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"THE LAST ACCEPTABLE PREJUDICE": STUDENT HARASSMENT OF GAY PUBLIC SCHOOL TEACHERS

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Cover Page Footnote

Matthew Bernstein is a Staff Attorney at Pegasus Legal Services for Children in Albuquerque, New Mexico, where he represents children in child welfare and special education cases. Prior to law school, he taught history, English, and economics at Amy Biehl Charter High School in Albuquerque. He sends deep gratitude to Steven K. Homer, Susan Bernstein, Jerome Bernstein, and Hannah Bloom.

“THE LAST ACCEPTABLE PREJUDICE”: STUDENT HARASSMENT OF GAY PUBLIC SCHOOL TEACHERS

Matthew D. Bernstein*

“Teachers can motivate students only if they themselves are motivated. They can make students feel valued and secure only if they feel valued and secure; they can foster enthusiasm for learning in students only if they are enthusiastic about teaching. The school culture can make or break a teacher in the same way that the classroom culture can support or undermine students' efforts to learn.”

—Deborah Stipek, *Motivation to Learn: From Theory to Practice*¹

“It’s my last closet. And I don’t think I’ll feel one hundred percent okay until I don’t have closets in my life. That would be my ultimate dream.”

—Anonymous high school teacher, Oregon²

ABSTRACT

In the United States, where the “marketplace of ideas” is a key social philosophy, few Americans receive the benefits of attending public schools with “out” gay and lesbian teachers. Even in an era where civil rights for homosexual public employees are increasing, more than one quarter of adults in the United States continue to believe that school boards should be permitted to fire teachers known to be homosexual. Amid a permissive legal climate that too easily puts aside the rights of teachers in a myopic focus on students, incidents where students harass teachers based on the teachers’ sexual orientation go virtually unpunished. Although these cases are seldom litigated, they promote a closeted culture of silence in a profession that employs more than one million Americans, and they represent a significant fissure in the civil rights landscape. The anti-gay movement, drawing on a long legacy of

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¹ DEBORAH STIPEK, *MOTIVATION TO LEARN: FROM THEORY TO PRACTICE* (2002).

² RITA M. KISSEN, *THE LAST CLOSET: THE REAL LIVES OF GAY AND LESBIAN TEACHERS* xvii (Heinemann 1996).

discrimination, perversely employs notions of morality and role modeling to enforce a culture of heteronormativity and bigotry in schools. Without adequate gay and lesbian role models, students cannot be active participants in the multiple social locations and spheres that form the lived experience of citizenship. While states are increasingly protecting homosexual public employees through non-discrimination statutes, only federal guidance in the form of Title VII protection or a national non-discrimination statute are sufficient to properly shield teachers and institute a truly democratic American classroom.

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I. INTRODUCTION: THE DUAL CLASSROOM

How many of your teachers were gay?³ Your answer to this question is highly conditioned by the time and place in which you grew up, by the extent to which it made sense for your teachers to conceal their homosexuality, and by society's reactions to those teachers brave enough to be publicly out.⁴ So unless you attended high school in the last ten years, you likely formed the impression that gay people simply did not teach in the public schools.

Today, there are over one million public school teachers working in the United States.⁵ Hundreds of them are able to express multiple pieces of their identity, including their sexual orientation.⁶ We have come a long way since 1977, when the Supreme Court of Washington could find that an admission of homosexuality connotes illegal and immoral acts in the public workplace because a teacher who engages in "sexual gratification with a member of [his] own sex" has "made a voluntary choice for which he must be held morally responsible."⁷ In 2013, almost half the states have banned workplace discrimination based on sexual orientation, and many also prohibit discrimination based on gender identity.⁸ Thousands of schools sponsor gay-straight alliances that fight bullying and homophobia.⁹ And many

³ For brevity and variety, I will use the terms gay and homosexual interchangeably. This paper focuses exclusively on public, secondary school teachers. As indicated, the umbrella term teachers may also include guidance counselors and other school employees who work directly with students.

⁴ I graduated from high school in 1996, and I knew of no teachers of mine who were gay.

⁵ Figure is for secondary teachers. Nat. Ctr. for Educ. Statistics, *Digest of Education Statistics*, Inst. of Educ. Sci., http://nces.ed.gov/programs/digest/d11/tables/dt11_070.asp (last visited Feb. 23, 2014).

⁶ The phrasing here is meant to reflect that each human is made up of multiple identities, and essentializing people based on their sexual orientation negates their depth. I see sexual orientation as breaking down into categories such as gay, lesbian, and bisexual, but also indicating a person's wider self-conception or way of viewing the world.

⁷ *Gaylord v. Tacoma Sch. Dist.* No. 10, 559 P.2d 1340, 1342, 1346 (Wash. 1977) (sitting en banc) (internal quotations omitted).

⁸ Gay, Lesbian, & Straight Education Network, *Who We Are*, <http://glsen.org/learn/about-glsen> (last visited Apr. 17, 2014).

Human Rights Campaign, *Employment Non-Discrimination Laws on Sexual Orientation and Gender Identity*, http://preview.hrc.org/issues/workplace/equal_opportunity/4844.html (last visited Apr. 30, 2013).

⁹ Gay, Lesbian & Straight Education Network ["GLSEN"], *Number of Gay-Straight Alliance Registrations Passes 3,500*, <http://www.glsen.org/cgi-bin/iowa/all/news/record/2100.html> (last visited Apr. 30, 2013).

students live with the knowledge that they may marry whomever they choose and receive state and federal recognition of the benefits of marriage.¹⁰

Nevertheless, the public school still exists as a forum for abuse.¹¹ Today, more than one quarter of adults in the United States continue to believe that school boards should be permitted to fire teachers known to be homosexual.¹² As has been the case since the origins of the public education system in the United States, the ability of teachers to lead free and happy lives is starkly shaped by the social context in which they work. Many teachers remain closeted, harassed, or in fear of losing their jobs due to their sexual orientation. The shadow of our federal lawmakers' refusal to institute nationwide protections for all sexual orientations through laws such as the Employment Non-Discrimination Act hangs over all governmental employees.¹³ While the attitudes and cultural beliefs of individuals play a central role in the failure of Congress to protect people from discrimination and violence based on sexual orientation, inequity in the law also significantly molds the ideological landscape.

Gay teachers work every day in a kind of legal limbo: inadequately protected by laws designed to stop discrimination and bigotry, like Title VII of the Civil Rights Act¹⁴ and the Equal Protection Clause in the Fourteenth Amendment, and without a body of case law to defend their rights to speech, expression, and privacy under the First Amendment.¹⁵ Even tort law, a common last refuge for legal recourse, provides little relief for gay teachers. Despite significant progress, courts have not successfully delineated the full range of rights

¹⁰ As this paper goes to press, thirty-five states and the District of Columbia allow gay marriage. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last visited Nov. 22, 2014).

¹¹ "Forum for abuse" is the terminology of Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579, 586 (1999). Quotations are omitted from main text for readability.

¹² *Views About Whether School Boards Should be Able to Fire Gay Teachers*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, <http://www.people-press.org/2012/06/04/section-6-religion-and-social-values/6-4-12-v-80/> (last visited Feb. 23, 2014).

¹³ Employment Non-Discrimination Act, S. 2238, 103rd Cong. (1994) through S. 811, 112th Cong. (2011).

¹⁴ 42 U.S.C. § 2000e (2006).

¹⁵ U.S. CONST. amend. I; U.S. CONST. amend. XIV Teachers are also regulated by the Elementary and Secondary Education Act (currently called "No Child Left Behind"), state Constitutional protections, state and federal anti-discrimination laws, union contracts, and local school board rules.

guaranteed to GLBT educators.¹⁶ Public schools remain bastions of conservatism, on pace to be some of the last public places of employment where people who identify as homosexual can live and work free from fear. This paper investigates the social construction of the public school classroom in an attempt to explain why that is the case and what this phenomenon means for the future.

Legal scholarship surrounding sexual orientation in schools is capacious and incisive.¹⁷ Most scholars focus on gay teachers' freedom of expression outside of work, their ability to resist discriminatory treatment by their districts in hiring and firing, restrictions on discussing their sexual orientations, or constraints on teaching inclusive curriculum. Little attention has been paid to incidents where gay teachers are harassed directly. This kind of harassment only rarely surfaces in the legal system, especially when the perpetrators are students. Student-on-teacher harassment occurs when hatred emboldens a reversal of control; students take social power and drive teachers out of their assigned capacities as role models, moral authorities, and autonomous individuals possessing inalienable rights. By examining the legal system's understanding of student-on-teacher harassment, this paper seeks to expose the persistent homophobia concealed under the progressive gay rights veneer steadily emerging in the United States. I argue that state anti-discrimination statutes are not sufficient; federal protection of public employees on the basis of their sexual orientation is urgent and essential.

The case of Tommy Schroeder offers a crucial case study. Schroeder was a fifteen-year veteran teacher in the Hamilton School District, near Milwaukee, Wisconsin, when the harassment began that ended his teaching career and drove him to court.¹⁸ In 1990, Schroeder began teaching sixth grade at Templeton Middle School in Hamilton.¹⁹ Eventually, he revealed his homosexuality to his fellow staff members and at a public meeting.²⁰ Beginning in the 1993-94 school year,

¹⁶ Susanne E. Eckes & Martha M. McCarthy, *GLBT Teachers: The Evolving Legal Protections*, 45 AM. EDUC. RES. J. 530, 530 (2008).

¹⁷ See Bryant, *supra* note 11; Todd A. DeMitchell et al. *Sexual Orientation and the Public School Teacher*, 19 B.U. PUB. INT. L.J. 65 (2009); Eva DuBuisson, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C.L. REV. 301 (2006); Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CALIF. L. REV. 967 (2003); and Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public Schoolteachers*, 6 COMMLAW CONCEPTUS 25 (1998).

¹⁸ *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 948 (7th Cir. 2002).

¹⁹ *Id.*

²⁰ *Id.*

according to an opinion by the United States Court of Appeals for the Seventh Circuit, “Schroeder began receiving unpleasant inquiries and crude, occasionally cruel, taunts from students regarding his homosexuality.”²¹ The harassment became increasingly brutal, and continued for many years. It came from colleagues, parents, and students at each of the schools where Schroeder worked.²² Schroeder reported the abuse on multiple occasions, and school officials disciplined the students involved.²³ However, because much of the harassment was anonymous, the associate principal at one school told Schroeder that there wasn’t much she could do.²⁴ After he requested a transfer several times, the district eventually moved Schroeder to Lannon Elementary School in the fall of 1996.²⁵ But after a year with no harassment, the taunts resumed at Lannon, and increased in ferocity.²⁶

²¹ *Id.*

²² For example, the father of a student told Schroeder, “I don’t want queers teaching my son.” *Id.* at 956 n.2. One teacher claimed that Schroeder’s former lover had died of AIDS, while another called him “a flaming homosexual.” *Id.* at 956. Schroeder nonetheless refused to disclose the names of staff members who harassed him. *Id.* Most of the abuse, however, came from students. “An eighth-grade student called him a ‘stupid faggot,’ and told him that he was ‘going to blow [his] ... head off.’” *Id.* at 948 n.1. A student complained that “the gay man” had disciplined her. *Id.* Another student told him, “How sad there are any gays in the world.” *Id.* Students openly discussed Schroeder’s sexuality during homeroom. *Id.* Other students claimed Schroeder had AIDS. *Id.* He was frequently called “faggot.” *Id.* at 948-49. A student physically confronted Schroeder, he heard catcalls in the school hallways, students shouted epithets at him while he was on bus duty, he received prank phone calls from students chanting “faggot, faggot, faggot,” and he found bathroom graffiti calling him a “faggot” and “describing, in the most explicit and vulgar terms, the type of sexual acts they presumed he engaged in with other men.” *Id.* at 948-49.

