaelson, a Jewish scholar of law and religion, wrote:

There is a moment in *Huckleberry Finn* where Huck realizes he has a choice. He's been told all his life that if he hides runaway slaves, he will go to hell. But he's gotten to know Jim, a runaway slave, as a human being. What does he do — conform with his mythic religion, or listen to his heart? Huck's decision — "All right, then, *I'll go to hell.*"¹⁶⁵

D. Popular Media

Discussing recent popular media ostensibly is beneath legal scholarship. But in the context of anti-queer HSV, Professor Elvia R. Arriola stated that "[a]nti-gay harassment relies on popular culture . . . to discourage individuals from departing . . . from the socially prescribed, bipolar, dimorphic relationships between the female/male biological sexes and feminine/masculine gender roles."¹⁶⁶ Placing Huck Finn's decision¹⁶⁷ in a modern context, the 2010 major motion picture comedy, *Easy A*,¹⁶⁸ portrayed protagonist Olive's best friend as queer kid Brandon, who suffered from HSV. The film never depicted incidents of HSV itself; however, in an attempt to stop the anti-queer HSV targeted against him, Brandon begged Olive to help re-identify him as non-queer by engaging in a prolonged fake sex scene at a student party. In describing his pain that led to his request, Brandon stated:

You don't understand how hard it is . . . I'm tormented every day at school, it's like I'm being suffocated, and

164. David P. Gushee, *Church-Based Hate*, CHRISTIAN CENTURY (June 2009), available at http://www.interstateq.com/media-press/a49_cc_06022009.pdf.

165. Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 MICH. J. GENDER & L. 41, 115 (2008) (quoting MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 271 (Walter Blair & Victor Fisher eds., 1996) (1884)).

166. Elvia Rosales Arriola, *Wildly Different: Anti-Gay Peer Harassment in Public Schools*, 1. GEO. J. GENDER & L. 5, 10 (1999) (footnote omitted).

167. See *supra* note 165 and accompanying text.

168. EASY A (Sony Pictures 2010).

sure we can sit and fantasize all we want about how things are going to be different one day, but this is today, and it sucks, alright, and there's only one way around that, so please just help me, 'cause I can't take another day of this, and I don't know what to do.¹⁶⁹

Despite the film's comedic genre and marketing to a mainstream PG-13 audience, the ultimate resolution for Brandon's character reflected an homage to Huck Finn's decision about Jim. The school, principal, peers, family, and religious zealots did not improve Brandon's life. Instead, when another character asked Olive if she heard that Brandon had run away from home, Olive replied, "[y]eah, totally. He left his parents a note that said 'goodbye, bitches,' and then he stepped out with some big old . . . black guy My apologies to Mark Twain."¹⁷⁰

Self-identified heterosexual actor Ryan Philippe's character, Billy Douglas, came out of the closet as the "first gay teenager on television — not just daytime but television period," on ABC's soap opera *One Life To Live*.¹⁷¹ Philippe took the role — in 1992 — "after

169. *Id.*; cf. an actual bullycide note posted on Suicide.org, a suicide prevention organization, that stated:

I have been punched and spit on and called [sic] faggot, queer, loser, pussy, fag boy. . . . I hate this fucking life I am so fucking tired of the shit I am scared I cant [sic] take any more. . . . I just [sic] want to die and that is all so I don't have to put up with this fucking shit I just am going to end eveythihng [sic] now I need to kill myself I hate [sic] life and this is why I have to die I am scared and iam [sic] tired of being laughed [sic] at made fun of beaten up and threatened and shit I need to go. i [sic] am so scared now I now I need [sic] to die but I will be fine after I am dead.

. . . .

I never did anything wrong

Suicide Note of a Gay Teen, SUICIDE.ORG, <http://www.suicide.org/suicide-note-of-a-gay-teen.html> (last visited Nov. 2, 2011).

170. EASY A, *supra* note 168. See also *supra* notes 109–21 and accompanying text.

171. Greg Hernandez, *Ryan Phillippe Talks To The Advocate About His Days Playing Gay Teen Billy Douglas on "One Life To Live"*, GREGINHOLLYWOOD (May 13, 2010, 8:47 AM), <http://greginhollywood.com/ryan-phillippe-talks-about-his-days-playing-gay-teen-billy-douglas-on-one-life-to-live-28041> (reprinting an interview Philippe conducted with *The Advocate*). The first out lesbian teen character on daytime television was Bianca Montgomery, played by Eden Riegel, on ABC's *All My Children* in 2000. *Television's Queer Teen Girls*, AFTERELLEN (May 18, 2008), <http://www.afterellen.com/TV/2008/5/queerteengirls>.

learning of the high rate of suicide among lesbian and gay teenagers.”¹⁷² Philippe also said that he

heard from a father . . . who hadn’t spoken to his son since he came out. When our show came on . . . it gave him some insight and understanding as to who his son was, so it opened up communication between them. As much as you can write off how silly the entertainment industry can be, it can affect change and make people see things differently.¹⁷³

Kurt Hummel serves as the current queer student on Fox television’s *Glee*. Openly queer actor Chris Colfer plays Kurt’s role. In January 2011, when Colfer earned a Golden Globe Award for portraying Kurt, his acceptance speech dedicated the award “to all the amazing kids that . . . are constantly told ‘no’ [by] people and environments and bullies at school, that they can’t be who they are or can’t have what they want because of who they are”¹⁷⁴ Although Colfer dedicated an award he earned for portraying a queer student to students subjected to anti-queer HSV, besides a few shoves into lockers, *Glee* has not yet portrayed anti-queer HSV realistically.¹⁷⁵ And unless the popular media’s portrayal of the brutal, cumulative nature of anti-queer HSV becomes more reflective of reality, millions of people will continue believing conservatives like Linda Harvey who claim that the problem is not serious.¹⁷⁶

The media’s treatment of Battered Woman Syndrome (BWS)¹⁷⁷ serves as a helpful contrast to its current depiction of anti-queer HSV and a model for how popular media can portray anti-queer HSV to change popular perceptions. In the early 1970s, popular media condoned and joked about men beating women. A July 1973 issue of *Ms.* magazine featured an advertisement for a Michigan bowling alley,

172. *One Life To Live Could Be A Gay One Says Popular Soap*, COLUMN OF LIFE, <http://www.column-of-life.com/oltagaytv01.html> (last visited Sept. 28, 2011).

173. Hernandez, *supra* note 171.

174. Jocelyn Vena, ‘*Glee*’ Star Chris Colfer Dedicates Golden Globe To Bullied Kids, MTV (Jan. 16, 2011, 9:17 PM), <http://www.mtv.com/news/articles/1656070/glee-star-chris-colfer-dedicates-golden-globe-bullied-kids.jhtml>.

175. See Hanh Nguyen, ‘*Glee*’ Bully Max Adler Kisses and Tells About Kurt Karofsky, ZAP2IT (Nov. 11, 2010, 8:15 PM), <http://blog.zap2it.com/frominsidethebox/2010/11/glee-bully-max-adler-kisses-and-tells-about-kurt-karofsky.html>.

176. See *supra* note 142.

177. See *infra* Part IV.C.

stating: “Have some fun. Beat your wife tonight. Then celebrate with some good food and drink with your friends.”¹⁷⁸

But, in 1984, the network television movie *The Burning Bed's*¹⁷⁹ detailed depiction of how men battered women marked a significant “turning point in [the] fight against domestic violence.”¹⁸⁰ The broadcast drove social change, as the movie boldly showed the demeaning and humiliating physical abuse that men inflicted on women, to the point that the broadcast’s portrayal of battered women’s suffering “was appalling to everyone.”¹⁸¹ Thereafter, popular perceptions about violence by men against women diametrically shifted from where they stood in the early 1970s to a point where “[a]ssaults on women are no longer legal or accepted by our culture.”¹⁸² By the late 1990s, popular attitudes regarding domestic abuse changed so much that a song called *Goodbye Earl* detailed: (i) a man’s prolonged physical abuse of a woman; (ii) the failure of systematic supports to defend her; (iii) the woman’s pact with a friend that the abusive man *deserved* to die because of his continued abuse; and (iv) the women killing him with malice aforethought but suffering no legal consequences — and this song earned the Country Music Association’s Music Video of the Year in 2000.¹⁸³ Thousands of people of diverse sexes have attended many concerts at venues throughout North America since that time, happily and passionately singing¹⁸⁴ why “Earl *had* to die.”¹⁸⁵

178. Nancy Fiora-Gormally, *Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?*, 2 LAW & HUM. BEHAV. 133, 145 (1978) (footnote omitted). Although scholarship on BWS existed in the early 1970s, BWS gained greater legitimacy in the late 1970s and early 1980s, following the work of Lenore Walker and sociologist Mildred Pagelow. See, e.g., THE VIOLENT HOME (Jetse Sprey et al. eds., 2d ed. 1972); Elizabeth Truninger, *Marital Violence: The Legal Solutions*, 23 HASTINGS L.J. 259, 259 (1971); see generally LENORE E. WALKER, THE BATTERED WOMAN (1979); MILDRED D. PAGELOW, WOMAN-BATTERING: VICTIMS AND THEIR EXPERIENCES (1981).

179. THE BURNING BED (Tisch/Avnet Productions, Inc. 1984).

180. Louise Knott Ahern, “*The Burning Bed*”: A Turning Point In Fight Against Domestic Violence, LANSING STATE JOURNAL (Sept. 27, 2009), <http://www.lansingstatejournal.com/article/99999999/NEWS01/909270304/-The-Burning-Bed-A-turning-point-in-fight-against-domestic-violence>.

181. *Id.*

182. Walter W. Steele, Jr. & Christine Sigman, *Reexamining the Doctrine of Self-Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 175 (1991).

183. Sheila Simon, *Greatest Hits: Domestic Violence in American Country Music*, 82 OR. L. REV. 1107, 1120–22 & n.88 (2003).

184. See, e.g., *Dixie Chicks- Goodbye Earl*, YOUTUBE, <http://www.youtube.com/watch?v=Tvj5j98bja0> (last visited Feb. 12, 2011); *Dixie Chicks- Goodbye Earl (Grammy's on CBS)*, YOUTUBE, <http://www.youtube.com/watch?v=wNREAK-EKrQ> (last visited Feb. 12, 2011); *Dixie Chicks, Goodbye Earl (2003) Arrowhead Pond, Anaheim, CA*, YOUTUBE, <http://www.youtube.com/watch?v=i0hyH4K9Ntw> (last visited Feb.

Burning Bed and *Goodbye Earl* evidence the media's ability to change and maintain popular opinion on social issues. But the popular media is, to date, yet another component in the systematic failure to defend queer kids from HSV by delegitimizing its brutal nature.¹⁸⁶

III. GOVERNMENTAL FAILURE TO DEFEND QUEER STUDENTS

Although the failure of non-governmental components to defend students from anti-queer HSV is endemic and troublesome, none of them possess the government's explicit power and authority to initiate violence. The essential purpose of government, according to David A. Strauss, "is . . . to protect citizens against violence by other citizens. Whatever else the social contract requires, it at least requires this much."¹⁸⁷ Through force and the coercive threat of using it, government actors have significant power to protect people from violence. Contrary to its essential purpose, the state may also violently initiate aggressive force. Professor Ruskola indicated that government actors have "particular potency" via "the coercive power of the state that backs it up, ready at any time to discipline those who do not abide by it."¹⁸⁸ Understanding the importance of state coercive power is important to this discussion because, according to queer theorist Dr. Eve Kosofsky Sedgwick, the "institutions whose programmatic

12, 2011); and *Dixie Chicks: Goodbye Earl*, YOUTUBE, <http://www.youtube.com/watch?v=XuwVxiW6RTc> (last visited Feb. 12, 2011).

185. DIXIE CHICKS, *GOODBYE EARL* (Sony Music Entertainment, Inc. 1999) (singing, *Well it wasn't two weeks after she got married that Wanda started gettin' abused. She put on dark glasses and long sleeved blouses and make-up to cover a bruise. Well she finally got the nerve to file for divorce, she let the law take it from there. But Earl walked right through that restraining order and put her in intensive care. Right away Mary Anne flew in from Atlanta on a red-eye midnight flight. She held Wanda's hand, as they worked out a plan, and it didn't take long to decide that Earl had to die. Goodbye Earl!*).

186. *But see* КОЯН, *Faget*, on КОЯН (Immortal/, Epic Records, 1994); КОЯН; *Thoughtless*, on THE UNTOUCHABLES (Immortal/, Epic Records, 1998). Jonathan Davis, the lead singer of the multiple Grammy Award winning band, КОЯН, has "HIV" tattooed on his arm because of repeatedly being called "faget" ("faggot") and "HIV" in school, despite self-identifying as a heterosexual with a negative HIV status. КОЯН's songs *Faget* and *Thoughtless* represent the HSV Davis endured; however, the graphic nature of the songs' lyrics permitted government censors to prevent this music from receiving mainstream media exposure. *See Complete List of Grammy Award Winners*, USA TODAY (Jan. 1, 2003), http://www.usatoday.com/life/music/awards/grammys/2003-01-07-grammy-complete-list_x.htm; Jonathan (HIV) Davis, КОЯН'S ALIAS, <http://korns-alias.tripod.com/id3.html> (last visited Oct. 1, 2011); Jonathan Davis, ANGELFIRE, <http://www.angelfire.com/in/kornpeachy/Jon.html> (last visited Feb. 12, 2011).

187. David A. Strauss, *Due Process, Government Inaction and Private Wrongs*, 1989 SUP. CT. REV. 53, 53 (1989).

188. Ruskola, *supra* note 68, at 285.

undertaking is to prevent the development of gay people is unimaginably large . . . [and] in the United States . . . most sites of the state, [including] education . . . enforce it . . . unquestionably, and with little hesitation at even the recourse to invasive violence.”¹⁸⁹ State power can also be co-opted by private citizens, leading to private action that has, in essence, state backing. On this point, Professor Kendall Thomas argued that when private persons initiate violence against queer adults in the face of the state’s willful ignorance, then the private persons impliedly act as if sanctioned by law.¹⁹⁰ Also helpful in examining the conduct of state actors towards queer kids is understanding that conservative policy, as articulated by high ranking personnel within the Bush Justice Department,¹⁹¹ holds that the state’s initiation of violent force at torture levels — even against a non-violent child — is acceptable.¹⁹² Because queer kids are under the age of majority, they lack the ability to vote and thus lack political power to change their status as targets of government hostility. Therefore, queer kids constitute a politically powerless minority whose living conditions are contextualized by conservative policy positions supporting the legitimacy of the state’s ability to initiate torturous levels of violence against non-violent children.

Given this background, this Part examines how state actors — including schools, the justice system, and legislatures — have failed to defend queer students from HSV while gratuitously initiating violence against them.

189. EVE KOSOFSKY SEDGWICK, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in TENDENCIES 1, 161 (Michèle Aina Barale et al. eds., 1993).

190. Thomas, *supra* note 80, at 1490–91.

191. See Gershman, *supra* note 2, at 8 (discussing the Bush Justice Department’s God, guns, and gays litmus test for conservatism as used in this Article).

192. See, e.g., John H. Richardson, *Is This Man a Monster?: The President Asked John Yoo to Define Torture. He Did...*, 149 ESQUIRE, 126 (Jun. 1 2008) (describing current University of California, Berkeley Boalt Hall law professor and former Bush Justice Department Office of Legal Counsel official, John Yoo’s, position that government could legitimately “crush the testicles of a child to make his father talk”); U.S. Dep’t of Justice Office of Legal Counsel Memorandum for John Rizzo Acting General Counsel of the Central Intelligence Agency (Aug. 1, 2002) (on file with author). Conservative policy, therefore, does not seek to restrain state power to protecting citizens from each other’s violence but instead promotes and accepts the preemptive initiation of aggressive state force.

A. Schools

School systems are government actors¹⁹³ that represent the locus of the anti-queer HSV that can lead to bullycidal behavior. Prior to becoming Attorney General and leading President George W. Bush's Justice Department, Senator John Ashcroft emphasized the important role that schools and teachers have in society, declaring,

in hiring schoolteachers . . . or those who deal with young people, you never just hire a teacher. You are always hiring more than a teacher. You are hiring a role model Whether he or she liked it or not, that teacher was a role model.¹⁹⁴

Because conservatives view the conduct of educators through the optic of the teacher-as-role-model,¹⁹⁵ this Part analyzes how educators model conduct toward queer students that exacerbates and perpetuates schools' socialization of anti-queer behavior.

In junior high, Mark Iverson was "pushed into lockers with a broomstick and called 'fag' while two teachers sat by and did nothing When Mark reported the abuse to a teacher, the teacher became antagonistic toward him, banned him from her classroom, and failed him."¹⁹⁶ Similarly, George Loomis, a Golden West High School student, received comparable harassment.¹⁹⁷ In George's case, a teacher noticed that George was wearing an earring, and the teacher told the class, "[t]here are only two types of guys who wear earrings — pirates and faggots — and there isn't any water around here."¹⁹⁸ In

193. The Supreme Court has long recognized that education has a governmental nexus. "[E]ducation is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954); "[p]roviding public schools ranks at the very apex of the function of a State." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); "[w]e have recognized 'the public schools as a most vital civic institution for the preservation of a democratic system of government.'" *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

194. 142 CONG. REC. S10000 (daily ed. Sept. 6, 1996) (statement of Sen. Ashcroft). Later that week, conservative Senator Nickles of Oklahoma underscored this idea by saying that queer "persons engaging in such conduct [publicly holding hands or walking arm-in-arm or kissing] [are] not the right type of role models they would like to have for their young people." 142 CONG. REC. S10,0676 (daily ed. Sept. 9, 1996) (statement of Sen. Nickles).

195. Whether non-conservatives may also hold the teacher-as-role-model position is outside this Article's scope.

196. Schaffner, *supra* note 46, at 159 (footnote omitted).

197. *Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1095–99 (E.D. Cal. 2001).

198. *Id.* at 1095.

another case, a gym teacher compelled a sixteen-year-old queer boy to attend the girls' gym class.¹⁹⁹ In Washington, D.C.,

several teachers repeatedly taunted an openly gay fifteen-year-old, calling him 'faggot' and 'fruit,' knowing that he was also being harassed and beaten by fellow students. When he complained to . . . the principal, they blamed the gay student for his mistreatment and recommended that he leave school.²⁰⁰

As state actors who have actively participated in anti-queer HSV, teachers-as-role-models have failed to meet government's essential purpose to protect against violence.

The Supreme Court understands schools' unique place relative to protecting students; and many of its cases "recognize the obvious concern on the part of . . . school authorities "acting *in loco parentis*, to protect children" from a variety of harms, including vulgar and sexually explicit speech.²⁰¹ Despite these obligations imposed on school personnel, a biology teacher laughed along with his biology students who called a student "faggot" in class.²⁰² A queer student in the same school confronted the teacher after class about students' anti-queer comments, and "the teacher told the student that he did not hear the comments and refused to do anything about them."²⁰³ Students in that school's choir class threatened queer students and called them "faggot," and although the teacher observed the incidents, "the teacher took no action."²⁰⁴

Other teachers simply do not know how to broach an issue involving sexual orientation.²⁰⁵ A researcher of anti-queer HSV stated,

199. Dennis & Harlow, *supra* note 51, at 448–49.

200. *Id.* at 449.

201. Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 684 (1986).

202. *Gay-Straight Alliance Network*, 262 F. Supp. 2d at 1095.

203. *Id.* at 1092.

204. *Id.* at 1095. See also Ruth Teichroeb, *Gay Kids Often Abused While Adults Stand By*, *Report Says*, SEATTLE POST-INTELLIGENCER, Nov. 13, 1997, at B2 (describing anti-queer HSV witnessed by adults at the school who refused to intervene); *Gay-Straight Alliance Network*, 262 F. Supp. 2d at 1095; Lovell, *supra* note 65, at 621 (asserting that a study "questioned more than 1,600 students" throughout the U.S., contained queer and non-queer respondents who constituted "representative samples for Hispanic, white, and African American students," and reported that seventeen percent of all the students questioned had been called 'gay' or 'lesbian' when they did not want to be.") (citations omitted); Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 327–38 (2009).

205. See, e.g., Greene, *supra* note 106, at 925–26 (quoting Interview with Maggie Desch, Science Teacher and GSA Faculty Advisor, U-32 High School, in East Montpelier, Vt. (Mar.

“[i]t [is] distressing how many educators [stand] by in silence or actually participate[]”²⁰⁶ Teachers’ anti-queer words and deeds flaunt the acceptability of socializing future generations in anti-queer behavior. Outside of the classroom, school administrators allow anti-queer HSV to continue uncontested. For example, in one school, a teacher found a letter written by a student to the faculty “literally begging [the administration] to discuss sexual orientation.”²⁰⁷ The student explained that “he probably wouldn’t have tried to commit suicide if he had been able to talk to someone about being gay,” yet the administration and other faculty “didn’t think such a topic warranted discussion, and *certainly* not for impressionable high school students.”²⁰⁸

Teachers may also fear being fired for discussing queer issues. In New Hampshire, a school fired a teacher “after refusing the principal’s order to keep books that portray homosexuality in a positive light . . . out of her classroom.”²⁰⁹ In addition, attempting to keep with the purpose of the school’s “Tolerance Day” by inviting a queer speaker to discuss tolerance relative to queer people, the principal sardonically told the teacher to “not invite a homosexual to speak . . . at Tolerance Day.”²¹⁰

Administrators also punish queer students who resist HSV. For example, in Rhode Island, a

vice-principal refused to protect an openly gay student who asked him for help in stopping threats and assaults he received in gym class. When the student skipped

10, 2002) (on file with author)). According to a 2000 study, there are three possible reasons teachers have a difficult time addressing sexuality based issues and preventing anti-gay harassment. First, teachers lack proper training. Second, personal biases may prevent teachers from actively pursuing these issues. Finally, teachers are hesitant to engage these issues for fear of being labeled gay or lesbian themselves, “which might compromise their reputation and future employment.” *Id.* at 925 n.11 (citing Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN’S L. J. 125, 150 (2000)).

206. Boxall & Noriyuki, *supra* note 50.

207. Ruskola, *supra* note 68, at 307.

208. *Id.*

209. Eisemann, *supra* note 103, at 151 n.157. In 1992, a teacher at a Montgomery County, Maryland high school showed the movie “The Life and Times of Harvey Milk” and brought in two speakers to speak to her class about sexuality issues. The principal had given the teacher permission. Concerned Women of America, Inc. filed a grievance with the school, “interrogated the teacher and accused her of being a lesbian.” As part of a settlement, the teacher was allowed to remain at the school only if she denied that the school had given her permission to show the movie and invite the speakers. *Id.*

210. *Solmiz v. Maine Sch. Admin. Dist.*, 495 A.2d 812, 815 (Me. 1985).

class to avoid the abuse, the vice-principal disciplined him. Knowing that the student's classmates abused him for being gay, the principal nonetheless punished him with an "in-house suspension — the practical effect of which was three days of being spit at and baited by the other students on suspension."²¹¹

At another school, when a queer student was attacked by students who yelled "fag," "queer," and other such names, the queer student resisted, and the school's administrators "led the gay student away in handcuffs."²¹² At that same school, when "[o]ther gay or lesbian students" and parents "complained repeatedly to . . . teachers and administrators about the hostile climate on campus," the school refused to act.²¹³

Similarly, after being physically attacked, queer student Derek Henkle waited in fear for nearly two hours for a school official to assist him.²¹⁴ When the assistant principal arrived, Derek told her what had occurred, but "she burst into laughter . . ."²¹⁵ Derek then transferred schools two times. During class at the second school, a girl threatened to have her boyfriend "finish the job" on Derek.²¹⁶ The principal told Derek to "stop acting like a fag."²¹⁷ Derek ultimately left and sued the school. A witness later testified during discovery that students indeed had planned to "finish the job" of killing Derek, "by hanging him from a gazebo not far from the parking lot" where he had suffered prior anti-queer HSV.²¹⁸ Derek remarked that the students "were emboldened to do so . . . by the fact that the school officials did nothing to address" prior HSV,²¹⁹ and that the administration's inaction evidenced "their tacit consent to the abuse . . . signaling to the students that they could get away with anything."²²⁰ At another school, after learning that seventeen year-old Tyler Long successfully hanged

211. Dennis & Harlow, *supra* note 51, at 452 (footnote omitted).

212. *Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.* 262 F. Supp. 2d 1088, 1093 (E.D. Cal. 2001).

213. *Id.* at 1093–94.

214. Armen H. Merjian, *Henkle v. Gregory: A Landmark Struggle Against Student Gay Bashing*, 16 *CARDOZO J. OF L. & GENDER* 41, 49 (2009) (footnote omitted).

215. *Id.*

216. *Id.* at 52 (footnote omitted). The girl was alluding to the attack on Derek at his original school. *Id.* at 49–52.

217. *Id.* at 51 (footnote omitted).

218. *Id.* at 49 (footnote omitted).

219. *Id.*

220. Derek had transferred out of the district prior to the students being able to attempt to execute their plan to kill him.

himself, school officials did nothing when his bullycide “was openly mocked in school by the bullies” who “wore nooses around their necks.”²²¹

Exacerbating these problems are states’ compulsory attendance requirements that place gay students at risk of being repeatedly attacked and abused. Every state requires that queer students regularly subject themselves to potentially more state-sanctioned violence via compulsory attendance,²²² and most have by enacting compulsory attendance laws.²²³ These laws generally authorize the coercive threat of force against queer students who choose to “skip classes in order to avoid harassment.”²²⁴ Each day, “an estimated 160,000 kids nationwide stay home from school because they are afraid of being bullied.”²²⁵ In 2003, queer student Dylan Theno, who had been subjected to years of HSV, “begged his mother not to send him back to school,²²⁶ saying things like ‘Mom, I cannot go back there,’ . . . and ‘Please, you cannot send me back.’ He was a crying, emotional wreck.”²²⁷ The abuse that Dylan received at school led to a diagnosis of PTSD . . . that likely stemmed from the harassment.”²²⁸ Another student wrote, “[i]t’s gotten to the point where I can hardly concentrate on my school work, and I’m afraid to go to school because I fear for

221. Jim Dubreuil & Eamon McNiff, *Bullied to Death in America’s Schools*, ABC NEWS (Oct. 15, 2010), <http://abcnews.go.com/2020/TheLaw/school-bullying-epidemic-turning-deadly/story?id=11880841&page=1>.

222. See Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 13 (1983) (stating that the Court has “acknowledged the power of states to enact compulsory attendance laws . . .”); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

223. INSTITUTE FOR EDUCATION SCIENCES, NATIONAL CENTER FOR EDUCATION STATISTICS, AGE RANGE FOR COMPULSORY SCHOOL ATTENDANCE AND SPECIAL EDUCATION SERVICES, AND POLICIES ON YEAR-ROUND SCHOOLS AND KINDERGARTEN PROGRAMS, BY STATE: SELECTED YEARS, 1997 THROUGH 2008, http://nces.ed.gov/programs/digest/d08/tables/dt08_165.asp.

224. See, e.g., *Gay-Straight Alliance Network*, 262 F. Supp. 2d at 1093; MASS. GEN. LAWS ch. 76, § 1 (2010) (stating “[t]he school committee of each town shall provide for and enforce the school attendance of all children actually residing therein in accordance herewith.”).

225. Susan Donaldson James, *Teen Commits Suicide Due to Bullying: Parents Sue School for Son’s Death*, ABC NEWS (Apr. 2, 2009), <http://abcnews.go.com/Health/MindMoodNews/story?id=7228335&page=1> (citing the U.S. Centers for Disease Control and Prevention).

226. *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 961 (D. Kan. 2005).