²³ *Id.* at 949.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* At Lannon, most of the abuse came from adults. One parent called him a pedophile, which Schroeder’s principal took seriously enough to raise the possibility of “proximity supervision” (restricting Schroeder from being alone with male students). *Id.* Another parent said, “Mr. Schroeder openly admitted at a district meeting that he was homosexual. Is that a good role model for our 5-, 6- and 7-year-old children?” *Id.* Staff members and parents called him a pedophile and accused him of sexually abusing boys. *Id.* One parent removed his child from Schroeder’s class because of Schroeder’s homosexuality. Someone slashed the tires on Schroeder’s car. He received anonymous phone calls at home whose callers said things such as “Faggot, stay away from our kids” and “We just want you to know you ... queer that when we pull out all our kids, you will have no job.” *Id.*

In February of 1998, Schroeder had a mental breakdown and resigned his position.²⁷ He applied for medical leave and long-term disability insurance, but the district terminated his employment at the conclusion of the 1998-1999 school year.²⁸ Schroeder then brought claims against the school district and school administrators, pursuant to 42 U.S.C. § 1983, alleging that they violated his right to equal protection by failing to take reasonable measures to prevent students, parents, and staff members, from harassing him on the basis of his sexual orientation.²⁹ The United States District Court for the Eastern District of Wisconsin granted summary judgment for the defendants.³⁰ Schroeder appealed to the Seventh Circuit Court of Appeals, which affirmed, and the Supreme Court of the United States denied certiorari.³¹

The *Schroeder* opinion is shocking in how quickly the Seventh Circuit shut down Schroeder's claimed rights, one by one. The court systematically sealed off from liability all parties involved in Schroeder's harassment. It cited, as justification, a shortage of school resources, the state interest in protecting students above teachers, a lack of faith in staff trainings around sexual orientation discrimination, the blamelessness of minor students, and the unavailability of parents.³² It also injected sexuality into Schroeder's identity, labeling him, in effect, radioactive.³³ In the end, the *Schroeder* court sent a clear message: provided schools make a minimum effort to punish the students identified as the perpetrators, *no one* holds legal responsibility for this kind of harassment. The students are blameless, the parents cannot be controlled, and the schools are too strapped for money and time to be on the hook for the wrongs suffered by their employees. The teachers will, in the words of Schroeder's first principal, "just have to ignore it."³⁴

As a society, we cannot ignore this issue, because public school classrooms are more than simply workplaces for adults. They are also discursive spaces where citizenship and social identity develop.³⁵ In fact, the law of the United States and the internal rules of American

²⁷ *Id.* The Seventh Circuit noted that Schroeder had a "protracted history of psychiatric problems," and, seeming to question its legitimacy, placed Schroeder's "mental breakdown" between scare marks.

²⁸ *Id.* at 949-50. The termination was in accordance with Schroeder's union's collective bargaining agreement.

²⁹ *Id.* at 948. The court used the term "homosexuality" rather than "sexual orientation."

³⁰ *Id.* at 946.

³¹ *Schroeder v. Hamilton Sch. Dist.*, 537 U.S. 974 (2002).

³² *Id.*

³³ For radioactive concept, see Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1608 (2001).

³⁴ *Schroeder*, 282 F.3d at 949.

³⁵ Hunter, *supra* note 33, at 1632.

schools share a great deal in common. The behavior of young people is heavily controlled by administrators outside the classroom and teachers within it, but classroom outcomes are also influenced by the responses of adults when students transgress. Students are far from powerless pawns; they test boundaries constantly. Students and adults collaborate to impact the working conditions of gay teachers, gay students, and, in fact, *all* students. Their relationship is symbiotic and dialectical. Much of what students carry away from high school has little to do with curricular content and everything to do with social situations.³⁶ In this sense, the perpetrators in harassment cases hold enormous power to reflect and influence community ideals of gay identity, and citizenship more generally. Civil rights laws, according to Nan Hunter, acknowledge these concepts in that they “establish a level playing field and eliminate irrationalities deriving from prejudice.”³⁷ But they also “provide access to discursive systems that generate a host of regulatory norms, many extending far beyond the market.”³⁸ These dual functions of the classroom—their role in the transference of cultural norms and as one of the largest public workplaces in the nation—should drive our efforts at protecting gay and lesbian educators.

II. GENDER, MORALITY, AND THE HISTORY OF MEANING IN SCHOOLS

For more than one hundred years, schools have been a central, if often overlooked, battleground in the delineation of the rights of homosexual people. A long ideological history appoints teachers as role models and moral exemplars and invokes gender expectations, religious dogma, angst over the sexualization of children, and superstition about sexual orientation. Historically, teachers who have acted in any way outside the often narrow boundaries set by school boards, religious leaders, parents, and courts (read: “community”) risked, at a minimum, losing their jobs.³⁹ Young people spend most of their lives in school,

³⁶ Unless otherwise noted, ideas in this paragraph come from my experiences as both a high school student and as a high school teacher.

³⁷ Hunter, *supra* note 33, at 1630-31.

³⁸ *Id.*

³⁹ Throughout the 20th century, schools excluded teachers because they were pregnant, in mixed-race marriages, thought to be Communist, and because they expressed pacifist views during wartime. Teachers have been regulated in terms of the way they dressed, their propensity to drink alcohol or play pinball outside of work, and for substance abuse problems in their personal lives. For a good discussion of these morality issues, see DeMitchell et al., *supra* note 17, at 68-79; Varona, *supra* note 17, at 29-31.

and the assumed propensity of students to absorb and copy the ideas, actions, and habits of teachers—what the Supreme Court called the “subtle but important influence” over student “perceptions and values”⁴⁰—means that teachers have long been held to a higher standard than most other public employees.⁴¹

Regulation of teachers based on their sexual orientation emerges from this larger impetus to monitor and control gender and morality, but these accepted cultural tropes often serve as a smokescreen for blatantly homophobic intentions that have nothing to do with genuine concerns over the education of children. Teachers work today within a gendered landscape that impacts and reflects notions of heteronormativity. Classroom norms date back to “traditional” conceptions of family, which viewed single female and male teachers with suspicion and birthed the stereotype of the single female “spinster” and the male “effeminate bachelor.”⁴² At various times in United States history, teachers were systematically dismissed for marrying, remaining unmarried after having children, getting divorced, or other “moral lapses.”⁴³ Set against these notions about proper gender roles, the earliest writings about homosexuality in the 1900s labeled homosexual educators as deviants who constituted a threat to children.⁴⁴ These fears centered on gendered notions of family and related images of masculinity, femininity, and fears of deviant sexual attitudes.⁴⁵ While men initially dominated the profession, today some 76 percent of public school teachers are female.⁴⁶

Inextricably tied to the gendered ideology of the classroom were concepts of proper moral behavior. The Supreme Court declared in 1952 that “a teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they

⁴⁰ *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

⁴¹ DeMitchell et al., *supra* note 17, at 69; see also Jason R. Fulmer, *Dismissing the “Immoral” Teacher for Conduct Outside the Workplace—Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J.L. & EDUC. 271, 277 (2002).

⁴² Pat Griffin & Mathew Ouellett, *From Silence to Safety and Beyond: Historical Trends in Addressing Lesbian, Gay, Bisexual, Transgender Issues in K-12 Schools*, 36 EQUITY & EXCELLENCE IN EDUC. 106, 107 (2003). For an excellent history of gender in teaching, see also CTR. FOR RESEARCH & EDUC. IN SEXUALITY, S.F. STATE UNIV., COMING OUT OF THE CLASSROOM CLOSET: GAY AND LESBIAN STUDENTS, TEACHERS, AND CURRICULA (Karen M. Harbeck, ed., *The Hawoah Press Inc.* 1991).

⁴³ DeMitchell et al., *supra* note 17, at 69-70 (internal quotations omitted).

⁴⁴ Griffin & Ouellett, *supra* note 42, at 107.

⁴⁵ *Id.* at 107-08.

⁴⁶ *Fast Facts: Teacher Trends*, INST. OF EDUC. SCI.: NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/FastFacts/display.asp?id=28> (last visited May 1, 2013); see also Harbeck, *supra* note 42, at 105.

live. In this, the state has a vital concern.”⁴⁷ At the same time, medical and psychological “experts” were reinforcing the notion that gay people were morally unfit for teaching. As a result, schools investigated and fired teachers whom they suspected of being homosexual. The accepted rationale was that since homosexuals could not reproduce “naturally,” they had to recruit and corrupt young people to their cause.⁴⁸ Morality clauses in state statutes, school board rules, and teacher contracts reflected these beliefs and affirmed homosexuality as cause for dismissal.⁴⁹

Underlying these anti-gay sociolegal manifestations were deep fears about the performances of gay teachers.⁵⁰ Social angst about altering adult gender roles centered on the development of children. If parenting is about duplicating or perfecting an image of oneself in one’s (heteronormative) offspring, then parental and school board worries about how gay adults could come to exist logically centered on children’s influences.⁵¹ If gay people are *made*, not born, it is natural to conceive of the classroom as an identity factory where traditional gender roles are cemented and laid down, held and conceived.⁵² In this sense, a gay teacher who “performed” her identity “launche[d] a personal attack on the heterosexual norm as well as on the stereotypical perceptions of homosexuality.”⁵³

The conflation of sexual orientation with sexual conduct emerged from these phobias. At the core of the over-reading of homosexual aggression—as seen through worries that homosexuals would molest children, or try to “convert” them to their lifestyle⁵⁴—is a deep fear of the opposite: that being homosexual is just fine.⁵⁵ The current sociolegal discourse formed, and was formed by, the historical exclusion of relief from discrimination still found today in the absence

⁴⁷ *Adler v. Bd. of Educ. of City of New York*, 342 U.S. 485, 493 (1952); *see also* DeMitchell et al., *supra* note 17, at 105.

⁴⁸ Varona, *supra* note 17, at 31.

⁴⁹ Fulmer, *supra* note 41, at 275.

⁵⁰ *See* Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3 (2008) (performance concept).

⁵¹ For the ideas in this section, I am indebted to a series of conversations with Professor Steven K. Homer. Interviews with Professor Steven K. Homer, Lecturer, Legal Analysis and Communication, Univ. of N.M. Sch. Of Law (Jan. - Apr., 2013).

⁵² *Id.*

⁵³ Jennifer Minear, *Performance and Politics: An Argument for Expanded First Amendment Protection of Homosexual Expression*, 10 CORNELL J.L. & PUB. POL’Y 601, 622-23 (2001).

⁵⁴ Varona, *supra* note 17, at 41.

⁵⁵ “[T]he fear that the child may come to self-identify with a group that the parent sees as culturally Other.” Karst, *supra* note 17, at 989.

of anti-discrimination protections for homosexual Americans. The legal system in the United States has worked to carve away the potential for positive identity formation in young gay people by preventing teachers from demonstrating that it is okay, and even *fantastic*, to be homosexual.

Beginning in 1969, as the social terrain became more combative across the United States, the culture wars heated up. Homosexuality in schools became both more visible and more contested. That year, the California Supreme Court held, in *Morrison v. State Board of Education*, that a school board could dismiss a teacher for immoral conduct or “moral turpitude” only if the behavior in question rendered her unfit to teach.⁵⁶ The decision, issued less than a year after the Stonewall Riots, was the first significant case to hold that morality clauses were not automatic vehicles for homophobia. Throughout the 1970s, a number of courts weighed in on whether a teacher’s perceived homosexuality was in itself cause for dismissal, or whether there must be a nexus between the teacher’s identity and her fitness to teach.⁵⁷ Most of these courts embraced the idea that homosexual conduct, even outside the school setting, per se violated state immorality statutes and provided grounds for dismissal.⁵⁸ The very essence of a gay teacher, these decisions suggested, is enough to negatively impact young people.⁵⁹

Despite an increase in civil rights generally in the United States in the mid to late 20th century, social opinion remained broadly

⁵⁶ *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 390-91 (1969).

⁵⁷ See, e.g., *Acanfora v. Bd. of Ed.* 491 F.2d 498, 500, 504 (4th Cir. 1974) (holding that a homosexual teacher was appropriately dismissed because he failed to disclose on his teaching application his prior membership in the Homophiles of Penn State, a gay rights group); *Burton v. Cascade Sch. Dist. Union High Sch.*, 353 F. Supp. 254, 255 (D. Or. 1973), *aff’d*, 512 F.2d 850 (9th Cir. 1975) (holding a state morality statute unconstitutional that allowed for dismissal of homosexual teacher without requiring a nexus between homosexuality and teaching performance); *Gaylord v. Tacoma Sch. Dist.*, 559 P.2d 1340, 1347 (Wash. 1977) (It is important to remember that Gaylord’s homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. It would be unreasonable to assume as a matter of law a teacher’s ability to perform as a teacher required to teach principles of morality is not impaired and creates no danger of encouraging expression of approval and of imitation. Likewise to say that school directors must wait for prior specific overt expression of homosexual conduct before they act to prevent harm from one who chooses to remain ‘erotically attracted to a notable degree towards persons of his own sex and is psychologically, if not actually disposed to engage in sexual activity prompted by this attraction’ is to ask the school directors to take an unacceptable risk in discharging their fiduciary responsibility of managing the affairs of the school district (citations omitted)).

⁵⁸ *Eckes & McCarthy*, *supra* note 16, at 535.

⁵⁹ *Id.*

intolerant of homosexuality. A 1970 Gallup survey found that more than 70% of respondents agreed with the statements, “[h]omosexuals are dangerous as teachers or youth leaders because they try to get sexually involved with children” or “[h]omosexuals try to play sexually with children if they cannot get an adult partner.”⁶⁰ Only 27% of Americans in 1977 would allow gay people to be elementary school teachers.⁶¹

After Stonewall galvanized the gay rights movement in 1969, anti-gay forces marshaled a backlash. In 1977, singer and beauty queen Anita Bryant claimed that in Los Angeles, 30,000 students under the age of 12 were “recruited and sexually abused by homosexuals” because “since homosexuals cannot reproduce, they must recruit, must freshen their ranks.”⁶² Bryant warned of holding up any gay teacher as a role model.⁶³ In this, she was not just successful, but influential; her recommendation that states repeal ordinances protecting gays and lesbians in housing and employment was replicated in Minnesota, Kansas, Oklahoma, Oregon, and California.⁶⁴ In Oklahoma, the legislature passed an initiative in 1978 that allowed schools to fire any employee who promoted public or private homosexual activity.⁶⁵

The anti-gay movement drew on a moral authority that sought to prescribe an authoritative definition of cultural meanings in the classroom and also to motivate political authority to stop the liberalization of society.⁶⁶ It was highly successful. By the 1990s, even while initiatives to protect gay students emerged in some areas, mistrust of homosexuals in schools had grown stronger.⁶⁷ In the 1996 debate over the Employment Non-Discrimination Act (ENDA), Senator Don Nickles, a Republican from Oklahoma, complained that ENDA would allow homosexual teachers to proselytize in the classroom and promote promiscuity.⁶⁸ Not only did ENDA fail, but Congress passed the

⁶⁰ *Facts About Homosexuality and Child Molestation*, SEXUAL ORIENTATION: SCI., EDUC., & POL’Y, DEP’T OF PSYCHOLOGY UNIV. OF CAL., http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html (last visited Feb. 21, 2014).

⁶¹ *Id.*

⁶² Varona, *supra* note 17, at 31.

⁶³ *Id.*; see also Griffin & Ouellett, *supra* note 42, at 107-08.

⁶⁴ Varona, *supra* note 17, at 31.

⁶⁵ *Id.* The Tenth Circuit found this statute unconstitutional in 1984; see *Nat’l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1274 (10th Cir. 1984), *aff’d sub nom. Bd. of Educ. v. Nat’l Gay Task Force*, 470 U.S. 903 (1985).

⁶⁶ See Karst, *supra* note 17, at 977.

⁶⁷ Griffin & Ouellett, *supra* note 42, at 110.

⁶⁸ Varona, *supra* note 17, at 25-26.

Defense of Marriage Act that same year.⁶⁹ The political right has continued to find vast success in its ability to “mobilize cultural constituencies” by focusing on the socialization of children.⁷⁰

In the last twenty years, as in other areas of public employment and civil rights, gay teachers have increasingly won victories while often suffering setbacks. In an era in which the Supreme Court has found substantive due process privacy rights in the areas of procreation, marriage, abortion, and the use of contraception, the Court has also increased its protections of sexuality and sexual orientation.⁷¹ The watershed decisions in *Romer v. Evans*⁷² and *Lawrence v. Texas*⁷³ liberated gay people from the reach of laws meant to punish them simply on the basis of their identity. Where once homosexuality was completely invisible in public education, now there is a limited tolerance. Nonetheless, today thirty-seven states have statutes that make immorality—a universal signifier for non-heterosexuality—a legitimate reason for teacher dismissal.⁷⁴ In many schools, gay teachers have no fear of persecution, but homophobia is increasingly hidden behind selectively-applied notions of heteronormative morality and ideation about “role models.”⁷⁵ While the closet door remains shut for many teachers who work in unforgiving communities, students have a way of prying that door open.

III. ILL-FITTING PRECEDENT

Harassment is a form of discrimination, which, legally speaking, only exists if it is tied to protected class status.⁷⁶ Among students, identity-based harassment is simply called bullying, and one would be hard pressed to find anyone who explicitly tolerates it. But against adults, our national laws condone bullying if it is not based on race,

⁶⁹ Defense of Marriage Act, 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006).

⁷⁰ Karst, *supra* note 17, at 969, 971.

⁷¹ DeMitchell et al., *supra* note 17, at 97-101.

⁷² *Romer v. Evans*, 517 U.S. 620 (1996) (finding that the amendment to the Colorado Constitution banning protections for homosexuals violated Equal Protection Clause).

⁷³ *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding unconstitutional the Texas ban on homosexual sodomy and overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

⁷⁴ DeMitchell et al., *supra* note 17, at 79; *see also What Are the Main Rights Teachers Have in the United States, and Why is it Important...*, ENOTES, <http://www.enotes.com/education-reference/teachers-rights> (last visited Feb. 21, 2014).

⁷⁵ *See, e.g., Holt v. Rapides Parish Sch. Bd.*, 685 So. 2d 501 (La. Ct. App. 1996) (affirming reversal of dismissal of female teacher for sleeping with female student at slumber party and giving student gifts).

⁷⁶ *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/types/harassment.cfm> (last visited Feb. 21, 2014).

color, religion, sex, or national origin.⁷⁷ When students harass teachers, they benefit from an added layer of protection of their anti-gay animus because students are subject to more lenient legal standards when it comes to their words and behavior. In effect, the law shields these student proxies from responsibility for bullying adults and protects supervisors and parents from wrongs they did not directly commit. This phenomenon is due to a shallow understanding of schools and to the historical homophobia, outlined above, camouflaged beneath the concern for vulnerable young people. Responsibility for stopping the harassment too often falls back on teachers, with disastrous results.

The most important federal legislation protecting discrimination in the workplace is the Civil Rights Act of 1964.⁷⁸ Title VII of the act makes it unlawful “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁷⁹ While Title VII has been successful in preventing workplace discrimination for the protected classes it explicitly mentions, plaintiffs seeking safeguards on the basis of their sexual orientation have not been able to rely on Title VII. Courts have “uniformly rejected the notion that either sexual orientation or gender identity” are analyzed within the protections of Title VII.⁸⁰ Judicial interpretation of Title VII has shifted radically since the act’s passage, and some plaintiffs in non-teaching fields have been successful in bringing Title VII “because of...sex” claims for discrimination on the basis of sexual orientation.⁸¹ However, no teacher has successfully utilized Title VII in bringing a sexual orientation harassment claim, and few have bothered to try. What should be the cornerstone of available remedies is instead a dead end.

Courts have increasingly muddled, rather than clarified, the exact meaning of “because of...sex” discrimination, often failing to articulate the important differences and overlaps between sexual harassment, gender discrimination, and discrimination based on sexual orientation in decisions that too often run against homosexual plaintiffs.⁸² Under Title VII, courts place gay people in a bind: on one

⁷⁷ 42 U.S.C. § 2000e-2 (2006).

⁷⁸ WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 448 (West Publishing, 3rd ed. 2008).

⁷⁹ 42 U.S.C. § 2000e-2 (2006).

⁸⁰ Rubenstein et al., *supra* note 78, at 449.

⁸¹ *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (finding that issue of material fact existed as to whether harassment of gay male employee was due to homosexuality).

⁸² *See, e.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (holding that same-sex sexual harassment is actionable under Title VII); *Price Waterhouse v.*

hand, those who present stereotypically find more success in court than those who do not; Title VII incentivizes plaintiffs to “act gay.” If they do not, their harassers can easily claim some other, non-protected basis for their actions.⁸³ On the other hand, if plaintiffs *do* present stereotypically and it is clear the discrimination occurred for this reason, courts are likely to limit the legal basis of the harassment to sexual orientation, which, in and of itself, is not a basis for a Title VII claim.⁸⁴ The fact that none of the teachers facing student harassment in the cases analyzed here even attempted to rely on Title VII exposes it as a selective administrator of justice.

Gay teachers have had some success relying on 42 U.S.C. § 1983, which creates a cause of action for constitutional violations.⁸⁵ Using Section 1983, teachers can seek protections and damages under the Equal Protection Clause, the Due Process Clause, the right to free speech and expression, and the right to privacy. Declarations of homosexuality (whether the teacher intentionally comes out or unintentionally “is outed” by someone else) are often the spark for harassment.⁸⁶ First Amendment speech and expression claims, applied through Section 1983, provide one avenue to protect gay teachers in these circumstances. In fact, Theresa Bryant calls the First Amendment, “the only protection for teachers, if such protection exists.”⁸⁷ Jennifer Minear goes even further, arguing that *all* homosexual identity should be seen as expression and thus protected by the First Amendment.⁸⁸ One advantage to expression claims is certainly that, in contrast to equal

Hopkins, 490 U.S. 228 (1989) (holding that the company who denied a woman promotion, telling her to go to “charm school” and act more feminine, stereotyped her in violation of Title VII); *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (affirming, under Title VII, casino's right to compel female employee to wear makeup); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (finding that lesbian hairdresser who claimed discrimination and gender stereotyping under Title VII was fired for other reasons); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206 (9th Cir. 2001) (affirming that harassment of hotel employee based on his sexual orientation was not actionable under Title VII).

⁸³ See *Dawson*, 398 F.3d at 218.

⁸⁴ “Rene did nothing to show the district court that the harassment was based on his gender. Instead, he stated quite plainly that the question presented was whether the conduct he alleged ‘is prohibited by Title VII *even though it was directed at [him] because of his sexual orientation.*’” *Rene*, 243 F.3d at 1210.

⁸⁵ “Every person who, under color of any statute. . . subjects. . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .” 42 U.S.C. § 1983 (2006).

⁸⁶ See *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1281 (D. Utah 1998).

⁸⁷ Bryant, *supra* note 11, at 590.

⁸⁸ Minear, *supra* note 53, at 626.

protection or Title VII, they nominally apply equally to people of all sexual orientations.⁸⁹

The free speech and expression approach, however, does not serve to protect teachers harassed by students. Speech and expression claims depend upon a two-step process: first, the teacher must be publicly out(ed), and second, the school or school board must take identifiable, aggressive actions to limit the teacher's expression. Once a gay teacher engages in some kind of out expression, under First Amendment law, courts analyze three prongs: the extent to which that performance is a matter of "public concern,"⁹⁰ whether it is "disruptive" to the school day,⁹¹ or whether it is "reasonably related to legitimate pedagogical concerns."⁹² Leaving aside the insult of applying these tests to a person's basic identity, scenarios such as these do not fit situations in which students harass teachers; in those cases, the teacher is often not out prior to the harassment, and the school board most commonly *does not* act.

Because First Amendment jurisprudence places a duty on homosexuals to officially "come out" in some symbolic or substantive way before assigning protection, it turns the closet inside out. It places the burden on the victim rather than the perpetrator. While it is an admirable goal that all gay and lesbian teachers freely express who they are, to require "out" behavior prior to legal protection reinforces stereotypes that somehow sexuality is more essential in the identities of gay people than it is for heterosexuals. Since heterosexuality is the default, invisible identity, no straight person needs to make a show of declaring his sexual preference—heterosexuality is simply assumed. Moreover, it is not relevant whether teachers harassed for their sexual orientation actually *are* gay or not: the salient issue is that the perpetrators have decided they are.

Under the First Amendment, it may also be difficult to prove that a school administration acted against a teacher because of sexual orientation or for another reason. Wendy Weaver's case demonstrates many of the drawbacks to First Amendment claims, despite the fact that she is perhaps the most successful plaintiff in a harassment case. Weaver was a veteran teacher and volleyball coach at Spanish Fork

⁸⁹ Equal protection sets up a hierarchy of protected classes and holds race as more important than sexual orientation, while Title VII simply excludes sexual orientation protections altogether.

⁹⁰ *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968).

⁹¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

⁹² *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, (1988).

High School in Spanish Fork, Utah, with an unblemished reputation.⁹³ When a student and volleyball player asked Weaver if she was gay, Weaver said simply, “yes.”⁹⁴ Parents and students suddenly began complaining about her and Weaver’s sexual orientation became a topic openly discussed by the principal, the school board, and even Weaver’s ex-husband.⁹⁵ One of her players and that player’s parents told the principal that the girl would not play under Weaver.⁹⁶ Weaver was then let go as volleyball coach and told that she could not discuss her “homosexual orientation or lifestyle” at school, and “if students, staff members, or parents of students ask about your sexual orientation or anything concerning the subject, you shall tell them that the subject is private and personal and inappropriate to discuss with them.”⁹⁷ The district reminded Weaver that she was “always perceived by the student as a teacher, authority figure and role model.”⁹⁸ Weaver brought suit under Section 1983, alleging that the school had violated her right to free speech under the First Amendment, and that her dismissal as coach violated the Equal Protection Clause.⁹⁹ She prevailed on summary judgment on all counts, with the court finding that her sexual orientation was “a matter of public concern.”¹⁰⁰

It is unclear, however, to what extent the Weaver decision should represent a victory in teacher harassment cases. *Weaver* is less about a teacher’s right to assert her sexuality freely than it is about a school’s ability to publicly shame a teacher as a form of harassment. In this case, rather than any student directly attacking Weaver, the school board and parents relied on the school administration to hold the nucleus of the homophobia. If the school had not taken clear and documented steps, in writing, to suppress Weaver’s expression of her sexual orientation—if, instead, it had stood by passively while others inflicted the damage—Weaver would have had shaky legal ground on which to stand. Wendy Weaver’s case is a useful paradigm to show just how

⁹³ As a teacher, she consistently received excellent evaluations. As a coach, Weaver led her team to four state championships. *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1280 (D. Utah 1998).