227. *Id.*

228. *Id.* at 968.

my safety.”²²⁹ Despite these safety concerns, “courts . . . consistently have held that compulsory school attendance does not give rise to an affirmative due process duty to protect students against third-party harms.”²³⁰ The stress resulting from anti-queer HSV causes some students to “skip class to avoid harassment.”²³¹ Other students “develop chronic psychological injury” and insomnia.²³² The abuse has gotten so bad that some students’ “grades suffer[ed],” and “they fail[ed] classes.”²³³ For other queer kids, the abuse and harassment is so severe that the queer kids feel forced to drop out of school.²³⁴ In all, more than a quarter of all queer students drop out of school, mostly for fear of their safety.²³⁵

In 1996, Teemu Ruskola observed, “administrators, teachers, and other professional helpers are hellbent on not seeing gay kids and not acknowledging their abuse, whether subtle or brutal.”²³⁶ Fifteen years later, schools’ (a) complicity in anti-queer HSV, (b) refusal to intervene during instances of anti-queer HSV, and (c) modeled socialization of anti-queer behavior continue to result in a staggering percentage of queer students who are denied “the inherent value”²³⁷ of a public education enshrined in each state’s constitution.²³⁸ As state agents, schools have failed of their essential purpose, by neither defending queer students from HSV nor providing them with a safe learning environment.

229. *Doe v. Southeastern Greene Sch. Dist.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790, at *5 (W.D. Pa. Mar. 24, 2006).

230. *Botello v. Morgan Hill Unified Sch. Dist.*, No. C09-02121, 2009 U.S. Dist. LEXIS 107558, at *9 (N.D. Cal. Nov. 18, 2009).

231. *Gay-Straight Alliance Network*, 262 F. Supp. 2d at 1093.

232. *Id.*

233. *Id.*

234. Andi O’Connor, *supra* note 69, at 96–97. See also JOHN C. GONSIORREK, *Mental Health Issues of Gay and Lesbian Adolescents*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN AND GAY MALE EXPERIENCES* 469, 475 (Linda D. Garnets & Douglas C. Kimmel eds., 1993) (stating that some gay youth who develop ‘internalized homophobia’ sabotage themselves by giving up on educational goals because societal bias will prevent them from succeeding anyway).

235. David P. Gushee, *Church-Based Hate*, *CHRISTIAN CENTURY* (June 3, 2009), http://www.interstateq.com/media-press/a49_cc_06022009.pdf.

236. Dennis & Harlow, *supra* note 51, at 304.

237. TENN. CONST. art. XI, § 12.

238. See *supra* note 33.

B. *The Justice System*

“In a legal environment that punishes any deviance from the norm, queer children often become targets and they must have effective [legal] representation to maximize their chances for surviving intact.”²³⁹ Numerous hurdles, however, prevent queer kids from obtaining such essential legal advocacy. First, queer kids independently lack the financial capital to retain an attorney. Second, queer kids do not know how to identify an attorney with the competence to practice in the area in which they seek representation.²⁴⁰ Third, even if a queer kid possessed the financial capital and knowledge to locate and retain a lawyer with practical competence, that attorney nonetheless may be unreceptive to having a queer client.²⁴¹ Even if this lawyer is both unbiased and generally competent in the relevant areas of law for which the queer youth seeks representation, aside from a few legal organizations that focus exclusively on the legal issues facing queer people — Lambda Legal, GLAD, and the National Center for Lesbian Rights — the bar²⁴² is generally unprepared to appreciate the situations that queer youth subjected to HSV face.²⁴³

Since at least the 1940s, courts have legitimized the use of force against queer people and queer kids. Professor William Eskridge estimated that “between 1946 and 1961” courts imposed criminal penalties “on as many as a million lesbians and gay men [who] engaged in consensual adult intercourse, dancing, kissing, or holding

239. Valentine, *supra* note 47, at 1076.

240. One suggestion to improve the ability for queer kids to access empathetic legal counsel would be to recognize state bar certifications in queer law that allow attorneys to advertise a specialized knowledge in that area of law. *See, e.g.*, Ohio’s system that permits attorneys to advertise themselves as holding an accredited specialty designation in areas, OHIO SUP. CT. R., GOV’T OF BAR OF OHIO 14.

241. *See generally* Valentine, *supra* note 47, at 1054 (stating “[u]nfortunately . . . biases . . . afflict attorneys who represent [the heterosexual] population, tainting their ability to represent [gay youth] in a conscientious, ethical, and effective manner.”); *Fisher v. Gibson*, 282 F.3d 1283, 1298 (10th Cir. 2002) (finding that an attorney who admitted he was bias against gay people violated his duties of diligence and loyalty to the client for various reasons).

242. Members of the bar constitute a government actor. First, the Supreme Court of every state authorizes the licensure and possesses the authority to sanction attorneys for their conduct. Second, attorneys are “officers of the court.” Third, only attorneys are sanctioned to represent persons in a court or administrative agency proceeding regarding legal matters. And fourth, an attorney’s failure to competently represent a client can lead directly to government’s use of force against that client.

243. *See, e.g.*, Valentine, *supra* note 47, at 1073.

hands.”²⁴⁴ Many courts’ views towards initiating the use of force against non-violent queer people have not evolved materially since that time. An instructive exchange occurred in 1990 between a Broward County Florida Circuit judge and the attorney responsible for prosecuting an alleged queer-basher:

Judge: “That’s, a crime now, to beat up a homosexual?”

Prosecutor: “Yes sir. And it’s also a crime to kill them.”

Judge: “Times have really changed.”²⁴⁵

Like school officials, courts also tend to ignore “homophobic harassment of queer youth”²⁴⁶ In 2007, an Ohio appellate court affirmed the trial court’s order that removed a queer child from an accepting mother to a father who lacked years of meaningful contact with the child.²⁴⁷ Part of the trial court’s order prohibited the queer child from wearing girls’ clothing and attending transgender support groups.²⁴⁸

A Mississippi judge advocated for a different type of force against queer people. In 2004, a judge, so upset with California’s domestic partnership laws wrote, “[i]n my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them”²⁴⁹ Such an impartial jurist surely distributes justice fairly to queer litigants, and such justice for queer kids is evident in cases ranging from Iowa to Arkansas.

In Iowa, a student who was subjected to repeated harassment, intimidation, and physical assaults, claimed that anti-queer HSV deteriorated his physical and psychological condition.²⁵⁰ To support the assertion, the student’s doctor sent a letter to the school describing the student’s bullycidal tendencies, assessing that the queer student’s “stress, fear, and anxiousness were exacerbated by the hostile

244. Leslie, *supra* note 81, at 347 (footnote omitted).

245. See Jenness, *supra* note 48 (referencing Nat Hentoff, *The Violently Attacked Community in America*, THE WEEKLY NEWSPAPER OF NEW YORK, Sept. 25, 1990).

246. Martin, *supra* note 95, at 179.

247. Smith v. Smith, No. 05 JE 42, 2007 WL 901599, at *1–*2 (Ohio Ct. App. Mar. 23, 2007), *appeal denied*, 873 N.E. 2d 1315 (Ohio 2007) (unpublished table decision).

248. *Id.* at *2.

249. Miss. Comm’n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1009 (Miss. 2004) (quoting “statement attributed to the judge . . . contained in a letter to the editor of *The George County Times*.”).

250. Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 819 (S.D. Iowa 2004).

environment” at the school.²⁵¹ Nonetheless, when the queer student forcibly responded to a subsequent instance of anti-queer HSV, the school suspended the queer student.²⁵² Although that student had at times skipped school to avoid anti-queer HSV,²⁵³ he wanted to return to school, so long as it was safe. And after overcoming many structural hurdles that many queer students face (having an accepting parent, capital and access to competent legal counsel, the existence of a school anti-harassment policy, and supportive mental health assistance), the school still refused to defend him from anti-queer HSV.²⁵⁴ As a result, the student’s attorney filed a motion in federal district court seeking a preliminary injunction that, inter alia, would order the school to “affirmatively enforce the harassment policy . . . with regard to intolerance and harassment against homosexuals.”²⁵⁵ Noting that the case before it was “strikingly similar” to the facts of the landmark *Nabozny* case, the court nonetheless declined to grant injunctive relief that would have ordered the school to take steps to provide a safe learning environment to a queer student.²⁵⁶

And in Arkansas, despite self-identifying as heterosexual, Billy Wolfe became subjected to years of repeated anti-queer HSV beginning when he was twelve years old. During that time, Billy and his family made the school aware of the HSV on multiple occasions, but the school either blamed Billy or refused to respond.²⁵⁷ The HSV that Billy endured in Arkansas was so ubiquitous that the *New York Times* profiled Billy’s situation to a national audience as it was happening.²⁵⁸ Having no shame, the school did not change. Billy and his family retained a lawyer who sued not only the school but also some of the students who initiated the anti-queer HSV;²⁵⁹ the lawyer did so because “a point had to be made: schoolchildren deserve to feel safe.”²⁶⁰ Although Billy’s lawyer recognized that little would come of

251. *Id.* at 817.

252. *Id.* at 818.

253. *Id.* at 819; *see also supra* notes 222–25 and accompanying text.

254. *Doe*, 316 F. Supp. 2d at 814.

255. *Id.*

256. *Id.* at 829 (citations omitted).

257. *Wolfe v. Fayetteville Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1016–18 (W.D. Ark. 2009).

258. Dan Barry, *A Boy the Bullies Love to Beat Up, Repeatedly*, N.Y. TIMES, Mar. 24, 2008, at A1 (describing the physical manifestation of the emotional stress that Wolfe endured by fearing what would happen to him each day at school).

259. *Id.*

260. *Id.*

the suits against the bullies,²⁶¹ he sued the school under § 1983, as Nabozny's lawyers had done. Perhaps to avoid the result in Iowa, Billy's lawyer availed his client of the state's anti-bullying law.²⁶² And in the fall of 2009, in the face of years of anti-queer HSV directed at Billy Wolfe, documented in writing and video by the *New York Times*, Billy navigated the hurdles that prevent so many others in his position from accessing the courts, and he sued under state's self-titled "anti-bullying" statute. Predictably, the court concluded, "Plaintiffs' claim for deprivation of the right not to be bullied, as stated in Ark. Code Ann. § 6-18-514, is **DISMISSED WITH PREJUDICE.**"²⁶³

Beyond denying relief to students targeted by anti-queer HSV through narrowly reading relevant protective statutes, courts have also broadly construed statutes in a fashion that targets queer youth with lifetime criminal implications. In the late 1980s, the Court upheld a Georgia statute that criminalized — with a twenty year prison term — consensual, private sexual relations involving the sex organs of one person and the mouth or anus of another person in *Bowers v. Hardwick*.²⁶⁴ But in 2003, the Court's majority in *Lawrence v. Texas*²⁶⁵ stated that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."²⁶⁶

Despite popular thinking to the contrary, *Lawrence* has not shielded kids who are sexually active with each other from the threat or reality of prosecution. For example, in North Carolina, any consensual sexual activity among minors, besides the insertion of a penis into a vagina, constitutes a "crime against nature," the legislative intent of which is to preserve "public . . . morality."²⁶⁷ Violating the state's "crime against nature" statute is a Class I felony.²⁶⁸ As a result,

261. *Id.* (stating that the bullies' "lawyer, D. Westbrook Doss Jr., said 'there was neither glee nor much monetary reward in suing teenagers'").

262. ARK. CODE ANN. § 6-18-514 (entitled "Anti-Bullying policies," defining "bullying," and requiring schools to maintain policies prohibiting bullying).

263. *Wolfe v. Fayetteville Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1023 (W.D. Ark. 2009) (emphasis in original).

264. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

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

266. *Id.* at 578.

267. N.C. GEN. STAT. § 14-177 (2010). The "legislative intent" of North Carolina's crime against nature "*is to punish* persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is *an offense against* public decency and *morality* According to Blackstone, the English law treated the offense in its indictments as unfit 'to be named among Christians.'" *State v. Stubbs*, 266 N.C. 295, 298 (N.C. 1966) (citations omitted) (emphasis added).

268. N.C. GEN. STAT. § 14-177 (2010).

the state can no longer prosecute queer adults who engage in consensual oral or anal sex based on the alleged immorality of those sex acts. However, alleged morality serves as the basis for which the state still can — and does — prosecute teens who consensually engage with each other in the identical sex acts that are constitutionally protected for adults. If convicted, the court can sentence queer kids to significant jail time, and order them labeled “registered sex offenders” for *life*. As a result, conduct among consenting queer kids that is legal for queer adults can limit myriad liberties even after reaching an age at which the conduct that caused the prosecution, conviction, and lifetime penalty is constitutionally protected.²⁶⁹

Such judicial behavior is particularly troubling, given that a 2005 Amnesty International report claimed that police officers targeted queer youth for selective enforcement of similar morals laws.²⁷⁰ The existence of crimes against nature have numerous negative adverse effects,²⁷¹ as “laws that criminalize sex between two teens of the same gender can only exacerbate the psychological problems these teens already experience,”²⁷² and these laws “may also increase the incidence of violence targeted at LGBT youth.”²⁷³ Even if a competent mental health professional were available to a sexually active queer kid, which seems improbable,²⁷⁴ the enforcement of crimes against

269. Evidencing recent post-*Lawrence* prosecution of minors under the state’s crimes against nature statute, see *R.L.C. v. N.C.*, 643 S.E. 2d 920 (N.C. 2007), *cert. denied*, *R.L.C. v. N.C.*, 552 U.S. 1024 (2007). See also Michael Kent Curtis & Shannon Gilreath, *Transforming Teenagers into Oral Sex Felons: The Persistence of the Crime Against Nature after Lawrence v. Texas*, 43 WAKE FOREST L. REV. 155, 156 (2008) (stating “the ‘crime against nature’ can still be used to prosecute teenagers who voluntarily engage in oral or anal sex with each other”); Daniel Allender, Note, *Applying Lawrence: Teenagers and the Crime Against Nature*, 58 DUKE L.J. 1825 (2009). Other states besides North Carolina are more specific in the anti-queer arsenal available to courts. See, e.g., TEX. PENAL CODE ANN. § 21.11(a) (criminalizing sexual acts involving minors who are of the same sex).

270. Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 NEV. L.J. 774, 796 (2006) (citations omitted). See also Gerald P. Mallon & Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Perspective*, 85 CHILD WELFARE 215, 220 (2006).

271. See, e.g., Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by “Unenforced” Sodomy Laws*, 35 HARV. C.R.-C.L.L. REV. 103, 105–110 (2000).