⁹⁴ *Id.* at 1281.

⁹⁵ *Id.* at 1286.

⁹⁶ *Id.* at 1281.

⁹⁷ *Id.* at 1281-82.

⁹⁸ *Id.* at 1282.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1284. *But see* *Rowland v. Mad River Local Sch. Dist.*, Montgomery Cnty., Ohio, 730 F.2d 444, 449 (6th Cir. 1984) (declaring that teacher’s sexual orientation was not a matter of public concern).

direct school involvement in harassment must be to constitute discrimination.¹⁰¹

IV. JUDICIAL HOMOPHOBIA MADE PLAIN: THE CASE OF TOMMY SCHROEDER

Tommy Schroeder's case, by contrast, symbolizes the enormous power students hold to express community homophobia and come away virtually without reproach. The Seventh Circuit handed down *Schroeder* in 2002, six years after *Romer*¹⁰² and one year before *Lawrence*.¹⁰³ These two cases opened the door to fundamental rights for gay and lesbian Americans by declaring, for the first time, that government animus against homosexuals was irrational.¹⁰⁴ However, as Katherine M. Franke explains, *Romer* and *Lawrence* also "[did] little to open up new forms of public and private sexual intelligibility that are not always already domesticinormative....The world post-*Lawrence* remains invested in forms of social membership and, indeed, citizenship that are structurally identified with domesticated heterosexual marriage and intimacy."¹⁰⁵ Tommy Schroeder fell victim to a court only willing to go so far in recognizing the legitimacy of homosexuality. His case demonstrates the limited reach of the *Romer-Lawrence* era.

As mentioned in the Introduction above, Schroeder took what feels like an intuitive path to face his district's poor response to student

¹⁰¹ Weaver's foes also used the courts themselves to harass her. In a separate case brought against her shortly after she filed her own complaint, a group of parents calling themselves the "Citizens of Nebo School District for Moral and Legal Values" accused Weaver of violating various state statutes concerning the conduct of teachers. *Miller v. Weaver*, 66 P.3d 592, 594 (2003). The group accused Weaver of administering personality tests to her students, discussing the results of those tests in class, requiring her students to interpret their dreams in class, and disparaging the Church of Jesus Christ of Latter-Day Saints. The group also said Weaver "encouraged students to question traditional sources of authority and determine for themselves whether alternative 'lifestyles' are right or wrong." *Id.* The Utah Supreme Court eventually dismissed all complaints, granted Weaver her costs, and agreed with the district court's assessment of the plaintiffs' "utter failure to address the substance of the [district court's] ruling." *Id.*

¹⁰² See *supra* note 72.

¹⁰³ See *supra* note 73.

¹⁰⁴ "The *Romer* decision highlights a judicial shift from considering animus against homosexuals to be an acceptable government rationale, to treating it like any other racial, ethnic, or religious bias." DuBuisson, *supra* note 17, at 329 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect")).

¹⁰⁵ Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1415-16 (2004).

harassment: he brought a challenge under the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁶ Seen as the centerpiece of constitutional protection of individual rights, Section One of the Fourteenth Amendment avers that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁷ Equal protection requires that all groups of people be treated similarly.¹⁰⁸ If the state makes a law that more heavily burdens one classification of people above another, it must demonstrate at minimum a rational basis for doing so. If the classification is deemed protected, the state has a higher burden to meet in its justification for the imbalance in treatment. Courts have not identified sexual orientation as a protected class.

In *Schroeder*, the court applied rational basis review, citing both *Romer* and *Bowers v. Hardwick*.¹⁰⁹ In order to establish an equal protection violation, then, the court found that Schroeder must show that the defendants “(1) treated him differently from others who were similarly situated, (2) intentionally treated him differently because of his membership in the class to which he belonged (i.e., homosexuals), and (3) . . . that the discriminatory intent was not rationally related to a legitimate state interest.”¹¹⁰ The court attacked Schroeder’s case on all three prongs and found that a rational basis for the district’s treatment of him *did* exist.¹¹¹

First, the court invalidated Schroeder’s definition of “similarly situated” and the significance of his class membership.¹¹² Lacking any clear examples of other out teachers that the district treated differently, Schroeder based his disparate treatment claim, in part, on the fact that administrators had handled a spate of racial incidents at the school much more urgently than they had his situation.¹¹³ The court found, however,

¹⁰⁶ *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 948 (7th Cir. 2002).

¹⁰⁷ U.S. CONST. amend. XIV, § 1.

¹⁰⁸ For equal protection analysis, *see, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring).

¹⁰⁹ *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding Georgia’s anti-sodomy statute). Overruled one year later in *Lawrence*.

¹¹⁰ *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 950 (7th Cir. 2002) (internal citations omitted).

¹¹¹ *Id.* at 959.

¹¹² *Id.* at 953.

¹¹³ “Schroeder would have us *infer* differential treatment because: (1) a memorandum circulated by the associate principal at Templeton, Patty Polczynski, failed to address and condemn the widespread use by students of ‘hetero-sexist’ and ‘anti-gay’ comments in the same manner that a previous memorandum had done with respect to racist comments and symbols, and (2) while the Hamilton School District held several district-wide staff/teacher training sessions and conducted annual student orientation programs to implement its policies prohibiting race and sex discrimination, the district

that it was not enough for Schroeder to show that racial incidents were treated differently than those involving sexual orientation. Instead, he needed to prove that he was treated differently from other *teachers*.¹¹⁴ Unlike in Wendy Weaver's case, where the court found significance in the fact that the district limited her speech and not the speech of heterosexual teachers, the acts of harassment in *Schroeder* resulted not from the district's actions, but from its failure to act when presented with the actions of others (i.e. the often anonymous students and parents who victimized Schroeder). Faced with no way to prove the absurd—that the district had not failed to take the necessary steps to stop the harassment of heterosexual teachers—Schroeder attempted to show disparate treatment across classifications (i.e. race vs. sexual orientation). But since courts apply strict scrutiny to racial classifications but only rational basis to sexual orientation—in effect placing more value on bigotry founded on race than bigotry founded on sexual orientation—the court was unimpressed.¹¹⁵ Richard Posner concurred specifically to make the point that even if Schroeder were right that the district handled racial harassment differently, he still could not prove that the state's actions were “irrational.”¹¹⁶

Rather than look comparatively to the manner in which the district treated various teachers, under the state's interest prong the court majority found it appropriate to examine the district's treatment of teachers against the interests of *students*, and it approached this comparison as a zero-sum game. The court explicitly noted that “in a school setting, the well-being of students, not teachers, must be the primary concern of school administrators.”¹¹⁷ It found that young children are “more vulnerable to intimidation and mockery than teachers with advanced degrees and 20 years of experience,”¹¹⁸ and that school officials should be cautious about using “draconian”¹¹⁹ “police tactics”¹²⁰ to remedy nonviolent harassment of a teacher by students,

never held similar training sessions or student programs to address sexual orientation discrimination.” *Id.* at 952.

¹¹⁴ *Id.*

¹¹⁵ “From a historical standpoint the core violation of the Equal Protection Clause is indeed the selective withdrawal of police protection from a disfavored group, as the term ‘equal protection of the laws’ connotes. . . . But Schroeder is no more a woman than he is a black. He is a white male.” *Id.* at 957.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 952. Posner echoed these words in his concurrence: “a public school's primary commitment is to its students, not to its teachers.” *Id.* at 958.

¹¹⁸ *Id.* at 952.

¹¹⁹ *Id.* at 956.

¹²⁰ *Id.* at 953.

“even though the harassment is offensive and cruel.”¹²¹ The court also assumed that the school could play no role in teaching tolerance because “it is hard to see how teaching the district’s teachers and staff about sexual orientation discrimination would have prevented the primary perpetrators, the students and their parents, from harassing him.”¹²² It found that while the actions against Schroeder—which were punished when possible—were relevant, their “underlying motivation” was not.¹²³

The key to the legal blamelessness of the school district to stop the harassment, in the court’s eyes, was the school’s lack of control over parents. “Obviously, if a child picks up foul language and prejudicial views from his parents at home, and then displays them at school, he should be disciplined,” Manion wrote.¹²⁴ The court’s equation of prejudicial views with simple foul language treated the parent’s role in transmuted hatred as irrelevant to the assignation of blame. In essence, the court vindicated parents’ fundamental right to instill bigotry in their children. Despite the fact that none of the briefs mention religious freedom in the *Schroeder* case, Manion injected this concept into his thinking, writing that a student “cannot . . . be disciplined for expressing a home-taught religious belief that homosexual acts are immoral . . . the Equal Protection Clause does not require a school district to do anything about parental unpleasanties unless they take place on school grounds.”¹²⁵

Central to the court’s logic on all of these counts was the notion that there are simply not enough resources to stop the harassment of one teacher, regardless of its basis. Because this appeared to be a single, isolated case, the *Schroeder* court cited Sixth Circuit precedent¹²⁶ to say that the district had no obligation to get involved.¹²⁷ In his concurrence, Judge Posner agreed, arguing that we simply don’t have time to protect

¹²¹ *Id.* It is not clear to which tactics the court refers—presumably it means the sensitivity training that Schroeder requested.

¹²² *Id.* at 954.

¹²³ *Id.* at 955. Distinguishing *Nabozny*, a case of brutal student-on-student harassment that Schroeder cited in his brief, Posner pointed out that in *Nabozny* the assaults were physical and the neglect by school officials—who literally laughed when *Nabozny* complained—were easy to see. *Id.* at 958-59.

¹²⁴ *Id.* at 955.

¹²⁵ *Id.* Ironically, later in its own opinion, the court warns against federal judges’ use of rational basis review as “a mechanism to impose their own social values on public school administrators who already have innumerable challenges to face.” *Id.* at 956.

¹²⁶ *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300-01 (6th Cir.1997) (holding that Cincinnati had rational basis in conserving costs in passing *Romer*-like ban on rights for homosexuals).

¹²⁷ *Schroeder*, 282 F.3d at 954.

gay teachers, just as we can't protect every "overweight, or undersized, or nerdish, or homely" employee.¹²⁸ Moreover, according to Posner, for the district to have added a prohibition against anti-gay language in its memo to teachers at Schroeder's school would have "diluted" the overall effect of the anti-bigotry message.¹²⁹

This barely-hidden disgust for homosexuality pervades Manion's majority and Posner's concurrence. Both judgments equate sexual orientation with sexual acts in a circular argument that blames Schroeder for his own purported sexual promiscuity. Manion found that "there is no simple way of explaining to young students why it is wrong to mock homosexuals without discussing the underlying lifestyle or sexual behavior associated with such a designation."¹³⁰ Posner referred to Schroeder's sexual orientation or "activity," which he said led to the school's "understandable reticence about flagging issues of sex for children."¹³¹ Both men's words inject sexuality and sexual acts into Schroeder's daily job performance and then lay the blame on Schroeder for their doing so, demonstrating their belief in what Nan Hunter calls "the intrinsic uncontrollability of gay male sexuality."¹³²

The Seventh Circuit's logic assumes that no student could understand what it means to love someone of the same sex because no student could possibly *be* gay. It obliterates any sense that gay people are part of a community that includes non-gay people or that heterosexual members of that community might also benefit from stopping bigotry aimed at their friends, family, and colleagues. It scrubs the history of gay rights from the possible list of classroom topics. And it reflects an epistemological inability to conceive of sexual orientation apart from heterosexuality, grounded in a permanent stigmatization of homosexuals. Put simply, the *Schroeder* opinion is a state vehicle for the very same bullying that Tommy Schroeder asked it to stop. Writing in the 21st century, Posner and Manion echo ideology that is hundreds of years old in claiming that there is something unique in the homosexual "lifestyle." To speak of love, as is the most common way of explaining to children why coupledness of any kind occurs, appears beyond their vocabulary. In one fell swoop, the *Schroeder* court

¹²⁸ *Id.* at 958 (Posner, J., concurring).