272. Higdon, *supra* note 51, at 247.

273. *Id.*

274. Dr. Ann Haas and twenty-five other mental health professionals asserted that the mental health care profession is currently unequipped to treat mental health issues faced by queer people in general, queer youth in particular, and any queer subgroup addressing coping with suicidal issues, and to fill this void,

all professional educational and training programs that prepare students to provide mental health care or administer mental health programs —

nature statutes dissuade such a “sexually active queer teen[] from seeking counseling for psychological problems for fear of exposing themself[] or partners to criminal liability.”²⁷⁵

Courts have acquiesced to violence against young queer people in other ways as well. For example, courts have recognized a “gay panic defense” that permits using a person’s visceral reaction to encountering a non-violent queer person as a just defense or a mitigating factor when the non-queer person uses lethal force against the non-violent queer person.²⁷⁶ Over time, gay panic defense has shifted from an insanity defense to a legitimate provocation defense that, if successful, leads to the acquittal of the queer person’s killer, despite no initiation of violence by the queer person.²⁷⁷ To illustrate, because queer college student Matthew Shepard allegedly touched one person’s groin area and blew in his ear, Shepard’s killers justified tying him to a fence, pistol-whipping him, and leaving him to die under a gay panic theory.²⁷⁸ Despite the existence of gay panic, no

including physician residency programs in psychiatry and primary care; graduate programs in psychology, social work, nursing, and public health; and other mental health and human services training programs — should develop and provide comprehensive, empirically based education about LGBT mental health needs and suicide risk.

Ann P. Haas et al., *supra* note 3, at 35 (2011).

275. Higdon, *supra* note 51, at 248.

276. See, e.g., Cynthia Lee, *The Gay Panic Defense*, 42 U.C. DAVIS L. REV. 471, 471 (2008); Teresa Marie Garmon, Note, *The Panic Defense and Model Rules Common Sense: A Practical Solution for a Twenty-First Century Ethical Dilemma*, 45 GA. L. REV. 621, 625 (2011) (stating “[a]s recently as 2009, the gay panic defense was used successfully to justify a brutal stabbing of a homosexual man.”) (referencing Eric Zorn, *Murder Defendant Gambles and Wins*, CHI. TRIB., July 5, 2009, at C21).

277. See generally Christina Pei-Lin Chen, Note, *Provocation’s Privileged Desire: The Provocation Doctrine, “Homosexual Panic,” and the Non-Violent Unwanted Sexual Advance Defense*, 10 CORNELL J. L. & PUB. POL’Y 195, 203 (2000) (stating that “the homosexual advance itself provokes the understandable loss of normal self-control that incites uncontrollable homicidal rage in any reasonable person, regardless of homosexual tendencies”); Robert G. Bagnall et al., Comment, *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV., 497, 499 (1984).

278. See C. Ray Cliett, Comment, *How a Note or a Grope Can be Justification for the Killing of a Homosexual. An Analysis of the Effects of the Supreme Court’s Views on Homosexuals, African-Americans and Women*, 29 N.E. J. ON CRIM. & CIV. CON. 219, 220 (2003) (detailing the use of gay panic defense by Matthew Shepard’s killers and describing how Scott Amadure’s killer justified his killing, because Amadure left a sexually suggestive note at his killer’s door and professed his admiration for his killer on a daytime television talk show). For a discussion of “gay panic” in a transgender context, see, e.g., Martha C. Nussbaum, *A Heat of Passion Offense: Emotions and Bias in “TRANS PANIC” MITIGATION CLAIMS: HIDING FROM HUMANITY* (Princeton Univ. Press 2004).

similar provocation defense exists for queer persons who theoretically kill after receiving an unwanted non-queer advance.

Beyond gay panic, recent courts have recognized that anti-queer students maintain First Amendment protections to wear clothing at school that not only denigrates queer kids,²⁷⁹ but also proclaims that queer kids should not exist.²⁸⁰ Similarly, a Texas federal district court denied a GSA's attempt to distribute advertisements and receive recognition as a school student group, based on the criminal nature of consensual sexual conduct among queer youth and its perceived immorality.²⁸¹ The superintendent's affidavit reiterated previous dehumanizing comparisons — made by prominent jurists Bork²⁸² and Scalia²⁸³ that related sex among consenting queer persons with sex among people and non-consenting animals — attesting that he would have denied other clubs whose basis was sex.²⁸⁴

Queer kids face increased risks in the legal system, which “are not dependent on the type of court proceeding in which they may find themselves.”²⁸⁵ Sentencing of queer kids is “more restrictive and punitive” compared to non-queer kids in the juvenile justice system.²⁸⁶ For instance, “juvenile court judges tend to perpetuate traditional gender norms” and “reserve their harshest judgment for the girls who

279. See *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005) (granting plaintiff student's request for injunctive relief against school prohibiting him from wearing a shirt, the back of which read “Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!”).

280. See *Zamecnik v. Indian Prairie Sch. Dist. # 204 Bd. of Educ.*, 710 F. Supp. 2d 711, 712 (N.D. Ill. 2010) (holding that schools could not prevent students from displaying the message “Be Happy, Not Gay.”).

281. *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 563 (N.D. Tex. 2004). Cf. *supra* text accompanying notes 250–252. Although *Lawrence* predated this opinion, Texas still criminalizes sexual acts involving minors of the same sex. TEX. PENAL CODE ANN. § 21.11(a). Among the proposed GSA's goals were to “improve the relationship between heterosexuals and homosexuals . . . help the community . . . [and] enhance the relationship between youth and their families.” *Caudillo*, 311 F. Supp. 2d at 556.

282. *Dronenburg v. Zech*, 741 F.2d 1388, 1397 n.6 (D.C. Cir. 1984), *reh'g denied*, 746 F.2d 1579 (D.C. Cir. 1984).

283. *Lawrence v. Texas*, 539 U.S. 558, 590–91 (2003) (Scalia, J., dissenting) (citations omitted).

284. *Caudillo*, 311 F. Supp. 2d at 566.

285. Valentine, *supra* note 47, at 1058.

286. Fedders, *supra* note 270, at 796. See also Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice System Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 420 (2006); Peter A. Hahn, *The Kids are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, 14 B.U. PUB. INT. L.J. 117, 125 (2004).

stray from the feminine ideal.”²⁸⁷ Some authors have suggested that queer youth “may find themselves sentenced in ways more restrictive and punitive than their offenses warrant because of the dearth of LGBTQ-sensitive programs and facilities in the juvenile and criminal justice systems,”²⁸⁸ while other authors have claimed that judges arguably use too much discretion in not finding child abuse when the child is queer,²⁸⁹ allowing for state-sanctioned violence towards queer kids to continue at home when the court would otherwise remove a non-queer kid from such violence. The key to queer youth in the juvenile courts mirrors what occurs in schools themselves, “staff in the juvenile . . . justice system find it more convenient to isolate the LGBTQ young person than to confront the harassing individuals and work to ensure environments of safety, tolerance and respect.”²⁹⁰

Courts have, therefore, mocked, advocated, imposed, ignored, and permitted the initiation of diverse varieties of force — including death — against non-violent queer adults and students. Literally heaping insult upon injury, when dealing with queer adults and queer children, judicial opinions perpetuate anti-queer imagery interwoven with the author’s personal morality. Despite the myriad systematic barriers obstructing bullycidal queer students’ ability to access the courts for redress, some queer students are fortunate enough to have the improbable familial and financial capital to secure competent legal counsel and seek defense under the law. In response, courts have rejected actions seeking a safe educational environment, including those based specifically on anti-bullying statutes. As a state institution and systematic component, courts have failed to defend students from anti-queer HSV by serving as a strong instrument of state sanctioned violence against them.

C. Legislatures

State legislatures negatively impact queer students in at least two material ways. First, despite the federal Equal Access Act,²⁹¹ state legislatures actively attempt to erect roadblocks to student participation in GSAs.²⁹² Second, much heralded anti-discrimination

287. Valentine, *supra* note 47, at 1090.

288. Fedders, *supra* note 270, at 798.

289. See Martin, *supra* note 95, at 182–84.

290. Fedders, *supra* note 270, at 798–99.

291. 20 U.S.C. §§ 4071–74 (1997).

292. See discussion *infra* Part III.C.1–2.

and anti-bullying legislation has failed to defend students from anti-queer HSV.²⁹³

1. Erecting Roadblocks to Student Groups

Knowing that queer students would likely want to remain closeted to their parents,²⁹⁴ some schools in the mid-1990s unsuccessfully attempted to require parental permission prior to allowing students to join a GSA.²⁹⁵ Despite findings that isolation from peers makes queer students feel alone and socially withdrawn, and knowing that courts overturned parental-consent measures in the late-1990s,²⁹⁶ schools and legislatures today continue to prevent the formation of GSAs. At the local level, in January 2011, a group of queer and queer-allied students at a Long Island high school submitted a petition to form a GSA in response to anti-queer HSV; the school rejected the petition.²⁹⁷ At the state level, legislators “have demanded outright bans against GSAs, comparing such clubs to organizations advocating illegal activity such as pedophilia . . . [and] school boards in Kentucky, Utah, California, Texas, Minnesota, and Indiana have forbidden or significantly curtailed the activities of GSAs” through various means, including parental consent requirements to join a GSA.²⁹⁸ A current member of Georgia’s Board of Juvenile Justice,²⁹⁹

293. See discussion *infra* Part III.C.3.

294. See, e.g., Eisemann, *supra* note 103, at 137 (“gay students may be too afraid to attend meetings out of fear of ‘outing’ themselves and being subjected to harassment”).

295. See, e.g., Steve Rylle, *School Board Rejects Parental OKs for Clubs; Education: Some Say Proposal Was Designed to Prevent Establishment of Hoover’s First Official Homosexual Club*, L.A. TIMES, May 8, 1996, at B1.

296. See, e.g., *East High Gay/Straight Alliance v. Board of Educ. For Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (D. Utah 1999); *East High Gay/Straight Alliance v. Board of Educ. For Salt Lake City Sch. Dist.*, No. 2:98-CV-193J, 1999 U.S. Dist. LEXIS 20254 (D. Utah Nov. 30, 1999) (overturning a Utah law banning *all* school clubs to prevent the presence of school GSAs).

297. Andrew Hackmack, *South High Seniors Fighting for Gay-Straight Alliance*, LONG ISLAND HERALD ONLINE (Jan. 19, 2011), http://www.liherald.com/stories/South-High-seniors-fighting-for-Gay-Straight-Alliance,30109?page=2&content_source (citing “bullying” as the reason the students wanted to start the club and noting the school’s rejection of the club and its proposed faculty advisor); see also *Principal Bullying Students At Valley Stream South HS, Students & Supporters to Rally & Protest*, LONG ISLAND GAY & LESBIAN YOUTH (Jan. 20, 2011), <http://www.ligaly.org/news.php?i=167> (indicating that the school’s principal admitted to calling people “faggot” in that past and claiming that nothing bad was meant by it). *But see supra* note 7 (describing the word’s violent etymology).

298. Keola R. Whittaker, *Gay-Straight Alliances and Free Speech: Are Parental Consent Laws Constitutional?*, 24 BERKELEY J. GENDER L. & JUST. 48, 49–50 (2009) (citations omitted).

299. *Board of Juvenile Justice*, DEPT. OF JUVENILE JUSTICE, <http://www.djj.state.ga.us/AboutUs/djjboard.shtml#Perry%20McGuire> (last visited Jan. 12, 2011).

who previously compared queer *teens* to pedophiles also said, “I think the problem here . . . is that the intent of the [Equal Access] act was never to allow organizations that advocate illegal activity [to have campus access] And in Georgia, sex between [queer] minors is illegal”³⁰⁰

On a relative basis, legislative efforts to block GSAs via parental consent laws harm the development of queer youth,³⁰¹ because for queer students able to access GSAs, “[t]he feelings of stigma and discrimination lessen as these teens ‘perceive that they belong to a world that includes others with similar histories and concerns.’”³⁰²

2. Curricular Legislation

While some state legislatures attempt to block access to GSAs, others boast laws that prohibit the socialization of a pro-queer identity. An Arizona statute prohibits schools from employing material that “portrays homosexuality as a positive alternative lifestyle.”³⁰³ Texas requires schools to tell minors that homosexual conduct is not an acceptable lifestyle and is a criminal offense.³⁰⁴ South Carolina’s health education classes may “not include a discussion of alternate sexual lifestyles from heterosexual relationships . . . *except in the context of instruction concerning sexually transmitted diseases.*”³⁰⁵ As a result, at the very time that these schools subject queer students to HSV and affirmatively model anti-queer socialization in the classrooms, these schools must also (a) not tell queer students anything

300. See *Georgia Republican Candidate Compares Gay Teens to Pedophiles*, THE ADVOCATE (Aug. 4, 2006), available at <http://www.advocate.com/article.aspx?id=35422>; see *supra* note 149 and accompanying text.

301. See, e.g., Alice Riener, Comment, *Pride and Prejudice: The First Amendment, The Equal Access Act, and the Legal Fight for Gay Student Groups in High Schools*, 14 AM. U.J. GENDER SOC. POL’Y & L. 613 (2006); 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, (2009); Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*, 2008 BYU EDUC. & L.J. 89 (2008).

302. Higdon, *supra* note 51, at 209 (citation omitted); see also Haas et al., *supra* note 3, at 26 (referencing a non-random study indicating that “connectedness to a gay/lesbian community and positive sexual identity were associated with greater social and psychological well-being.”).

303. ARIZ. REV. STATE. ANN. § 15-716(C) (West 2009).

304. TEX. PENAL CODE ANN. § 21.11(a) (West 2011) (current through end of the 2011 Regular Session and First called Session of the 82nd Legislature) (criminalizing sexual acts involving minors who are of the same sex); see also *supra* notes 267–269 and accompanying text.

305. S.C. CODE ANN. § 59-32-30(A)(5) (West 2010) (emphasis added).

positive about their queer identity, (b) refrain from stating that their queer identity is acceptable, (c) remind queer students that queer behavior is criminal, and (d) limit any discussion of a queer lifestyle to its ultimate disease. This legislative mandate for schools and school employees is unacceptable for queer kids subjected to HSV, and doubtless has an impact on queer kids' self-worth and mental health.