¹²⁹ *Id.*

¹³⁰ *Id.* at 954. To push Posner's stance to its logical conclusion, one wonders whether, if we were talking about students who were harassing a female teacher who had just gotten married, it would be possible to explain that it was not okay to tease her without talking about sex.

¹³¹ *Id.* at 958.

¹³² Hunter, *supra* note 33, at 1607.

defined homosexual teachers and students out of full American citizenship.¹³³

V. LEGAL CONFUSION: JOAN LOVELL AND AN ELUSIVE HOSTILE WORK ENVIRONMENT

The *Schroeder* opinion is valuable in that the men who wrote it had the courage to place their bold rationales in plain sight. It stands as a symbol of a shockingly outdated sociolegal logic. By contrast, the case of Joan Lovell illustrates what happens when courts with a genuine interest in stopping sexual orientation harassment reach, albeit unsuccessfully, for the legal backing to do so.

Lovell worked as an art teacher for the Comsewogue school district in New York for 27 years without discussing her sexuality with anyone in the district.¹³⁴ In 2001, three female students in her class complained that Lovell was “looking at them in a sexual manner or saw Lovell looking at one of their friends.”¹³⁵ Lovell’s principal investigated the students’ claims, discovered them to be false, and transferred the students out of Lovell’s class.¹³⁶ He also, however, gave one student a grade of 100% in Lovell’s class, and took no disciplinary action against the students.¹³⁷ A number of incidents followed in which various students in the school harassed Lovell. One called her a “dyke,”

¹³³ Posner concluded that there was no evidence that the school authorities were hostile to Schroeder at all, let alone due to his sexual orientation “although the character of the defendants’ response to his complaint may have been influenced by the hostility of some parents to the idea of their kids’ being taught by a homosexual.” *Schroeder*, 282 F.3d at 957 (Posner, J., concurring). Posner in particular, threw up his hands, writing that “while in hindsight it appears that the defendants could have done more to protect Schroeder from abuse,” there was no evidence there that the discrimination Schroeder suffered was “invidious or irrational.” *Id.* at 959 (Posner, J., concurring). Judge Diane P. Wood, writing in dissent in *Schroeder*, harshly criticized the majority opinion: “Nothing in *Romer* justifies a system under which a state or state actors like the District and its officials deliberately either omit altogether or give a diminished form of legal protection from verbal or physical assaults to individuals in certain disfavored classes. Yet both the majority opinion and the concurrence see no problem in the fact that the defendants intentionally responded less vigorously to the abuse that finally broke Schroeder than they themselves would have done for others . . . The majority also makes the unwarranted factual finding that there was no evidence of hostility to Schroeder. Even a glance at the facts the majority itself has set out shows that this is, at a minimum, a disputed point of fact.” *Id.* at 961 (Wood, J., dissenting).

¹³⁴ *Lovell v. Comsewogue Sch. Dist.*, No. CV 01 7750JO, 2005 WL 1398102, at *1 (E.D.N.Y. June 15, 2005).

¹³⁵ *Id.*

¹³⁶ *Id.* at *2.

¹³⁷ *Id.*

another called her “disgusting,” students whispered and pointed at her as she walked through the halls, and two female students hugged each other in mock fear when they saw her.¹³⁸ Still, her principal failed to take remedial measures.¹³⁹ More incidents followed. The principal suspended two students who asked Lovell whether she was a “dyke,” and told the full class that they were not to discuss the incident.¹⁴⁰ Another student called Lovell a “racist,” and when she sent him to the office, he responded that Lovell “just hate[s] men.”¹⁴¹ Finally, someone wrote “Lovell is a stupid dyke” on a desk.¹⁴² The principal called in the local police department’s Bias Crime Unit to investigate, but the perpetrator was never identified.¹⁴³

After a final incident in which a student falsely accused Lovell of telling the student to “go home and commit suicide” and a rumor spread in the student body that Lovell had been fired for doing so, Lovell saw the school doctor, who diagnosed her with anxiety and depression.¹⁴⁴ Her own doctor diagnosed her with Post-Traumatic Stress Disorder resulting directly from the harassment.¹⁴⁵ On June 30, 2003, she went on catastrophic leave and did not return to school for the rest of the 2003-2004 school year.¹⁴⁶

Though Lovell brought her case no further than the district court, the *Lovell* opinion provides a synoptic catalogue of the enormous inconsistency and convoluted interpretations available in these circumstances. The *Lovell* court’s explication of nearly every aspect of her case differed from the Seventh Circuit’s findings in *Schroeder*. First, even the basic equal protection analyses the two courts set up is dissimilar. In framing the legal standards surrounding Lovell’s claim, the United States District Court for the Eastern District of New York emphasized that to prove a violation by the district, Lovell must show that she was treated differently from other similarly-situated employees of the school on the basis of “impermissible considerations” or “by a malicious or bad faith intent to injure” her.¹⁴⁷ Rather than take the *Schroeder* court’s approach and examine Lovell’s “membership” in a

¹³⁸ *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 321 (E.D.N.Y. 2002).

¹³⁹ *Id.*

¹⁴⁰ *Lovell v. Comsewogue Sch. Dist.*, No. CV 01 7750JO, 2005 WL 1398102, at *3 (E.D.N.Y. June 15, 2005).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *3-*4.

¹⁴⁵ *Id.* at *4.

¹⁴⁶ *Id.*

¹⁴⁷ *Lovell v. Comsewogue Sch. Dist.*, No. CV 01 7750JO, 2005 WL 1398102, at *8 (E.D.N.Y. June 15, 2005) (citation omitted).

“class” of homosexuals, the *Lovell* court inquired whether Lovell's case was “sufficiently similar to others who were harassed by students, whether the defendants' handling of her situation was sufficiently different, and whether the explanation for any such difference is grounded in anti-homosexual animus. . .”¹⁴⁸ On a motion for summary judgment, the court found that the answers to most of these questions could potentially come out in her favor and declined to grant summary judgment for the district.¹⁴⁹ Where the Seventh Circuit in *Schroeder* decided as a question of law that sexual orientation and race were not comparable, the *Lovell* court held that these were issues a jury should decide.¹⁵⁰

Lovell's central claim borrowed Title VII concepts to assert that her employers created a hostile work environment, but she brought her case under the Equal Protection Clause.¹⁵¹ This choice drew the court into opening a Pandora's Box of conflicting and unsettled legal precedent leading to confusing results. The likely reason Lovell implicitly invited the court to import Title VII hostile work analyses into her equal protection claim was to sidestep the fact that she was not a member of a protected class under Title VII. Tommy Schroeder had attempted to make a similar connection in his own harassment case, which the Seventh Circuit rejected, calling it “a clear violation of the separation of powers.”¹⁵²

The *Lovell* court, however, entertained the idea. In analyzing Lovell's claims, it turned to several Title VII cases that center on sexual harassment and “because of sex” discrimination, not specifically on sexual orientation harassment. For example, in *Quinn v. Nassau County Police Department*, which the *Lovell* court cited,¹⁵³ a New York district court found that a police department had fostered a hostile work environment by failing to protect a gay officer from harassment.¹⁵⁴ The harassment, however, was sexual in nature, and the court specifically identified it as such, saying “the Second Circuit has explained that

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at *5-*6.

¹⁵² “Schroeder attempts to side-step this analysis completely by inviting us to ‘hold explicitly that Title VII analysis/law shall apply in § 1983 cases where discrimination in employment is the basis for the claimed Equal Protection violation.’...It is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit.” *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002).

¹⁵³ *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002).

¹⁵⁴ *Quinn v. Nassau Cnty. Police Dep't*, 53 F. Supp. 2d 347, 350 (E.D.N.Y. 1999).

sexual harassment can, under certain circumstances, amount to a constitutional tort.”¹⁵⁵ In *Harris v. Forklift Systems, Inc.*, on the other hand, the Supreme Court heard the case of a plaintiff who brought a Title VII “because of sex” case to stem discrimination on the basis of her identity as a woman.¹⁵⁶ *Lovell* looked to this precedent to examine the extent to which the environment *Lovell* faced was severe or hostile.¹⁵⁷ Finally, in *Annis v. County of Westchester*, the Second Circuit appeared to hold that plaintiffs suing under Section 1983 may import hostile work environment analyses from Title VII.¹⁵⁸ The *Lovell* court cited *Annis* to conclude that “it is well established in this circuit that sex-based discrimination, including sexual harassment, is actionable under § 1983 as a violation of equal protection.”¹⁵⁹ The *Lovell* court drew on this variety of precedents to completely tangle the important legal and experiential distinctions between sexual harassment, sex-based discrimination, and sexual orientation harassment.

Despite the court’s confusion, *Lovell* contains the only attempt to articulate a legal standard to analyze cases in which students harass teachers on the basis of sexual orientation. In its review, the court turned to another New York case, *Peries v. New York City Board of Education*, which involved a Title VII claim brought by a teacher of Sri Lankan descent whose students harassed him for nearly a decade based on his national origin and race.¹⁶⁰ The *Peries* court found that the authority of administrators relative to teachers in stemming student abuse was an issue of first impression.¹⁶¹ While *Peries* pointed out that the Supreme Court had ruled in *Davis v. Monroe County Board of Education* that administrators might be liable if they failed to take action to stop

¹⁵⁵ *Id.* at 356. “In the Court’s view, the United States Constitution and the provisions of 42 U.S.C. § 1983, combined with logic, common sense and fairness dictate the answer: individuals have a constitutional right under the Equal Protection Clause to be free from sexual orientation discrimination causing a hostile work environment in public employment.” *Id.* at 350.

¹⁵⁶ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 18-19 (1993).

¹⁵⁷ *Lovell*, 2005 WL 1398102, at *8.

¹⁵⁸ “We therefore hold that an employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII. While we share the district court’s concern that this may invite an increase in the number of cases brought in the first instance in the district courts, that is a policy matter outside our province.” *Annis v. County of Westchester, N.Y.*, 36 F.3d 251, 255 (2d Cir. 1994).

¹⁵⁹ *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002).

¹⁶⁰ For example, his students called him a “fucking Hindu” and asked him, “why are you here? You go home.”

Peries v. New York City Bd. of Educ., No. 97 CV 7109(ARR), 2001 WL 1328921, at *1 (E.D.N.Y. Aug. 6, 2001).

¹⁶¹ *Id.* at *5.

student-on-student sexual harassment, “neither the Supreme Court nor the Second Circuit has extended that right to teachers.”¹⁶² The *Peries* court distinguished student-on-student harassment and student-on-teacher harassment, finding that the most important distinction between them is that “a victim student has no disciplinary authority over the harassing student, while a victim teacher wields at least nominal disciplinary authority.”¹⁶³ The *Peries* court found it “conceivable” that school officials owed a higher duty of protection to students than to teachers, but also asserted that administrators have more power than teachers to discipline and control students.¹⁶⁴ *Peries* thus held that, although administrators “should be” required to stem student-on-teacher harassment, the administration defendants were not given sufficient notice to be held liable.¹⁶⁵ Therefore, they were entitled to qualified immunity from Section 1983.¹⁶⁶ In other words, the *Peries* court found that school administrations have a limited duty to protect their employees from student harassment, even for teachers whose identities—racial and national in *Peries*’ case—are explicitly protected by Title VII.

The *Peries* opinion appeared to heavily influence *Lovell*. The *Lovell* court distinguished the conduct of the students from that of the administration, finding that *Lovell* would have to show that her administrators subjected her to discrimination and a hostile work environment.¹⁶⁷ It was not enough to demonstrate that the students created a hostile work environment motivated by animus and that the administration did not sufficiently protect *Lovell*.¹⁶⁸ Rather, she would have to prove that her principal also was motivated by animus, “because even if he did not know in 2001 that he had to protect *Lovell* against the students’ discrimination, he is presumed to have known of his obligation not to engage in such discrimination himself.”¹⁶⁹ In making the claim that the administration would not have known, absent a Supreme Court holding, that it had a duty to protect its employees from harassment no matter the identity of the aggressor, the *Lovell* court in effect set up a double burden: to pursue successful harassment claims based on

¹⁶² *Id.* at *8. Compounding the confusion in *Peries* is the fact that *Davis* is Title IX sexual harassment case. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 635-36 (1999).

¹⁶³ *Peries*, 2001 WL 1328921, at *6.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *8.

¹⁶⁶ *Id.*

¹⁶⁷ *Lovell v. Comsewogue Sch. Dist.*, No. CV 01 7750JO, 2005 WL 1398102, at *10 (E.D.N.Y. June 15, 2005).