3. *Anti-Discrimination and Anti-Bullying Legislation*

Despite being much heralded during their creation, school anti-discrimination laws ("ADLs") and anti-bullying laws ("HSVLs") have failed to defend queer students from HSV. Massachusetts' ADL³⁰⁶ exemplifies their general failure. Massachusetts' ADL was much lauded when enacted,³⁰⁷ but it was so ineffective that the commonwealth enacted a specific HSVL in 2010.³⁰⁸ But HSVLs do not work either. An Arkansas court rejected a claim under an anti-bullying statute, despite evident bullying.³⁰⁹ California's heralded and robust statutory scheme, that was supposed to defend queer kids from HSV,³¹⁰ neither stopped Seth Walsh's bullycide last October nor prevented California's legislature from currently attempting to revise its HSVL during the 2011 Session.³¹¹ Although forty-five states have some sort of HSVL in place,³¹² "experts say those laws have been based on a vague, loophole-riddled model that gives vast discretion to local school districts to do whatever they want or don't want, and have

306. MASS. GEN. LAWS ANN. ch. 76 § 5 (West 2010). See also Nancie L. Katz, *Massachusetts Urges Sensitivity to Gay Kids: Plan May be First Statewide Effort to Fight Harassment in Schools*, DALLAS MORNING NEWS, July 11, 1993, at 12A.

307. See, e.g., Don Aucoin, *Weld Signs Gay Student Rights Law: Proponents Disappointed by Lack of Public Ceremony*, BOSTON GLOBE, Dec. 11, 1993, at 17; Sara Rimer, *Gay Rights Law for Schools Advances in Massachusetts*, N.Y. TIMES, Dec. 8, 1993, at A18.

308. See *infra* note 323.

309. See *Wolfe v. Fayetteville Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1023 (W.D. Ark. 2009); *supra* text accompanying note 263.

310. See Katie Feiock, *supra* note 66, at 327-29.

311. *A Watch-do Organization – Advocating for Bullied Children & Reporting on State Anti Bullying Laws*, BULLY POLICE USA, <http://www.bullypolice.org/> (last visited Feb. 20, 2011).

312. Hawaii, Minnesota, Montana, North Dakota, and South Dakota do not possess HSVLs, although South Dakota is considering one. For the text of each state's law, go to <http://www.bullypolice.org/> and click on the relevant state. *Id.*

lacked teeth to work in the real world,”³¹³ as “each month over 250,000 students report being physically attacked.”³¹⁴

Much like California’s HSVL, New Jersey initially enacted its HSVL in 2002, but had to amend the law in 2007 because the HSVL failed to protect queer students from HSV.³¹⁵ Nonetheless, the 2007 amendments also failed to provide defenses from anti-queer HSV, causing the legislature to amend the law again, in 2008. And, when the 2008 amendments failed to curb anti-queer HSV, the national media storm that followed the suicide of New Jersey college student Tyler Clementi in late 2010 prompted Governor Chris Christie to pass additional amendments to the HSVL in early 2011.³¹⁶ The intent of the 2011 amendments — apparently unlike the 2007 and 2008 amendments — is “to eliminate loopholes,”³¹⁷ and the marketing of

313. Brody Levesque, *New Jersey Governor Signs Comprehensive Anti-Bullying Law*, QUEERTODAY.COM (Jan. 6, 2011), http://queertoday.com/profiles/blogs/new-jersey-governor-signs?xg_source=activity.

314. BULLY POLICE USA, *supra* note 311; *see also* Laurie Bloom, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut’s Anti-Bullying Statute*, 7 CONN. PUB. INT. L. J. 105, 107 (2007) (stating that

While anti-bullying laws may be well intended, they are by-and-large both vague and ineffective, providing only false comfort, if any, to bullying victims, parents and school officials. Even when bullying leads to violence and tragedy, the statutes provide no remedy in the courts for victims. Schools shirk their statutory duty to report and remediate, by underreporting bullying or simply ignoring it. Juvenile bullies and their parents are rarely held accountable, and school administrators hide behind a shield of municipal immunity.)

315. *See* Matt Friedman, *Gov. Christie signs ‘Anti-Bullying Bill of Rights,’* NJ.COM (Jan. 6, 2011), http://www.nj.com/news/index.ssf/2011/01/gov_christie_signs_anti-bullyi.html.

316. The law requires, *inter alia*, (a) the posting of the contact information for the school’s anti-bullying specialist on the school’s home page; (b) public disclosure of investigations at the next school board meeting; (c) administrative agency determinations to be appealable to the Appellate Division of the Superior Court. *See, e.g.*, Steven Goldstein, *History in New Jersey: The Legislature Passes an Unprecedented American Paradigm to Stop the Bullying of Students*, GARDEN STATE EQUALITY (Nov. 22, 2010), http://equalityfederation.salsalabs.com/o/35022/t/0/blastContent.jsp?email_blast_KEY=2922; Anti-Bullying Bill of Rights Act; 2011 N.J. Sess. Law Serv. 3466, 214th Legislature §§ 21, 26, supplementing P.L.2002, c.83 (C.18A:37–13 et seq.); N.J. STAT. ANN. § 2 c.310 (C.18A:6-112), *available at* http://www.njleg.state.nj.us/2010/Bills/A3500/3466_R1.HTM. Claiming that the amendments were “more dangerous than the gay marriage bill,” conservative Judeo-Christian leaders protested this amendment. *See* Stephanie Samuel, *NJ Anti-Bullying Bill of Rights Advances Amid Concerns*, THE CHRISTIAN POST (Nov. 23, 2010), <http://www.christianpost.com/news/nj-anti-bullying-bill-of-rights-advances-amid-concerns-47766/>.

317. Matt Friedman, *Gov Christie Approves Toughest Anti-Bullying Law In The Country*, NJ.COM (Jan. 7, 2011), http://www.nj.com/news/index.ssf/2011/01/nj_gov_christie_approves_tough.html.

New Jersey's HSVL as the "toughest anti-bullying law in the country" has begun.³¹⁸

Regardless of an HSVL's textual requirements, school personnel openly avoid their statutory duties. For example, in Connecticut, "while legislators referred to the HSVL statute as a mandate for anti-bullying policy, after almost four years, it has proven to be no more than advisory," and "of thirty central Connecticut public schools surveyed, fourteen reported zero bullying incidents for the entire 2005-2006 school year."³¹⁹ At the same time, numerous "students in these same schools reported staying out of school for fear of their personal safety."³²⁰ Like New Jersey, Connecticut passed its HSVL "swiftly" after media reports of a 12-year old student succumbing to bullycide.³²¹ Enactment of HSVLs often follow high-profile student suicides, enabling legislators to earn political points in their home districts by voting on a symbolic but substantively vacuous bill.³²² Legislators have admitted their intent that HSVLs should not be punitive,³²³ which explains why many HSVLs lack private rights of action for students subjected to HSV.³²⁴ As a result, claiming that

318. *Id.*

319. Bloom, *supra* note 314, at 116.

320. *Id.*

321. *Id.* at 115.

322. Richard Pérez Peña, *Stricter Law On Bullying In New Jersey*, N.Y. TIMES, Jan. 6, 2011, at A18 (quoting New Jersey state senator Barbara Buono admitting that "no question, that [the Clementi] tragedy and a string of other suicides in the fall by school kids gave [the bill] momentum.").

323. *See, e.g.*, 45 H.R. Proc., Pt. 10, 2002 Session, p. 3212 (evidencing a Connecticut state representative stating:

It is not a punitive kind of thing. I would hope the parents don't target our teachers, don't target school systems to say that we have all these acts of bullying, the teachers or the administrators are not doing their job. That is not what the intent of the bill is.)

The proposed "Student Non-Discrimination Act" introduced by Sens. Franken and Polis contains similar insufficiencies. *See*, H.R. 4530/S. 3390, 111th Cong. (2010).

324. *See generally* 2010 N.H. Laws, 1523 § 193 F-9 (2010) (stating "nor shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state"); 2010 Mass. Laws, § 370 (i), effective May 2010 (stating "nor shall this Section create a private right of action."). Even in states that permit private rights of action, numerous hurdles restrict a student's ability to seek redress. Emily Montgomery, Comment, *Me & Julio Down by the Schoolyard: An Analysis of School Liability for Discriminatory Peer Sexual Harassment Under Vermont Law*, 35 VT. L. REV. 515, 515 (2010) (stating "despite the layers of protection given to students in Vermont," students subjected to "peer sexual harassment struggle to recover against schools that fail to address known incidents of harassment" and arguing that requiring "a victim [to] exhaust his

ADLs and HSVs are sufficient government defense mechanisms for bullying queer students is laughable; legislatures have failed to provide queer students with practical defenses from HSV and bullycide.

IV. THE MODEST PROPOSAL AND “HOW NOT TO GET TENURE”³²⁵

The network of socio-legal components that are supposed to systematically mitigate the risk of HSV-related bullycide for non-queer kids has constituted an inescapable maze of failure and abuse for queer students for decades.³²⁶ Queer students continue to face a choice of which threat of force to endure. Do they choose potential punishment, partly dispensed by an anti-queer judicial system, for breaking compulsory attendance laws? Or should they select the sadism of attending the best societal incubators of anti-queer violence — schools — where state actors-as-role-models unabashedly encourage, ignore, and participate in anti-queer HSV? Because conservative policies, principles, and powers materially underlie all component parts within the existing systematic failure, any new proposal should largely rely on the conservative language and theory that the socio-legal system embraces.³²⁷

Thomas Jefferson stated that the most important function of education was “rendering the people the safe, as they are the ultimate guardians of their own liberty.”³²⁸ Jefferson’s intersection of education and the individual right to guard one’s own liberty provides a

or her administrative remedies prior to the availability of a private right of action seriously limits the availability of redress for” those subjected to HSV.).

325. See JONATHAN SWIFT, *A MODEST PROPOSAL* (2008) (1737); Rivera, *supra* note 82, at 1180.

326. See Dennis & Harlow, *supra* note 51.

327. A number of other conservative defenses may exist for queer students, including, *inter alia*, prosecuting the initiators of bullycide under the language of anti-assisted-suicide legislation championed by conservatives in the mid-1990s. See, e.g., CAL. PENAL CODE § 401 (Deering 2011) (criminalizing anyone who “deliberately aids, advises and encourages another to commit suicide”); *Washington v. Glucksburg*, 521 U.S. 702, 702 (1997) (upholding a Washington prohibition on assisted suicide). A second conservative defense involves creating restrictive student speech codes that ban sexually charged words that are precursors to, and references of, violence, such as “faggot,” under the conservative majority’s evisceration of student speech rights in *Morse v. Frederick*, 551 U.S. 393, 424–25 (2007) (recognizing that because schools have a “special characteristic” to ensure the physical safety of students, First Amendment protections do not apply to speech that could lead to school violence) and underpinned by *Bethel v. Fraser*, 478 U.S. 675 (1986) (asserting that lewd speech undermines a school’s mission). Such strategies, however, are beyond the scope of this Article.

328. THOMAS JEFFERSON, *THE JEFFERSON CYCLOPEDIA* 276 (Funk & Wagnalls eds., John P. Foley ed. 1900); JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 148 (W. Peden ed. 1954).

groundwork to begin constructing an immediately practical and conservative defense against anti-queer HSV. This Part first reviews the Model Penal Code's lesser evil doctrine and its deontological undercurrents. Second, this Part argues that two recent Supreme Court opinions involving the Second Amendment legitimize bullycidal queer kids' right to bear arms at school. Third, this Part concludes by suggesting the need to recognize a syndrome defense for queer kids criminally charged for their actions.

A. The Lesser Evil Doctrine's Moral Undercurrents

After being subjected to HSV, queer student Kevin Caruso's bullycide letter pondered: "[i]s it better that they kill me or I kill myself [sic] don't fucking know."³²⁹ The option, however, that Kevin failed to consider was: "[i]s it better that they kill me, that I kill myself, *or that I kill them?*" Generally speaking, "conduct that violates a [criminal] prohibition will be justified if it avoids a greater harm than the prohibition itself. The lesser evils defense explicitly provides for such a balancing."³³⁰ The lesser-evil doctrine's grant of a legally recognized choice to violate the rights of others without their consent generally contrasts with criminal law's other justifications. Additionally, the MPC is silent as to comparing the consequences of

329. See *Suicide Note of a Gay Teen*, *supra* note 169.

330. Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 741 n.22 (1990) (citing MODEL PENAL CODE § 3.02); see generally Andrea L. Earhart, Case Note: *Criminal Law/Self-Defense: Should A Defendant Be Denied The Affirmative Defense Of Self-Defense If The Criminal Act Was Not Intentional? Self-Defense Or Defense Of Self?*, 1 WYO. L. REV. 695, 699 (2001) (citations omitted) (stating "conduct considered blameworthy is justified when the greater good or the lesser evil results from the homicide, or when a superior interest is protected through homicide."). See MODEL PENAL CODE § 3.02 JUSTIFICATION GENERALLY: CHOICE OF EVILS:

(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

any choices made by people who avail themselves of § 3.02(1).³³¹ Therefore, so long as (1) bullycidal queer students believe that killing their bullies is a lesser harm than being killed or killing themselves, and (2) the legislature has not enacted a statute specifically stating that bullycidal queer students who take the lives of their bullies do not constitute lesser relative evils, then they have sufficiently met the MPC's standard to justifiably choose to kill in self-defense. And bullycidal queer kids in Kevin Caruso's situation should know that.

Because deontology is "the theory of moral obligation, and, by connotation, encompasses moral theories that emphasize rights and duties,"³³² the lesser evil doctrine is, therefore, deontological, as it raises issues surrounding the rights, duties, and morality of subjectively extinguishing another person's life. While conservative laws and judicial interpretations may denigrate the morality of queer people, no legislative exception exists under MPC § 3.02(1)(b) that bars bullycidal queer kids from availing themselves of its deontological choice to kill the perceived lesser evil. This legal position generally reflects the theological position. Many enduring conservative Judeo-Christian teachings have attacked the morality of queer people, yet the authors of those teachings did not except queer people from using the lesser evil doctrine. Therefore, under conservative legal and theological paradigms that assume queer peoples' immorality, such presumed immorality is irrelevant to the choice that the lesser evil doctrine offers. The sole question is whether bullycidal queer students subjectively believe that killing their bullies results in a lesser evil relative to killing themselves or being killed by the bully, and this sub-part concludes that such a subjective belief is reasonable.

Prior to analyzing enduring theologians and their texts, reviewing modern religious leaders' moral judgments relative to rights or duties of queer people is instructive.³³³ Rabbi Levin, who railed against statutory changes intended to make schools a more tolerant place for queer students,³³⁴ also stated that "if minors . . . are subjected to unwanted [violent] advances they are entitled to do *what it takes to defend themselves*."³³⁵ Linda Harvey, the President of Mission America, who opposed laws that purportedly created rights and duties

331. To better understand consequentialism and its relationships to deontology, see Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

332. See Stelzig, *supra* note 36, at 907.

333. See *supra* Part II.C.

334. See *supra* note 127 and accompanying text.

335. Levin, *supra* note 127.

relative to reducing HSV,³³⁶ acknowledged that “any incidents of bullying and name-calling *can be punished without forcing acceptance* of offensive behaviors [such as homosexuality].”³³⁷ Indeed they can, under MPC §3.02(1). And in the midst of a culture war that he helped create, James Dobson likened the struggle for queer liberty to the Japanese attack on Pearl Harbor.³³⁸ The ultimate U.S. response to the Japanese was not immediately self-defensive; rather, it was a delayed, opportunistic, deontological choice, justified because dropping two atomic bombs against the culture that initiated the violence was subjectively a lesser evil than allowing the Japanese societal threat to continue.

Academics and theologians often refer to the lesser evil doctrine as the “just war” theory when applied in societal, rather than individual, contexts.³³⁹ The moral justification of a society’s choice to enter a war hinges on that society’s belief that not only will its actions achieve peace, but also that its actions will create a peace that leaves the world in a *better relative position* than prior to its engagement in the war.³⁴⁰ While Saints Augustine and Thomas Aquinas, for example, asserted strong anti-queer positions,³⁴¹ they nonetheless are “associated with the just war tradition[] and . . . regarded their arguments as a consistent evolution from early Christian teaching, not a deviation from it.”³⁴² Describing the just war, Professor Elshstain stated that these saints knew that

336. See *supra* notes 141-44 and accompanying text.

337. *Real Christians Say ‘No’ to Bullying and Homosexual Behavior*, MISSIONAMERICAN.COM, <http://www.missionamerica.com/agenda.php?articlenum=117> (last visited Feb. 24, 2011).

338. See text accompanying *supra* note 137.

339. See, e.g., Jean Bethke Elshstain, *A Discussion: The Just War Tradition and Natural Law*, 28 *FORDHAM INT’L L.J.* 742, 748-49 (2005) (citations omitted).

340. See Jean Bethke Elshstain, *Conference: The Third Annual Grotius Lecture: Just War and Humanitarian Intervention*, 17 *AM. U. INT’L L. REV.* 1, 2, 7 (2001).

341. See, e.g., AUGUSTINE, *CONFESSIONS* III.8 (stating “[o]ffense against nature are everywhere and at all times to be held in detestation and should be punished. Such offenses, for example, were those of the Sodomites.”); see also Saint Thomas Aquinas, Doctor of the Catholic Church, *Super Epistulas Sancti Pauli Ad Romanum* I 27f, (stating

They are called passions of ignominy because they are not worthy of being named ‘For the things that are done by them in secret, it is a shame even to speak of.’ For if the sins of the flesh are commonly censurable because they lead man to that which is bestial in him, much more so is the sin against nature, by which man debases himself lower than even his animal nature.

(quoting *Ephesians* 5:12)).

342. Elshstain, *supra* note 339, at 749.

we all have a responsibility . . . to serve and to love our neighbors. If our neighbor is being . . . *systematically and continually crushed by . . . an intolerable oppression*, the just use of force and the vocation of soldiering rise to the fore as options to which we may be urged, perhaps even commanded, by a God of justice.³⁴³

The very concept of a just war “is driven by a call to justice,” and “[t]he aim is to repair that which has been torn asunder by a prior violence and to protect a community for which one has responsibility, or both.”³⁴⁴

Therefore, despite anti-queer statements, these enduring Christian teachers supported a lesser evil doctrine through a just war’s use of defensive violence. Just as no legislative carve-out exists to the MPC’s lesser evil doctrine for queer people who defend themselves,³⁴⁵ the Christian view of the lesser evil doctrine as embodied in the just war theory articulated by Augustine and Aquinas has no exception for queer neighbors. Unlike the dispersed teachings of renowned Christian theologians, the Talmud is a single location that contains centuries’ worth of rabbinic study.³⁴⁶ The Talmud includes “commentary upon commentary added by various rabbis over the centuries.”³⁴⁷ Its teachings are also generally anti-queer.³⁴⁸ Yet the translated Talmud asserts a lesser-evil self-defense doctrine notwithstanding other

343. *Id.* at 749–50 (citations omitted) (emphasis added); see also Jean Bethke Elshtain, *Why Augustine? Why Now?*, 52 CATH. U. L. REV. 283, 299 n.2 (2003).

344. Elshtain, *supra* note 339, at 750.

345. MODEL PENAL CODE § 3.02(1)(b)–(c) (Official Draft 1962) authorizes such carve outs.

346. THE BABYLONIAN TALMUD (I. Epstein ed. 1935).

347. David B. Kopel, *The Torah and Self-Defense*, 109 PENN ST. L. REV. 17, 29 (2004); see also Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The RODEF Defense*, 33 WAYNE L. REV. 1257, 1257–59, n.2 (1987). To better understand the historical context of the Talmud, see ADIN STEINSALTZ, THE TALMUD, THE STEINSALTZ EDITION: A REFERENCE GUIDE (Israel Berman trans., 1989).

348. See, e.g., Rachel Sara Rosenthal, *Of Pearls and Fish: An Analysis of Jewish Legal Texts on Sexuality and their Significance for Contemporary American Jewish Movements*, 15 COLUM. J. GENDER & L., 485, 489, 528 (2006) (analyzing “those halakhic works that are most representative of rabbinic legal positions on issues of sexuality” and concluding that “homosexual intercourse not only defied gender expectations but also defied the procreative paradigm.”).

questions of morality: “[i]f someone comes to kill you,” it says, “get up early in the morning to kill him first.”³⁴⁹

As a result, despite current conservatives’ reliance on prominent current and past Judeo-Christian religious leaders when espousing anti-queer invective, these same religious leaders also recognize the deontological choice embodied in the lesser-evil doctrine. In the face of a systematic failure to defend them from violence, and regardless of society’s perception of the immorality of their queer identities, if bullycidal queer students believe that killing their bullies is a comparatively lesser evil than killing themselves or being killed, then they possess a just right to kill their bullies under both the MPC and timeless Judeo-Christian teachings.

To evidence the legitimacy of a subjective belief that a bullycidal queer kid who takes the life of a bully may be engaging in the lesser evil requires a general analysis of bullies’ relative damage to society. First,

[s]tudies have shown that forty percent of bullies are convicted of three or more crimes by the time they are twenty-four. By the time they were thirty, twenty-five percent of elementary school bullies had a criminal record and had served time in prison, compared to the less than five percent of non-bullies who had criminal records by age thirty. Bullies are more likely to . . . “be abusive toward their wives, and use harsh punishment on their children.” Additionally, a bully’s children are more likely to be bullies themselves, thus perpetuating the cycle of abuse, intimidation, harassment, and crime.³⁵⁰

Moreover, “bullies identified by age eight are six-times more likely to be convicted of a crime by age 24 than non-bullies”³⁵¹ In a study that covered thirty-five years,

researcher E. Eron . . . found that childhood bullies continued to bully as adults. They required more

349. THE BABYLONIAN TALMUD, *supra* note 346 at *Sanhedrin*, 72a; *see also id.*, at *Berakoth*, 58a (describing how Rabbi Shila justified his actions by analogizing them to the law of the pursuer).

350. Stacy M. Chaffin, Note & Comment: Education Mini-Symposium: *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 *How. L.J.* 773, 782 (2008) (citations omitted).

351. KOHUT, *supra* note 27, at 39.

governmental aid because of their tendency to be convicted of crimes and incarcerated, they had higher rates of alcoholism requiring government-subsidized treatment, and their development of personality disorders caused them to have multiple, unstable, violent marital relationships. They spent a great deal of time in family court.³⁵²

As a result, “unchecked, bullies are likely to enter adulthood with perilous anti-social personality traits that lead to . . . multiple divorces . . . and violent criminal behavior.”³⁵³ Beyond the anti-queer-HSV-related exceptions of quitting school, leading to less education, resulting in obtaining lesser skilled jobs, this author could not locate any remotely similar statistics for queer students who grow into queer adults.³⁵⁴ Thus, throughout their lives, bullies are a demonstrated relative drain on society’s human and economic capital, causing more societal problems versus bullycidal queer persons.³⁵⁵ Therefore, a bullycidal queer kid legitimately and subjectively may believe that an admittedly evil act of killing a bully in self-defense is a lesser evil than killing oneself or being killed, because the act comparatively betters society. While conservative Judeo-Christian tenets may view them as evil, bullycidal queer students subjectively represent a *lesser* evil to society than their bullies.

B. Bullycidal Queer Students’ Right to Bear Arms at School

Assuming that bullycidal queer students are justified in killing their bullies in self-defense, and recognizing that “the American people have considered the handgun to be the quintessential self-defense weapon,”³⁵⁶ two recent Supreme Court 5-4 conservative majorities in *District of Columbia v. Heller*³⁵⁷ and *McDonald v. City of Chicago*³⁵⁸ suggest that, in the process of defending themselves, bullycidal queer students may bear arms at school. *Heller* represented

352. *Id.* at 40.

353. *Id.* at 14.

354. *See supra* Part III.A.

355. *Cf.* Michael E. Brewer, *Sodomy Laws, and Privacy: The Cost of Keeping Gays in the Closet*, 79 DENV. U. L. REV. 546, 549 (2002) (applying a societal cost benefit analysis to the restriction and subordination of queer people).

356. *District of Columbia v. Heller*, 554 U.S. 570, 629 (2008).

357. *Id.*

358. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

the “Court’s first in-depth examination of the Second Amendment,”³⁵⁹ and its majority stated that “by the time of the [nation’s] founding” the Second Amendment “was understood to be an individual right protecting against both public and private violence.”³⁶⁰ Two years following *Heller*, the *McDonald* majority held that the Due Process Clause of the Fourteenth Amendment incorporated the Second Amendment right articulated in *Heller* to the states.³⁶¹

Heller’s majority opinion, delivered by Antonin Scalia, articulated “a strong presumption that the Second Amendment right is exercised individually and belongs to *all* Americans,”³⁶² indicating that its “very text . . . implicitly recognizes the pre-existence [to the nation’s founding] of the right and declares only that it ‘shall not be infringed.’”³⁶³ Buttressing this assertion, *Heller* analyzed historical evidence regarding what rights the Second Amendment contained,³⁶⁴ and concluded that “[s]elf-defense . . . was the central component of the right itself.”³⁶⁵ Declaring that “the right to self defense is the first law of nature,”³⁶⁶ *Heller* emphasized that at the nation’s founding, “Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repe[l] force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’”³⁶⁷ Moreover, “perfectly captur[ing]”³⁶⁸ the Amendment’s essence, *Heller* quoted a 1846 Georgia Supreme Court case indicating that the Second Amendment protected “[t]he right of the whole people, old and young, men, women *and boys*, and not militia only, *to keep and bear arms . . .*”³⁶⁹

Writing for the *McDonald* majority, Justice Alito underscored *Heller* by emphasizing the natural right of self-defense law, reasserting that “self-defense is a basic right, recognized by many legal systems from ancient times to the present day” as “‘the central component’ of the Second Amendment right,” and concluding that “citizens must be permitted . . . to use [handguns] for the core lawful purpose of self-

359. *Heller*, 554 U.S. at 635.

360. *Id.* at 594.

361. *McDonald*, 130 S. Ct. at 3026, 3050.

362. *Heller*, 554 U.S. at 581 (emphasis added).

363. *Id.* at 592 (citations omitted).

364. *Cf. infra* text accompanying notes 410–12 (reviewing historical evidence of a syndrome defense).

365. *Heller*, 554 U.S. at 599.

366. *Id.* at 606 (citation omitted).

367. *Id.* at 594–95 (citation omitted).

368. *Id.* at 612 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)).

369. *Id.* (citation omitted).

defense.”³⁷⁰ *McDonald* indicated that “evidence from the period immediately following the ratification of the Fourteenth Amendment only confirms that the right to keep and bear arms was considered fundamental.”³⁷¹ Amplifying the natural and fundamental concept of bearing arms in self-defense from a religio-cultural perspective, *McDonald* indicated that under “Jewish, Greek, and Roman law . . . if a person killed an attacker, ‘the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame.’”³⁷²

Heller admittedly indicated that “nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools,”³⁷³ but the Court indicated that such restrictions are only “presumptively lawful.”³⁷⁴ Often, the Court has recognized that presumptions may be rebutted,³⁷⁵ even in matters involving police powers,³⁷⁶ minors bearing arms,³⁷⁷ and particularly when concerning a fundamental right.³⁷⁸ Moreover, *Heller*’s mere

370. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (citations omitted).

371. *Id.* at 3041.

372. *Id.* at 3036 n.15 (citations omitted).

373. *Heller*, 554 U.S. at 626.

374. *Id.* at 627 n.26 (emphasis added) (this passage was reiterated in *McDonald*, 130 S. Ct. at 3047).

375. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (referencing, inter alia, E. CLEARY, MCCORMICK ON EVIDENCE 968-969 (3d ed. 1984)).

376. *See, e.g.*, *O’Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, 282 U.S. 251, 257-58 (1931) (declaring,

The statute . . . deals with a subject clearly within the scope of the police power As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.).

377. *See, e.g.*, *Ulster Cnty. Court v. Allen*, 442 U.S. 140, 167 (1979) (holding that a state firearms statute created a permissive presumption).