¹⁶⁸ *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319, 321 (E.D.N.Y. 2002).

¹⁶⁹ *Id.*

harassment by students, gay teachers will have to show animus in *both* the students and the school officials.¹⁷⁰

The propensity in the law to view students as innocent and passive actors in these cases obstructs teacher claims in another important aspect. In *Peries*, multiple students harassed the plaintiff over a long period of time, and the school defendants claimed the diffuse nature of the harassment as a defense, arguing, in the words of the court, that “Dr. Peries submitted a small number of complaints about many different students, but not enough complaints about any one student to merit taking serious action such as suspension.”¹⁷¹ Essentially, the logic the defendants asserted hinged on the assumption that teachers carry pervasive moral authority at all times and in all situations. The way to stop this behavior was simply to discipline the individual actors responsible. If the teacher could not handle the harassment, that said more about the teacher than the student perpetrators or adult administrators. If the conduct came from many corners, it was not as valid. In fact, the more serious and widespread the student-led harassment became, the more insulated the school was from its responsibility to remedy it. Luckily for Dr. Peries, the court did not wholly accept this argument, but instead held that the extent to which the school took appropriate action to stop the harassment was a question of fact for a jury.¹⁷²

The *Peries* court held that, under Title VII, student harassment of teachers should be analyzed using a standard similar to that used for employees harassed by their employers’ customers.¹⁷³ The *Peries* court cited EEOC guidance to find that the degree of responsibility an employer carries towards its employees is assessed based on whether the employer “knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”¹⁷⁴ The EEOC identifies the key factors in assessing employer responsibility as “the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.”¹⁷⁵ It also pledges to look “at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.”¹⁷⁶

¹⁷⁰ *Id.*

¹⁷¹ *Peries*, 97 CV 7109(ARR), 2001 WL 1328921, at *7.

¹⁷² *Id.*

¹⁷³ *Id.* at *6.

¹⁷⁴ *Id.* at *5 (citation omitted).

¹⁷⁵ *Id.* (citation omitted).

¹⁷⁶ U.S. EEOC, *supra* note 76.

This standard is potentially useful in placing an onus on school administrations to take effective action to stem student-on-teacher harassment generally, but it remains a part of Title VII. Lovell's importation of Title VII standards into her sexual orientation case will likely not pass muster in most courts. Her legal creativity has logical, not legal, force. Further, while the *Peries* standard is compelling, it explicitly welcomes a discussion of control, and cases like Tommy Schroeder's demonstrate the landmines there. The Supreme Court itself has declared that schools do not control students, *teachers* do: "A public school does not control its students in the way it controls its teachers or those with whom it contracts. Most public schools do not screen or select students, and their power to discipline students is far from unfettered."¹⁷⁷ The logic here is that schools control teachers and teachers control students. Therefore, if teachers cannot control students, teachers themselves are fully responsible. Schools have only a limited duty to control or stop student harassers.

If this calculation seems odd, the addition of sexual orientation turns it bitter. The long history of stereotypes and bigotry described above means that sexual orientation harassment presents a unique trap that anti-gay forces seize to validate stereotypes and perpetuate intolerance. Namely, a teacher who complains about treatment from students obviously cannot control them. It is a weakness to lose control of kids and by extension represents a lack of ability of gay and lesbian people to be parents—the "effeminate bachelor" and "recruitment" tropes updated for the 21st century. This ideology teaches children that gay people are not worthy of respect and therefore cannot properly exercise authority. It is the bully's mentality burned directly into the law: first you cannot control these kids, and now you want to *cry* about it?¹⁷⁸

The patchwork of legal remedies sought by Schroeder and Lovell makes plain the legal inadequacy in this area. Plaintiffs shouldn't have to put together a Frankenstein monster of precedents and theories to achieve recognition of their basic rights by schools, parents, and students themselves. The fact that both Tommy Schroeder and Joan Lovell tried to import parts of Title VII into their claims for equal protection demonstrates the need for federal anti-discrimination protection. It is at best ironic and at worst conspiratorial that the *Schroeder* court conflated sexual orientation with sexuality when assessing classroom culture but made an erudite and nuanced distinction

¹⁷⁷ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 664 (1999).

¹⁷⁸ Ideas in this paragraph influenced by Homer, *supra* note 51.

between those notions in its legal analysis.¹⁷⁹ Schroeder, the court seemed to say, was only entitled to his identity if it was a problem. The power of the state only went as far as protecting *others* from *him*. Lovell, on the other hand, was the victim of a school system that simply had no clear idea of its responsibility to her. Had her skin been another color, had the epithets used against her been tinged with a different history of oppression, then perhaps the injuries she suffered would have been recognized as worth remedying.

VI. (OUT) (OF) CONTROL: TORT LAW'S ENVISAGING OF CHILDREN, PARENTS, AND SCHOOLS

The sections above demonstrate that, in many ways, constitutional and civil rights laws are inadequate to render justice because they largely vacate the responsibility of school officials for stopping harassment. This section looks at whether tort claims present a successful avenue for addressing student-on-teacher harassment. Suits in tort often present victims who have not found redress in other legal areas with an outlet for remedies. Tort law has two central aims: first, to inject the actions of people with moral liability and to impose monetary sanctions when it is right to do so, and second, to promote social policy that is good not just for the individual wronged, but for society as a whole.¹⁸⁰ In situations of student-on-teacher harassment, neither conception prevails. While civil rights violations *are* torts,¹⁸¹ culpability does not necessarily follow. Because of the numerous intersecting doctrines necessary to assign liability for non-physical torts committed in school, and the high bar they present in combination, it appears that tort claims for negligence or intentional infliction of emotional distress (IIED) do not offer a reliable avenue for relief.

IIED is the most likely tort a teacher who is a victim of student harassment might rely upon. In allowing IIED claims generally, public policy recognizes intangible harms such as distress, emotional harm, anxiety, diminished enjoyment, and loss of autonomy.¹⁸² These torts represent “the antithesis of happiness or enjoyment of life which everyone pursues.”¹⁸³ The conduct alleged in an IIED claim must be outrageous.¹⁸⁴ The only case where a gay teacher who had been

¹⁷⁹ Homer, *supra* note 51.

¹⁸⁰ DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 10 (2d ed. 2012).

¹⁸¹ *Id.* at § 75 (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

¹⁸² Dobbs et al., *supra* note 180, at § 381.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at § 386.

harassed brought claims for IIED was in *Murray v. Oceanside Unified School District*.¹⁸⁵ However, in this case it was Dawn Murray's fellow employees, not her students, who were the perpetrators.¹⁸⁶ The only question before the California appellate court that heard her case was whether her claims for IIED were barred by workers' compensation laws.¹⁸⁷ The *Murray* court held that harassment on the basis of sexual orientation is outside the normal employment environment and, if it is sufficiently outrageous, is analogous to sexual harassment because they both "[exceed] all bounds of decency usually tolerated by a decent society."¹⁸⁸ The fact that students were uninvolved in the harassment, however, makes this a limited victory for the types of plaintiffs central to the discussion here.

An example of the challenge involved for teachers in bringing IIED claims for student-on-teacher harassment *outside* the school environment is found in a 2008 decision by the Texas Court of Appeals. In *Draker v. Schreiber*, a vice-principal brought suit against two of her students after the students created a fake social media site in her name that made lewd sexual comments and, among numerous graphic references, implied that she was a lesbian.¹⁸⁹ After discovering the site, Draker became worried about the public exposure of her name and information, given its connection to the lewd material, and experienced various health problems.¹⁹⁰ She alleged defamation and IIED against the students, and negligence and gross negligence against the parents.¹⁹¹ She lost on all counts.¹⁹²

The court held that, in Texas, IIED is a "gap-filler" tort, meaning that it is only available in "those rare instances in which a defendant intentionally inflicts severe emotional distress in a manner so unusual that the victim has no other recognized theory of redress."¹⁹³ IIED claims in Texas cannot arise out of the factual basis for any other claim.¹⁹⁴ Draker could not employ any of the facts from her defamation

¹⁸⁵ *Murray v. Oceanside Unified Sch. Dist.*, 79 Cal. App. 4th 1338 (2000).

¹⁸⁶ *Id.* at 1345-46.

¹⁸⁷ *Id.* at 1347.

¹⁸⁸ *Id.* at 1362 (citing *Fisher* 214 Cal. App. 3d 590).

¹⁸⁹ *Draker v. Schreiber*, 271 S.W.3d 318, 324 (Tex. App. 2008).

¹⁹⁰ These problems included "a rash, digestion problems, constipation, sleeplessness, depression and anxiety which all began upon the discovery of the MySpace.com web page. Ms. Draker has had to take various medications related these symptoms." *Draker, v. Schreiber*, No. 06-08-17998-cv, 2008 WL 965855 (Tex. App.-San Antonio), *7 (internal citations omitted).

¹⁹¹ *Draker*, 271 S.W.3d at 321.

¹⁹² *Id.*

¹⁹³ *Id.* at 322 (internal citation omitted).

¹⁹⁴ *Id.* at 323.

claim, which she lost on summary judgment, to assert IIED.¹⁹⁵ Justice Catherine Stone wrote a scathing concurring opinion to the decision in which she decried the conduct of the students in the case as “outrageous” but lamented that “there is no civil legal consequence for the unacceptable conduct. The lack of a consequence is because, in Texas, a claim for intentional infliction of emotional distress exists only in theory.”¹⁹⁶ Texans, she wrote, “would be better served by a fair and workable framework in which to present their claims, or by an honest statement that there is, in fact, no remedy for their damages.”¹⁹⁷

IIED can, in theory, be employed against parents when they use their children¹⁹⁸ as proxies to inflict harm against others. In *Segal v. Lynch*, a father filed a tort claim against his child’s mother for IIED, charging that the mother had “engaged in extreme and outrageous conduct designed to poison his relationship with his children. . .”¹⁹⁹ Essentially, the father claimed that the mother used the children as a tool to inflict distress upon him.²⁰⁰ A New Jersey appellate court affirmed the trial court’s dismissal of the action, holding that the plaintiff’s claim was barred because it was not in the best interests of the child, but also affirming that the plaintiff father had “advanced a good faith argument in support of his legal position in a novel, complex, and heretofore

¹⁹⁵ *Id.* at 323-24.

¹⁹⁶ *Id.* at 326.

¹⁹⁷ *Id.* at 327. North Carolina recently passed legislation that criminalizes internet-based student-on-teacher harassment. The state legislator who sponsored the bill said that teachers need protection from students who use the internet to spread false accusations. “These children are bright and conniving,” he said. Despite the use of the term “cyberbullying” to describe the conduct the law proscribes, the ACLU of North Carolina is planning to challenge the bill. The organization’s state policy director said that “essentially, what we’re teaching students is it’s not OK to criticize government officials.” The ACLU fact sheet on the law cites the immaturity of students and the fact that they “often say or post online things without fully understanding the consequences...They should not receive a criminal record and be saddled with a lifetime of damaging consequences simply for posting something on the Internet that a school official finds offensive.” See *N.C. Law Protects Educators From Online Harassment*, 32 EDUC. WEEK 14 (Dec. 12, 2012), 2012 WLNR 27876674.

¹⁹⁸ The shift in language here, from “students” to “children,” is not meant to reflect any distinction in age, but rather one in relationships. When young people are compared to their parents, they are “children.” When they are at school, they are “students.”

¹⁹⁹ *Segal v. Lynch* 993 A.2d 1229, 1233 (App. Div. 2010).

²⁰⁰ The father charged that the mother “intentionally or recklessly engaged in extreme and outrageous conduct designed to poison his relationship with his children, which alienated the natural bond and affection that should exist between them and caused both he and the children emotional distress.” *Id.* at 1232-33.

relatively unexplored area of the law.”²⁰¹ To date, it does not appear that any teacher has sued any parent for employing a child as a tool of bigotry. However, the notion that children are, as Steven K. Homer has written, “unregulated conduits of society’s homophobia,” presents a novel way of examining the ideological relationship between parents and their children.²⁰²

Another possible avenue for teachers seeking protection from student harassment under tort law is through negligence actions brought against school administrations. Under the doctrine of *in loco parentis*, schools have a duty to exercise the same degree of care toward their students as would a reasonably prudent parent.²⁰³ However, schools are only liable for injuries that are *foreseeable* and that are related to the absence of adequate supervision.²⁰⁴ In this sense, under tort law, schools are not the “insurers of safety” for students.²⁰⁵ However, negligence doctrine does appear to acknowledge a stronger connection between the actions of schools and students than does, for example, Title VII jurisprudence.

The status of parents under tort law in general is a linchpin for analyzing negligence within schools. Under common law, parents are not necessarily vicariously responsible for the actions of their children.²⁰⁶ However, a parent may be liable for the actions of a child that the parent fails to control, even if the child is not subject to liability.²⁰⁷ In essence, the younger and more impressionable the child, the more control the parent theoretically has to influence the child.²⁰⁸ Nonetheless, parental liability is often more theoretical than real. Even in cases where minor children have committed *violent* offenses, courts have not been quick to assign liability to adults for negligent supervision.²⁰⁹ To face liability, parents must know of the *specific* propensity and occasion of the child’s actions.²¹⁰ It is not enough if the

²⁰¹ *Id.* at 1233-34.

²⁰² Personal communication from Steven K. Homer, Lecturer, Legal Analysis and Communication, University of New Mexico School of Law (Feb. 11, 2013, 12:49 MST).

²⁰³ See, e.g., *Mirand v. City of New York*, 84 N.Y.2d 44, 49 (1994); *McLeod v. Grant County School Dist. No. 128*, 255 P.2d 360, 362 (Wash. 1953).

²⁰⁴ *Diaz v. City of Yonkers*, 103 A.D.3d 682, 683 (N.Y. App. Div. 2013) (emphasis added).

²⁰⁵ *Mirand*, 84 N.Y.2d at 49.

²⁰⁶ LEONARD KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT, AND SEXUAL ABUSE 233 (vol. 2, rev. ed 2005).

²⁰⁷ RESTATEMENT (SECOND) OF TORTS § 316 (1965).

²⁰⁸ *Id.*

²⁰⁹ See, e.g., *Williamson v. Daniels*, 748 So. 2d 754, 757 (Miss. 1999).

²¹⁰ Dobbs et al., *supra* note 180, at § 421.

parents know merely that the child is dangerous; they are liable only if they are negligent in failing to control their children or warn others.²¹¹ Courts recognize that teenagers need freedom to develop and consider older children more difficult to control and more responsible for their own actions than younger children.²¹² Thus, the parents of high school age students are *less* likely to face liability for the actions of their children, despite the fact that older children are, in many ways, more able to inflict emotional damage.²¹³ No matter the age, it is extremely rare that civil responsibility is assigned to students themselves, especially for non-violent offenses.²¹⁴

The difficulty in assigning tort liability against minors is only exacerbated in the classroom context. For example, in *Dinardo v. City of New York*, a special education teacher brought a negligence action against the city and city board of education seeking damages for physical injuries she sustained in trying to break up an altercation between students.²¹⁵ The teacher, Zelinda Dinardo, had complained for months to the school that one of the students had been “verbally and physically aggressive” and expressed concerns for her own safety in the classroom.²¹⁶ Her supervisor and principal assured her that “things were being worked on, things were happening” and told her to “hang in there because something was being done.”²¹⁷ The New York Court of Appeals held that the school’s assurances were too vague to result in a justifiable reliance by Dinardo.²¹⁸ The court cited the fact that there was an ongoing administrative process at the time of the incident as evidence of Dinardo’s lack of legal recourse.²¹⁹ Chief Judge Jonathan Lippman reluctantly concurred, citing a recent New York case that held that government action must be ministerial, not discretionary, to form the basis for tort liability.²²⁰ He acknowledged the severity of the facts: the student had threatened to kill the plaintiff and other students, and Dinardo testified that she wanted to quit as a result of the dangerous classroom situation.²²¹ Chief Judge Lippman also emphasized the

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* (citations omitted).

²¹⁴ I have found no court decisions in this area.

²¹⁵ *Dinardo v. City of New York*, 921 N.E.2d 585 (2009).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 874-75.

²¹⁹ *Id.* at 874.

²²⁰ *Id.* at 876.

²²¹ *Id.* at 875.

existence of a special relationship between teacher and supervisors.²²² Liability in this case, he found, was “entirely consistent with the general tort principle that a defendant should be held liable for the breach of a duty it voluntarily assumed.”²²³

Even in cases where the student’s victims have faced severe physical harm, tort liability has been elusive.²²⁴ Proximate causation may be difficult to prove, debates arise about whether a duty exists,²²⁵ claims are barred as a matter of law,²²⁶ immunities are assigned,²²⁷ and various technicalities stand in the way.²²⁸ For teachers who have been “merely” verbally abused, as in the cases of Tommy Schroeder and Joan Lovell, neither IIED claims against parents nor negligence actions

²²² *Id.* at 875-76.

²²³ *Id.* at 877 (internal citations omitted); *see also* *Rivera v. Bd. of Educ. of City of New York*, 82 A.D.3d 614 (N.Y. App. Div. 2011).

²²⁴ *See, e.g.,* *Rodriguez v. Spencer*, 902 S.W.2d 37 (Tex. App. 1995) (affirming dismissal of negligent supervision case against mother whose minor child helped beat a man to death because the victim was gay); *see also* the following cases listed in *Dobbs et al., supra* note 180, at § 421: “*Dinsmore-Poff v. Alvord*, 972 P.2d 978 (Alaska 1999) (‘a plaintiff must show more than a parent’s general notice of a child’s dangerous propensity. A plaintiff must show that the parent had reason to know with some specificity of a present opportunity and need to restrain the child to prevent some imminently foreseeable harm. General knowledge of past misconduct is, in other words, necessary but not sufficient for liability.’); *Parsons v. Smithey*, , 504 P.2d 1272, (Ariz. 1973) (parents of teenager with long history of aggressive antisocial behavior not liable because they could not have foreseen particular attack with a saw and hammer); *Doe v. Andujar*, , 678 S.E.2d 163 (Ga. Ct. App. 2009) (child’s guardian had notice of child’s problem with ‘misguided emotions,’ but no knowledge of any proclivity or propensity to sexually molest other children). *But cf. McNamee v. A.J.W.*, , 519 S.E.2d 298 (Ga. Ct. App. 1999) (parents not responsible for son’s sex with 15-year-old girl in parents’ home while they were away); *Crisafulli v. Bass*, 38 P.3d 842 (Mont. 2001) (‘the parent first know that he or she has the ability to control the child and, secondly, that the parent understands the necessity for doing so. It furthermore conditions liability on a finding that the parent’s failure under these circumstances created an *unreasonable* risk of harm to a third person’).”

²²⁵ *See, e.g.* *Rivera v. Bd. of Educ. of City of New York*, 82 A.D.3d 614 (N.Y. App. Div. 2011).

²²⁶ “Negligence claims are barred as a matter of law by the New York’s Workers’ Compensation Law.” *Berger-Rothberg v. City of New York*, 803 F. Supp. 2d 155, 167 (E.D.N.Y. 2011), reconsideration denied, 07-CV-1878 RRM SMG, 2011 WL 3511086 (E.D.N.Y. Aug. 10, 2011).

²²⁷ *Dobbs et al., supra* note 180, at § 418.

²²⁸ *See, e.g.* *Rivera v. Bd. of Educ. of City of New York*, 82 A.D.3d 614 (N.Y. App. Div. 2011), whose facts are similar to that of *Dinando*. Despite that the plaintiff was injured while trying to restrain a disruptive student that she had previously asked the school to remove from her classroom, her claim for negligence failed. A New York appellate court held that she did not effectively plead a special duty owed to her by the school, nor did she prove that the school’s actions were ministerial, as discretionary government action cannot form the basis of negligence liability.

against schools offer promising avenues to relief. The liability of children themselves is also extremely tricky. Dobbs Law of Torts describes the children's standard of liability as "almost no standard at all; it holds the child to whatever he can reasonably do, perhaps best indicated by what he in fact has done."²²⁹ As in other parts of the law, tort jurisprudence assumes that children are in need of protection; it is extremely difficult to paint children as perpetrators. Children, like their parents, are also often judgment-proof.²³⁰ The amalgamation of these standards means that the deterrent function inherent in tort-based civil protections does not apply to students who clearly see that the consequences for their homophobic but non-violent actions will result in, at worst, a few days off school.²³¹

VII. THE DIALECTICAL CREATION OF SOCIAL CITIZENSHIP

The key to understanding the unique topography of the secondary classroom is to recognize both the vulnerability of young people and their power. Children are vulnerable because they emulate and look up to adults, whom they trust. They are powerful because they influence adults with their behavior, and because they will soon become adults themselves. They are not-yet fully formed individuals, but they are still key members of social communities and discourse. They act and they are acted upon, they destroy and create, they take power for themselves and they give it away easily. Unfortunately, the law is often unable to reflect the complexity of this distinctiveness. It treats students simply as innocent pawns, vessels that absorb what they are taught, young and burgeoning minds in need, merely, of protection. It seems easier for our criminal system to think of a seventeen-year old murderer as an adult than it does a seventeen-year old bully in school.

The law also does not effectively understand secondary teachers. It applies to them legal standards developed mostly for students or for higher education.²³² While the law recognizes that in some sense a teacher's most basic job is to endure various types of mundane

²²⁹ Dobbs et al., *supra* note 180, at § 134.

²³⁰ This is tort-speak for possessing little money. See Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121 (2001) (exploring issues of insurance and tort violations).

²³¹ See Dobbs et al., *supra* note 180, at § 14 (describing the use of torts as a deterrent).

²³² As Karen Daly writes, "the use of an undifferentiated standard for students and teachers ignores the legal distinctions and different level of constitutional protection afforded to children and adults, resulting in insufficient protection for teacher speech and contributing to the denigration of teachers as professionals." Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 13 (2001).

harassment on a daily basis, it is unable to assess when a line has been crossed.²³³ In a school, it is the adults' job to demonstrate to students the borders of acceptability. However, this does not mean students should not be expected to conform to those perimeters. Teenagers understand that they are not held fully responsible for their actions, and they are experts at exploiting that position of power. The line between acceptable and unacceptable in a public school—between “kids being kids,” and kids ruining the lives of adults—should not apply differently to teachers according to their privilege or identity.

The evidence above demonstrates that parents essentially possess the right to teach their children whatever they want. As they worry aloud about teachers' purported influence, some parents exploit the formative identity of children by closing their minds to tolerance. The law shields these children when victims seek accountability. Thankfully, however, children are not just vessels to be filled. They are also vehicles for changing the beliefs and attitudes of their parents. They can be liberalizers and liberators from outdated ideologies. Kenneth Karst writes that older children are often “agents of change” who can threaten the parent's own identity, as invested in the child.²³⁴ Karst describes how young people can “culturally emigrate” from “parents' morality, from the authority of meanings the parents have assigned to behavior, even from the parents' religion and their other group identities.”²³⁵

Such a process is presently underway nationwide. Many in the current generation of teenagers, which contains more openly gay individuals than any of its predecessors, feel they can only express their openness while at school.²³⁶ (Conversely, the student perpetrators of sexual orientation abuse have likely not been able to escape the imprisoning ideology of home; they carry their cage to school). The fact that they are out for even some portion of their daily lives contributes to the massive improvement in attitudes towards homosexuality underway in our society.²³⁷ In many ways, children—

²³³ With over thirty students in a class on a given day in an average high school, chances are that ten will be paying close attention, five will be in need of individual reading help, three will be texting under their desk (probably with their parents), two will be holding a side conversation, and one will be thoroughly stoned on marijuana. Personal observations.

²³⁴ Karst, *supra* note 17, at 991.

²³⁵ *Id.*

²³⁶ Personal observations.

²³⁷ One example of this improvement is that in 2011, only 8 out of 10 gay students reported experiencing harassment in school, down from 9 in 2009. GLSEN, *The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools*, 23 (2011).

who are elastic, creative, and open—are better equipped than adults to be the frontline troops in the war on homophobia and heterosexism.

While most of this paper has focused on the ways in which the law leaves teachers powerless (as one commentator smirked, “If teachers had such power over children, I would have been a nun years ago”),²³⁸ teachers, of course, *do* influence students. All teachers, no matter their sexual orientation, are, in the words of Theresa Bryant, “critical front-line soldiers in any effort at tolerance education.”²³⁹ It cannot be emphasized enough that tolerance is not just a gay issue. When bigotry prevails in the classroom, everyone loses. A student struggling with her own sexual identity and orientation suffers from witnessing the harassment of a teacher, a straight student must cope with classmates who express confusing and cruel viewpoints, and the child with gay parents at home closets her joy and love for her family.²⁴⁰ The new freedoms claimed by many young people in the internet age also provide solace and motivation for teachers who did not grow up with those same opportunities. Students and adults collaborate to make schools safe places for all community members.