378. *See, e.g.*, *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997) (writing for the conservative majority, Chief Justice Rehnquist declared, “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed . . .’”) (citations omitted) (joined by O’Connor, J., Scalia, J., Kennedy, J., and Thomas, J.). *See also* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (stating “there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”) (citations omitted).

presumption that regulation forbidding the carrying of firearms in schools is lawful faces a “strong presumption”³⁷⁹ in *McDonald* that the right to bear arms in self-defense is natural and fundamental, belongs to all people, and is independent of one’s age or location.³⁸⁰

The *McDonald* majority, plus concurring and dissenting opinions, all help to construct a rebuttal to the *Heller* presumption by applying the Court’s rationale to a typical bullycidal queer student described *passim* in this Article. First, the majority stated that appellants in *McDonald* were several persons who “ha[d] been the targets of threats and violence;”³⁸¹ bullycidal queer kids have been the targets of threats and violence for decades.³⁸² The *McDonald* majority also asserted, “if . . . their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents . . . whose needs are not being met by elected public officials.”³⁸³ Part III of this Article demonstrated that these students constitute a minority whose safety needs have not been met by elected and employed public officials. As a result, the safety of other law abiding members of the queer student community would be enhanced by the possession of handguns for self-defense.³⁸⁴

Antonin Scalia’s concurrence helps thwart any claim that the *McDonald* majority’s recognition of a Second Amendment self-defense right was limited strictly to the home, bolstering the argument that the fundamental right to bear arms in self-defense extends to schools. The concurrence demonstrated that upon the incorporation to

379. *Heller*, 554 U.S. at 581 (2008).

380. While a rebuttable presumption may exist favoring regulation of gun-free schools, a compelling governmental interest must exist for that regulation to trump a fundamental right to bear arms. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 592 (2003) (Scalia, J., dissenting) (“The Fourteenth Amendment expressly allows States to deprive their citizens of ‘liberty,’ so long as ‘due process of law’ is provided”) (emphasis in original); *see also* U.S. CONST. amend. XIV, § 1.

381. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (citation omitted).

382. *See supra* Parts I–III.

383. *McDonald*, 130 S. Ct. at 3049.

384. This enhancement arguably occurs, *inter alia*, because most assailants “are more worried about meeting an armed victim than they are about running into the” state’s police powers. Don B. Kates, Jr., *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 144–45 (1991) (citations omitted). Furthermore, “a gun simply offers . . . an option; a dangerous option to be used only with discretion and/or because throwing oneself on the mercy of a violent attacker may be more dangerous,” and “at most one percent of defensive gun uses resulted in the offender taking the gun away from the victim.” *Id.* at 150 (detailing the value of handgun possession as both a deterrent and defense against crime).

the states of other Amendments contained in the Bill of Rights, no subdivision or restriction of those rights occurred.³⁸⁵ To illustrate, Scalia noted, “the First Amendment freedom of speech is incorporated — not the freedom to speak on Fridays, or to speak about philosophy,”³⁸⁶ but, instead, the entire freedom of speech is incorporated. Thus, he argued, the entire right to bear arms in self-defense as reflected in the Second Amendment is incorporated to the states, not just the right to bear arms in self-defense within the confines of one’s home.³⁸⁷

Even Justice Stevens’ dissent can support bullycidal queer students’ rights to bear arms defensively in school. First, he acquiesced that under the majority’s holding, the right to bear arms is fundamental.³⁸⁸ Second, he argued that “the origins of the American heritage of freedom [and] the abiding interest in individual liberty makes certain state intrusions on the citizen’s right to decide how he will live his own life intolerable.”³⁸⁹ State intrusions against bullycidal queer students have occurred on a regular basis for decades, their purpose has been to prevent queer students from deciding how to live their lives, and they have constituted intolerable breaches of individual liberty.³⁹⁰ Third, and most important, Stevens stated that “*absent government tyranny, it is only when the state has failed to interfere with (violent) private conduct that self-help becomes potentially necessary.*”³⁹¹ Following the detailed demonstration of tyrannical behavior on the part of governmental³⁹² and non-governmental³⁹³ actors, even assuming *arguendo* that it has not occurred, state and non-state actors also have failed to intervene against private conduct targeting students for anti-queer HSV, proving that even in dissent, Justice Stevens could recognize a need to bear arms at school in self-defense. As a result, the *Heller* majority, as well as the majority, concurring, and dissenting opinions in *McDonald*, may legitimize

385. *McDonald*, 130 S. Ct. at 3054 (Scalia J., concurring).

386. *Id.* at 3054 n.5.

387. Crystallizing Scalia’s point that the right is not limited to the home is the illogical example of a person who becomes homeless, thus losing the right to bear arms at the moment of arguably needing greater self-defense protections.

388. *McDonald*, 130 S. Ct. at 3132 (stating “the Court’s case for incorporation must thus rest on the conclusion that the right to bear arms is ‘fundamental.’”) (Stevens, J., dissenting).

389. *Id.* at 3092 (quoting *Fitzgerald v. Porter Mem’l Hosp.*, 523 F.2d 716, 720 (7th Cir. 1975) (opinion by Stevens, J.)).

390. *See supra* Part III.

391. *McDonald*, 130 S. Ct. at 3106 n.32 (Stevens, J., dissenting).

392. *See supra* Part III.

393. *See supra* Part II; Thomas, *supra* note 80.

bullycidal queer students' rights to bear arms in self-defense at schools after a systematic failure not only to defend them from private anti-queer HSV, but also to prevent state actors from tyrannically participating in violence against queer students.

C. Situational Similarities to BWS that Call for a Syndrome Defense

Following a systematic failure, if targets of anti-queer HSV (a) believe that taking the lives of their bullies constitutes a lesser evil, (b) engage in lethal self-defense by exercising their rights to bear arms at school, and (c) find themselves nonetheless prosecuted for such conduct, the law must recognize a syndrome defense in such a case. Professor Victoria Nourse indicated, "the law of self-defense . . . is far from as settled or coherent as it is assumed to be."³⁹⁴ Despite some objections in the legal literature,³⁹⁵ "courts in many jurisdictions have applied syndrome evidence to a wide array of claims — claims of siblings and children, and the odd battered male [Such claims] are not particularly controversial for courts"³⁹⁶ Because syndrome defenses exist in both theory and practice, a need exists to recognize a syndrome defense for bullycidal students subjected to anti-queer HSV.

Perhaps the best syndrome defense to use as a basis for comparison is BWS.³⁹⁷ Its utility as an analytic arises because anti-queer violence "has taken its place among such societal concerns as

394. V. F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1237 (2001). Building on Nourse's assertion, although many people also believe that a duty to retreat exists as a condition precedent to a legitimate claim of self-defense, jurisdictions are divided on the issue, and "[a] majority of jurisdictions do not require retreat." *Id.* at 1237 n.10 (referencing WAYNE R. LAFAVE, *CRIMINAL LAW* 497–499 (West 3d ed. 2000) and Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 429–35 (1999)); see also Joelle Anne Moreno, Comment, *Killing Daddy: Developing a Self-Defense Strategy for the Abused Child*, 137 U. PA. L. REV. 1281, 1282 n.6 (1989) (reiterating the jurisdictional division on the duty to retreat).

395. See, e.g., ALAN M. DERSHOWITZ, *THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1994). But see Kit Kinports, *So Much Activity, So Little Change: A Reply to the Critics of Battered Women's Self-Defense*, 23 ST. LOUIS U. PUB. L. REV. 155 (2004); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207 (1992).

396. Nourse, *supra* note 394, at 1288.

397. See *supra* text accompanying notes 178–86. See also FLA. STAT. ANN. § 776.013(3) (West 2005) (representing portions of Florida's so-called "Stand Your Ground" law recently discussed in the popular media relative to the shooting death of teen Trayvon Martin). See, e.g., Patricia Mazzei, *Miami-Dade commissioners urge Florida Legislature to take up 'Stand Your Ground' following Trayvon Martin's death*, THE MIAMI HERALD BLOG (Apr. 3, 2012), <http://miamiherald.typepad.com/nakedpolitics/2012/04/miamidadecommissionersurge.html>.

violence against women”³⁹⁸ While violence against women in the 1970s was a laughing matter,³⁹⁹ today “domestic violence . . . [is] a category of crime so repugnant that it has its own tools to protect victims from repeated abuse.”⁴⁰⁰ Despite the recognized HSV suffered by queer kids since the 1970s, no such syndrome defense yet exists for them.⁴⁰¹ Recognizing the latent heterosexism reflected in BWS’s original construction,⁴⁰² BWS nonetheless contains sufficiently similar characteristics to bullycidal queer students that justify recognizing a syndrome defense that this Article calls Bullycidal Queer Student Syndrome (“BuQSS”). This sub-part first describes the evidentiary issues surrounding a syndrome defense and next evidences correlations between BWS and a proposed BuQSS. It concludes by calling on socio-legal professionals to work towards the recognition of such a syndrome defense.

1. Syndrome Defenses Generally

Self-defense claims do not “create a right to kill because of past mistreatment” but instead “provide a framework for understanding why the abused . . . found it impossible to survive without killing.”⁴⁰³ Nor do syndrome defenses such as BWS create separate legal defenses; rather, they relate to “the evidentiary use of expert and lay testimony concerning” violence to bolster the abused’s “credibility or to support the substantive elements of her defense.”⁴⁰⁴ Specifically, syndrome expert testimony can explain the target’s

398. GARY COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 28 (1995).

399. See *supra* note 178 and accompanying text.

400. Simon, *supra* note 183, at 1110.

401. Unless one believes that the existence of a syndrome defense incentivizes the use of lethal force, no reason exists to prevent structuring it prophylactically.

402. BWS assumes that the abuse that results in this syndrome can only occur from male-on-female abuse, not some other variant. See, e.g., Michelle Van Natta, *Constructing the Battered Woman*, 31:2 FEMINIST STUD. 416, 419, 427, 436 (2005).

403. Gail Rodwan, *The Defense of Those Who Defend Themselves*, 65 MICH. B.J. 64, 64 (1986).

404. Laurie Kratky Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 667, 671 n.22 (1995). For a detailed analysis of evidentiary rules relevant to BWS expert testimony, see generally Stephanie Duvien, *Recent Developments: Battered Women and the Full Benefit of Self-Defense Laws*, 12 BERKELEY WOMEN’S L.J. 103, 108–09 (1997); Elizabeth M. Schneider, *Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN’S RTS. L. REP. 195 (1986); Steele & Sigman, *supra* note 182; Cynthia L. Coffee, *A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Woman’s Syndrome*, 25 J. FAM. L. 373, 373–96 (1986). See also FED. R. EVID. 702 (stating “if . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise”).

heightened sensitivities to the abuser's actions⁴⁰⁵ or the target's need to use a weapon despite the abuser not possessing one.⁴⁰⁶ Expert witnesses can assist jurors in understanding the state of mind of a person suffering from syndrome abuse at the time the target killed the abuser and "explain the perceptions, hypervigilance, lack of alternatives, and constant fear . . . to help jurors understand why" the target may have "reacted very forcefully to apparently less serious force"⁴⁰⁷ Syndrome expert testimony can evidence how the target's fear of the abuser leads to the target's belief that the abuser is dangerous at all times and not just during specific acts of abuse.⁴⁰⁸ Thus, "because many victims of abuse kill their abusers when they are not being assaulted, experts . . . are necessary to 'illuminate the psychological bases for a sense of immediacy and life-threatening risk,'"⁴⁰⁹ such as when the abused waited until the abuser was asleep before killing the abuser.⁴¹⁰

Not unlike the *Heller* and *McDonald* majorities' review of the historical basis of self-defense underpinning a fundamental right to bear arms, an historical examination also demonstrates that

since the nineteenth century, past threats and violence . . . have been considered highly relevant to a claim of self-defense, on questions of imminence and aggression, and the nature of the threat In 1888, courts would charge juries that the reasonable person is not to be judged by some "ideal" standard but that the members of the jury were to put themselves "in the position of" the assailed person⁴¹¹

405. Cf. *supra* note 9 and accompanying text (describing how Seth Walsh was able to call his mother for help while simultaneously believing his abuse was imminent).

406. Duvien, *supra* note 404, at 106.

407. Diane R. Follingstad et al., *Factors Predicting Verdicts in Cases Where Battered Women Kill Their Husbands*, 13:3 LAW & HUMAN BEHAVIOR 253, 255 (1989).

408. Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 127 (1985).

409. Julie Blackman, *Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill*, 9 WOMEN'S RTS. L. REP. 227, 231 (1986) (citations omitted).

410. Follingstad et al., *supra* note 407, at 255.

411. Nourse, *supra* note 394, at 1289. See also Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C.L. REV. 371 (1993); Jeffrey B. Murdoch, *Is Imminence Really Necessary? Reconciling Traditional Self-Defense Doctrine With the Battered Woman Syndrome*, 20 N. ILL. U. L. REV. 191 (2000); Lance K. Stell, *Close Encounters of the Lethal Kind: The Use of Deadly Force in Self-Defense*, 49 J.L. & CONTEMP. PROBS. 113, 113-17 (1986) (describing the development of the law of self-defense generally).

As a result, “it was well established in the nineteenth century that the defendant’s perception of the victim’s threat . . . rather than an actual threat, was sufficient to establish self-defense if the perception was reasonable”⁴¹² This represents the standard that syndrome defenses permit via expert testimony. Professor Nourse concluded that, “from traditional self-defense law itself . . . something like norms in battered women’s syndrome testimony may be necessary to reconcile the law to its own aspirations.”⁴¹³ The historical framework thus suggests that even syndrome defense arguably rests on a conservative foundation.

2. *Similarities of BWS to a proposed BuQSS*

As a particular syndrome defense, BWS implies that women subjugated to repeated prior abuse likely will suffer violent abuse in the future, “that we should believe her when she claims the threat was serious . . . that the threats are real and well understood,” that she “did not act out of revenge,” and that “women should not be blamed for failing to leave.”⁴¹⁴ During the development of BWS in the late 1970s, proponents said a battered woman’s

fear is overwhelming . . . [and] intensified repeatedly by recurrent and increasingly violent beatings. It is a dread she lives with on a day-to-day basis, frequently and unpredictably aroused This cumulative terror has aroused in her a . . . “wild desperation.” Moreover, our *society condones her subordinate position* in that home and *she has learned that outside help is unavailable and ineffectual*. Often the situation reduces to this: she

412. Nourse, *supra* note 394, at 1290.

413. *Id.* (citation omitted).

414. *Id.* at 1288; *see also id.* at 1238 n.14 (stating that “courts have consistently disavowed the notion that ‘leaving the relationship’ is the proper legal standard in battered woman cases.”). Similarly, numerous education law decisions suggest that leaving school does not constitute an acceptable legal standard for students subjected to anti-queer HSV, as it would result in an impermissible *de facto* segregation of, and an inferior education for, queer students. *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (stating that the impact of educational segregation is greater when it has the sanction of law); United States v. Virginia, 518 U.S. 515, 554 (1996) (holding the unconstitutionality of sex-segregation that led to inferior educational opportunities); Vorchheimer v. Sch. Dist. of Phila., 400 F. Supp. 326, 334 (E.D. Pa. 1975), *rev’d*, 532 F.2d 880 (3rd Cir. 1976), *aff’d by an equally divided court*, 430 U.S. 703 (1977), *addressed separately, sub. nom.* Newberg v. Bd. of Pub. Educ., 9 Phila. Ct. Rep. 556 (1983), *aff’d on other grounds*, 478 A. 2d 1352 (Pa. Super Ct. 1984).

cannot leave; he will not stop beating her; and she wants it to stop. She is, in effect, “trapped.”⁴¹⁵

One of the primary justifications for BWS is that “because a battered woman faces a higher risk of violence than most members of the general public,” she “usually knows her potential attacker very well and therefore can estimate her risk more accurately than other people.”⁴¹⁶ The ability to estimate risk applies to children as well as adults, as “battered children and women perceive, more acutely than strangers, the imminence and degree of danger at the hands of their abusers,” and by being subjected to prolonged abuse, “they ‘become attuned to stages of violence . . . [and] interpret certain conduct to indicate an imminent attack or a more severe attack.’”⁴¹⁷ Due to this specialized knowledge by the target, they may “reasonably believe that their lives are at risk because of changes in the abuser’s routine style of assault, or because the abuser says or does something that, in the past, has signaled great danger,” even if a third party may not view the situation as life-threatening.⁴¹⁸

General self-defense theories “presuppose[] the objective and rational observations of two strangers,”⁴¹⁹ but bullycidal students, “like battered women, perceive the behavior of their batterer with a degree of knowledge and familiarity not accounted for in the rational observation standard of the self-defense model”⁴²⁰ because HSV occurs *en loco parentis* by a known abuser. Targets of anti-queer HSV typically have the same bullies, positioning queer students to know their attackers well and estimate their risk more accurately than others.⁴²¹

415. Fiora-Gormally, *supra* note 178, at 156.

416. Sayoko Blodgett-Ford, *Do Battered Women Have a Right to Bear Arms?*, 11 YALE L. & POL’Y REV. 509, 543 (1993).

417. Moreno, *supra* note 394, at 1286 (citation omitted); *see also* Jeffery Robinson, *Defense Strategies for Battered Women Who Assault Their Mates: State v. Curry*, 4 HARV. WOMEN’S L.J. 161, 171 (1981) (asserting “battered women become very familiar with behavioral cues from their batterer”); *cf.* discussion of Seth Walsh’s bullycide, *supra* note 4, 10 and accompanying text.

418. Blackman, *supra* note 409, at 230; *cf.* Seth Walsh’s ability to call his mother while knowing he was about to be attacked, *supra* note 9 and accompanying text. *See also* Van Natta, *supra* note 402, at 420 (“identifying patterns in . . . experiences of abuse is a crucial task” in assessing the syndrome’s applicability).

419. Moreno, *supra* note 394, at 1283.

420. *Id.* *See also* discussion of BWS *infra* Part IV.C.

421. *See supra* note 42 (describing the prolonged nature of the bully-target relationship).

Anti-queer HSV can “lead to the development of a learned helplessness,”⁴²² which is a survival skill present in persons employing syndrome defenses that occurs when targets of violence believe that they have no control over their lives, as no correlation appears to exist between the target’s behavior and the behavior of the abuser.⁴²³ Bullycidal queer student Kevin Caruso demonstrated that he believed that he had no control in his life; he was frightened, and yet he never did anything overtly wrong.⁴²⁴ Moreover, like a battered woman who “has learned experientially or vicariously that the legal system does not work for her,”⁴²⁵ queer kids “who report [peer] abuse are frequently ignored . . . for” the aggression against them.⁴²⁶

Religious arguments justifying the initiation of violence against ostensible sinners whose equality to the dominant majority was “unnatural” is a hurdle to accepting BuQSS much as it was a hurdle to recognizing BWS. Opposing BWS,

Our Judeo-Christian heritage places heavy emphasis on the woman’s proper role Since Eve, as the originator of sin, bears the responsibility for all the world’s ills, it is only fitting that her descendants pay for her guilt. Throughout the Bible . . . and other religious writings, references to the proper role for women are consistent. She is to be submissive, subordinate to her husband, silent, and mindful of her unclean state.⁴²⁷

As a result of religious opposition and experiential similarities, a tremendous likeness exists between the reality of BWS and a

422. KOHUT, *supra* note 27, at 48–49; WALKER, *supra* note 178, at 49.

423. Blodgett-Ford, *supra* note 416, at 529 n.115; *see also* United States v. Johnson, 956 F.2d 894, 899 (9th Cir. 1992).

424. *Cf. Suicide Note of a Gay Teen*, *supra* note 169 (pleading “I never did anything wrong” and “what am I supposed [sic] to do . . . I am scared everyday.”).

425. Fiora-Gormally, *supra* note 178, at 153. *See also* Thomas Pelton, *Cops plan conference on domestic violence*, NEW HAVEN REG., Oct. 14, 1993, at 1 (describing the little merit of restraining orders in such cases); *cf. supra* Part III.B (detailing courts’ failure to defend queer kids).

426. Himmelstein & Brückner, *supra* note 21, at 54; *see also supra* note 421.

427. Fiora-Gormally, *supra* note 178, at 144 (referencing, *inter alia*, *Genesis* 3:16; *Job* 4:4 [sic]; [1] *Peter* 3:1; [1] *Peter* 3:7); Fiora-Gormally, *supra* note 178, at 145 n.89 (referencing St. Paul and Pope Pius IX’s statement that women’s equality with men is “unnatural.”) (emphasis added); *cf.* Part II.C (discussing religion and queer people); *supra* notes 266–68 and accompanying text (underscoring the *unnatural* view of queer teen intimacy by its maintenance as a crime against nature.).

BuQSS.⁴²⁸ Beyond their demonstrated bias against queer kids, courts' are loath to embrace new and unsupported legal theories, even if doing so leads to an unjustified conviction.⁴²⁹ Because this Article can propose, but not create, a recognized syndrome defense for bullycidal queer students who kill their bullies in self-defense, the author beseeches educators, sociologists, members of the mental health, medical, and legal communities, and, yes, students, to amass a robust literature recognizing the similarities between existing, applied, and recognized syndrome defenses to a BuQSS, evidencing its legitimacy.⁴³⁰

CONCLUSION

This Article demonstrated that in spite of many conservative legal and theological doctrines viewing queer identities as immoral, those same legal and theological mores also acknowledge a fundamental and natural right for bullycidal queer students to bear arms and exercise lethal self-defense in the face of an evidenced systematic failure to defend them from HSV. Presumably, for the first time in the history of queer legal scholarship,⁴³¹ this Article embraced the anti-queer conservative language, theology, and legal theories under the litmus test of "God, guns, and gays" that underpin the dominant majority's systematic failure to defend queer kids from HSV. In doing so, this Article legitimized a practically meaningful and immediate choice for bullycidal queer students who believe that they

428. See *supra* notes 417–424; see also *infra* note 433.

429. See, e.g., *Jahnke v. State*, 682 P.2d 991, 1007–08 (Wyo. 1984) (upholding the conviction of a sixteen year-old who killed his father after years of abuse and attempts to obtain assistance from child protection agencies due, in part, to the court's discomfort with the state of developed academic knowledge regarding a "battered child syndrome.").

430. Although tangential to the scope of this Article, bullycidal queer students who kill their bullies deserve other shields. In civil terms, former Judge (and current Fox News contributor) Andrew Napolitano of New Jersey ruled that BWS "may also be raised . . . in lawsuits against their abusers." *Court Victory Seen for Battered Women*, N.Y. TIMES, Aug. 7, 1994, at 39. If a plaintiff may wield a syndrome defense as a civil plaintiff, a syndrome defense should also function as a shield to civil liability.

431. See, e.g., Douglas NeJaime, Essay, *On the Cutting Edge: Charting the Future of Sexual Orientation and Gender Identity Scholarship: New Entrants Bring New Questions*, 19 LAW & SEX. 181 (2010); Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261 (1995); Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997); JONATHAN RAUCH, WHO NEEDS MARRIAGE?, in BEYOND QUEER: CHALLENGING GAY LEFT ORTHODOXY 296 (Bruce Bawer ed., 1996) with none of those articles evidence an acceptance of core socially conservative anti-queer principles concomitant with an attempt to advance the recognition of rights for queer people.

have no alternative but to succumb to bullycide or be killed by their bullies: bear arms under the Court's recent guidance in *McDonald*, justifiably take the life of their bullies in self-defense under the lesser evil doctrine, and, if prosecuted, avail themselves of a warranted syndrome defense.

Since the appearance of the initial law review article addressing anti-queer HSV and suicide twenty-five years ago,⁴³² legal scholarship addressed the issue only intermittently.⁴³³ When it did, the scholarship suggested defenses based on, inter alia, pursuing private actions under Title IX, § 1983, and state education provisions, while legislating curricular provisions, anti-discrimination acts, and anti-bullying clauses.⁴³⁴ Although legal scholarship helped to shape other areas of queer law, a systematic roadblock prevents countless queer youth from simply accessing the judicial system.⁴³⁵ Those queer kids able to arrive in court face a theory-to-praxis disconnect.⁴³⁶ Practitioners' engagement of scholarly legal strategies have demonstrably failed to speak the language⁴³⁷ needed to defend from anti-queer HSV not solely these student clients — who face the fewest systematic roadblocks and possess the greatest social capital — but *all* queer students targeted for HSV. Twenty-five years of failing to stop government's dual monopolies of schools and their legitimized initiation of violence against non-violent queer students bred only another generation of students either socialized in the acceptability of anti-queer aggression or dead from succumbing to anti-queer bullycide.

After at least twenty-three years of pacifism⁴³⁸ in the face of state-sanctioned brutality,⁴³⁹ queer peoples' self-defensive use of force

432. Dennis & Harlow, *supra* note 51, at 469.

433. *Supra* Part II.A.

434. *Supra* Parts II–III.

435. *Supra* Part III.

436. *Id.*

437. See generally 42 U.S.C. § 1983 (1994) (requiring a “nefarious discriminatory purpose”); Title IX, 20 U.S.C. § 1681 (1983) (mandating a “deliberate indifference” applied exclusively to “gender”); ARK. CODE ANN. § 6–18–514 (articulating a cause of action for “deprivation of the right not to bullied” under which courts fail to provide relief in spite of HSV).

438. See, e.g., JEAN BETHKE ELSTHAIN, *JUST WAR AGAINST TERROR: THE BURDEN OF AMERICAN POWER IN A VIOLENT WORLD* 126 (Basic Books 2003) (declaring “for the pacifist, peace is the highest good and if injustice prevails, it must be contested with nonviolent weapons.”). See generally Leslie, *supra* note 81 (referencing Professor Eskridge's evidence of anti-queer state violence from 1946 onward); JOHN LOUGHERY, *THE OTHER SIDE OF SILENCE: MEN'S LIVES & GAY IDENTITIES: A TWENTIETH-CENTURY HISTORY* 218–37 (1998) (detailing non-violent protests against harassment by mid-twentieth century queer activist groups, including the Mattachine Society and Daughters of Bilitis); DAVID CARTER, *STONEWALL: THE*

in 1969 to thwart government-initiated violence at the Stonewall Inn broadly sparked the modern queer rights movement.⁴⁴⁰ Pacifistically suffering through twenty-five years of anti-queer bullycides for a matter deemed by legal scholars as “most urgent”⁴⁴¹ in 1986 is unacceptable; recognizing this history, suffering even another twenty-five seconds is unforgivable. Embracing the deontology inherent in the “God, guns, and gays” mantra can structure an immediately available legal self-defense for bullycidal queer students while speaking the language that undergirds the dominant majority’s socio-legal system.

This Article explained how today’s students subjected to anti-queer HSV can represent the “ultimate guardians of their own liberty,”⁴⁴² by possessing a legitimate option to respond to the initiation of HSV against them — with lethal force if necessary — and perhaps lead to a new age Stonewall. As award-winning singer Martina McBride recounted in a song about a battered woman ultimately killing an abusive husband, in an anthem whose video not only earned the 1994 Country Music Association Video of The Year but also that conservative Fox News commentator Sean Hannity has used as the introductory theme for his nationally broadcast radio program,

I ain’t sayin’ it’s right or it’s wrong, but maybe it’s the
only way. Talk about your revolution, it’s
Independence Day.⁴⁴³

RIOTS THAT SPARKED THE GAY REVOLUTION 108–10 (St. Martin’s Griffin 2010) (discussing several random, isolated, and generally ineffective physical responses to anti-queer violence prior to Stonewall, excepting the 1966 Compton’s Cafeteria Riot in San Francisco).

439. See, e.g., GARY COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 5-30 (Columbia University Press 1995).

440. See, e.g., CARTER, *supra* note 438.

441. Dennis & Harlow, *supra* note 51, at 469.

442. JEFFERSON, *supra* note 328, at 276; JEFFERSON, *supra* note 328, at 148.

443. See MARTINA MCBRIDE, *Independence Day, on WAY THAT I AM* (RCA Records 2003).