Today’s Anita Bryants must style their superstitions under false fronts. It is a sign of improvement that today’s anti-gay movement publicly worries less that gayness will transfer from teacher to student and more about broader issues such as “procreation” or “family values.” Today’s anti-gay forces fear that gay people will become an accepted part of the larger social conversation. They dread that full acceptance of gay teachers means ascribing inherent value to homosexuality and making it something that we could actually *want* to develop in our children.²⁴¹ If gay young people don’t exist, then gay role models don’t either; attempts to maintain the closet for teachers are also efforts to

²³⁸ Varona, *supra* note 17, at 33.

²³⁹ Bryant, *supra* note 11, at 588-89.

²⁴⁰ According to GLSEN, 81.9% of GLBT students were called names or threatened at school due to their sexual orientation in the past year, and 63.5% of students felt unsafe. GLSEN, *supra* note 237, at xiv. To feel supported, LGBT students need teachers and staff who empathize with them, and more than 77% of LGBT students reported that their school employed either zero (58.8%) or one (18.6%) openly LGBT teacher or school staff member. *Id.* at 51. The lack of out teachers impacts the response to the bullying of students. One student in the GLSEN report said of the harassment in his school, “Teachers don’t do anything about it. [The] PE teacher just told me to ‘man up’ and the other students will leave me alone. The English teacher just told me to stay away from them and the principal wouldn’t even talk to me.” *Id.* at 30. Students who felt supported by staff at their school were much more likely to attend school, to feel safe while there, to set higher academic goals, to feel part of their school community, and even to get better grades. *Id.* at xvii.

²⁴¹ Homer, *supra* note 51.

destroy the evolution of the values of tolerance on a broader scale.²⁴² If there is one idea anti-gay forces do not accept, it is not whether gay people exist (there is treatment for that²⁴³), but that being gay can be *fabulous*. To combine the joy of youth with a security in being homosexual is powerfully threatening to those who cling to a rigid homophobic standard. Two years before Stonewall, the United States Supreme Court spoke triumphantly of the “marketplace of ideas” on which “the Nation's future depends.”²⁴⁴ We should champion this idea, even if the celebration of homosexuality is likely not what the Court—historically white, male, and ostensibly heterosexual—had in mind. The cultivation of authentically democratic schools, where development of healthy gender identity, sexuality, and sexual orientation is encouraged, threatens established power structures and pushes equality forward in electrifying directions.

VIII. THE ROAD AHEAD: RECOMMENDATIONS AND CONCLUSIONS

Most federal sources of school law perpetuate the closet. Federal courts have promoted “doctrinal unpredictability and inconsistency”²⁴⁵ in free expression and equal protection violations when it comes to sexual orientation, and they have utterly muddled their interpretations of Title VII “because of sex” discrimination. The United States Congress declines, year after year, to ratify the Employment Non-Discrimination Act, which would protect employees in large workplaces from discrimination based on their sexual orientation.²⁴⁶ Only state non-discrimination statutes currently offer any relief to public employees, including teachers, for harassment based on sexual orientation.²⁴⁷ For a right as fundamental as the need to feel safe and secure at work and to be free from open persecution based on an

²⁴² *Id.*

²⁴³ See Kate S. Thompson, *Unchanging: The Battle to Prohibit Sexual Orientation Change Efforts*, forthcoming.

²⁴⁴ *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967).

²⁴⁵ Daly, *supra* note 232, at 1.

²⁴⁶ Human Rights Campaign, *Employment Non-Discrimination Act: Legislative Timeline*, <http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline> (last visited May 2, 2013). In 2009, President Obama issued Executive Order 11478, which banned discrimination based on sexual orientation against all federal employees, as “part of EEOC’s ongoing efforts to provide a model workplace.” EEOC, *Procedures for Complaints of Discrimination Based on Sexual Orientation*, http://www.eeoc.gov/eeoc/internal/sexual_orientation_order.cfm (last visited Apr. 17, 2014).

²⁴⁷ See Eckes & McCarthy, *supra* note 16, at 541-52.

essential piece of human identity, state residence should not determine the chance for relief. Too many states abdicate their responsibility as gatekeepers of fundamental rights for gay and lesbian people. We need federal protections for public employees in all states. Until we ratify a national law like the Employment Non Discrimination Act or add sexual orientation as a classification protected under Title VII, we will continue to fail teachers by perpetuating “the last acceptable prejudice.”²⁴⁸

One central question that remains unresolved is why there have been so few plaintiffs bringing student-on-teacher harassment cases.²⁴⁹ The easiest explanation, of course, is that there have been few incidents. As tempting as this conclusion may be, embracing it ignores the larger cultural forces surrounding this issue. Suzanne Eckes and Mary McCarthy suggest three reasons why there have not been more cases recently challenging the rights of GLBT educators in general. First, information on reasons for a teacher’s dismissal or “voluntary” resignation is not readily available, especially for non-tenured school personnel.²⁵⁰ Second, most cases settle out of court and do not provide a paper trail. Third, state and local anti-discrimination protections for sexual orientation are successful in preventing harassment and discrimination.²⁵¹ I suggest, additionally, that the historical legal terrain in the United States sends a clear message to potential plaintiffs that the law is stacked against them. As delineated above, statutes do not apply, precedents do not fit, and courts are at best confused and at worst homophobic. Class and racial issues also likely contribute.²⁵² Moreover, as Eva DuBuisson writes, when schools are successful in

²⁴⁸ Anonymous teacher from Los Angeles, quoted in Bettina Boxall, *A Painful Lesson for a Gay Teacher: L.A. District Has Support Groups and a Policy Against Discrimination. But Student Taunts Drove Him Out*, LOS ANGELES TIMES, June 18, 1994, http://articles.latimes.com/1994-06-18/news/mn-5394_1_gay-student (last visited Mar. 3, 2014).

²⁴⁹ The stories of Martin Bridge and Jerry Crane—both of whom suffered awful harassment at the hands of students—present two examples of cases never litigated. See Boxall, *supra* note 248; *Obituary of Jerry Crane*, THE DETROIT NEWS, January 4, 1996, <http://www.personproject.org/Alerts/States/Michigan/crane.html> (last visited May 2, 2013).

²⁵⁰ Eckes & McCarthy, *supra* note 16, at 540.

²⁵¹ For an example of a harassment case, perpetrated by fellows teachers and school administrators, not students, but decided, in part, under a state anti-discrimination statute, see *Curcio v. Collingswood Bd. of Educ.*, CIV 04-5100 (JBS), 2006 WL 1806455 (D.N.J. June 28, 2006).

²⁵² Teachers are historically middle class and therefore many may not be able to afford an attorney. A secondary effect of silencing is the preclusion of health and other benefits to gay spouses. Finally, the addition of racial identity to sexual orientation in these cases would present additional complications; it appears that all plaintiffs described above were European-Americans.

preventing speech by teachers, the result is silence.²⁵³ A lack of litigation does not equate to widespread tolerance or success in the safeguarding of civil rights in this area.

The best way to solve this issue is for Congress to revise the Civil Rights Act by adding sexual orientation protections to Title VII. This solution is the most direct and comprehensive way to provide fundamental rights nationwide, ensure that gay teachers are free of harassment and discrimination, and make certain that *all* students have access to inclusive curriculums. Because Title VII reform is highly unlikely, we must rely on other important advances, most pertinently state and local anti-discrimination statutes. These laws, based on Title VII but with added protections based on sexual orientation and in some states also gender identity, provide strong safeguards. They are problematic, however, because they determine fundamental protections based on state citizenship.²⁵⁴ Smaller improvements, such as the elimination of morality clauses from teacher contracts, the inclusion of union-backed anti-discrimination clauses, and public awareness campaigns also contribute.²⁵⁵

The impassioned fight for gay marriage also plays a role in ushering in new rights to LGBT educators, even as the marriage debate obscures other equality strategies. Despite the recent landmark Supreme Court decisions in *Windsor*²⁵⁶ and *Perry*,²⁵⁷ the classroom is still a flourishing centerpiece of conservative notions about gay identity. (If we compare *Brown v. Board of Education*²⁵⁸ and *Loving v. Virginia*²⁵⁹—which came fourteen years later—LGBT activists may have confused the proper order here²⁶⁰). As many commentators have pointed out, there are drawbacks to the placement of marriage at the head of the civil rights agenda.²⁶¹ While marriage is the “organizing and stabilizing institution of society,”²⁶² it is also a milieu where heterosexuals receive a specific and identifiable privilege based on their sexual orientation. In schools, by contrast, heterosexual people receive

²⁵³ DuBuisson, *supra* note 17, at 320 (2006).

²⁵⁴ See Eckes & McCarthy, *supra* note 16, at 540 (surveying anti-discrimination statutes).

²⁵⁵ See *The Rights of LGBT Public Employees*, LAMBDA LEGAL (Jan. 10, 2006), <http://www.lambdalegal.org/publications/the-rights-of-lgbt-public-employees>.

²⁵⁶ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

²⁵⁷ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²⁵⁸ *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

²⁵⁹ *Loving v. Virginia*, 388 U.S. 1 (1967).

²⁶⁰ See Poirier, *supra* note 50, at 59-72.

²⁶¹ *Id.*

²⁶² *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

various advantages, yet their entitlement pervades invisibly. The lack of explicit recognition of heterosexual privilege in schools means that the optics of equal protection challenges are less profitable for teachers than for gay spouses in marriage cases. The disparate treatment across classifications is also much less stark for Schroeder and Lovell than for Perry and Windsor. This is why, in the post-*Lawrence* legal landscape, we think of gay people as autonomous adults deserving of rights when we talk about marriage, but that image instantly vanishes when we think of gay people as teachers.

The risk for teachers of bringing challenges is also higher than for marriage advocates. The fact that every one of the teachers who have brought lawsuits in this study had at least fifteen years of teaching experience probably indicates both the necessary background for plaintiffs and the exhilaration that comes with pent-up honesty. Like John Lawrence and Michael Hardwick, Tommy Schroeder and Joan Lovell were average citizens who chose to fight back when challenged.²⁶³ For teachers of *any* stripe, however, job security is not a given, especially in the political climate of the present day.²⁶⁴ Courts are a theoretical refuge, but in reality they may be even less protective than schools. To secure victory, plaintiffs need highly favorable facts that are not usually available. Teachers pay a disproportionate price for hard won advances that do not appear, as does marriage, on CNN. The threat of being fired is still high enough to keep gay teachers on notice that it is more expedient to carefully cover their sexual orientation than to embody it.²⁶⁵ A teacher cannot come out of a closet that is locked from the outside. The closet holds such enormous power because it is *imposed*, not chosen. Schools are therefore an example of a locus where current strategies around LGBT equality are muted in favor of a cautious incrementalism.²⁶⁶ It is no accident that all of the test cases in this area emerge from venues north of the Mason-Dixon Line.

The tendency of those who see schools as strategic battlegrounds for gay and lesbian civil rights is to play a waiting game. Since tolerance of homosexuality is undergoing a revolution, it makes sense in some

²⁶³ See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986). See also Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 Mich. L. Rev. 1464 (2004).

²⁶⁴ See, e.g., Valerie Strauss, 'I Have Had Enough' – Veteran Teacher Tells School Board, THE WASHINGTON POST ANSWER SHEET (MARCH 10, 2013, 12:05PM), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/03/10/i-have-had-enough-veteran-teacher-tells-school-board/>.

²⁶⁵ See Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

²⁶⁶ Homer, *supra* note 51, and personal conversation, Professor George Bach, Assistant Professor of Law, University of New Mexico School of Law (Mar. 27, 2013).

ways not to fight too hard for tolerance right now, given that younger generations are becoming increasingly tolerant, and the views of the nation as a whole are shifting. But before we surrender further ground in the classroom, it is worth re-examining the lives of our advance troops. We should think about what working conditions we want for gay people and what values we want to inculcate in our youth rather than looking to the law to form our social values. Cultural forces in public spaces of discourse like classrooms are infinitely more powerful than the ability of the law to maintain pace with the changing times.²⁶⁷ Recently, Jason Collins, a center in the National Basketball Association, announced that he is gay. He became the first professional athlete currently playing in one of the four professional sports to do so. In a beautifully written article in *Sports Illustrated*, Collins explained that he was inspired by President Obama's mentioning of the Stonewall riots in his second inaugural address, and also by "the grade-school teacher who encourages her students to accept the things that make us different."²⁶⁸ If the goal is still that classrooms are incubators of democracy,²⁶⁹ then we should be sure to fulfill that promise for our teachers as well.

²⁶⁷ *Brown* is one exception, but the likelihood of a forward-looking, unanimous decision in a major civil rights case (*Windsor* and *Perry* are two examples) feels increasingly unlikely.

²⁶⁸ Jason Collins & Franz Lidz, *Why NBA Center Jason Collins is Coming Out Now*, *SPORTS ILLUSTRATED* (April 29, 2013, 11:01AM), <http://sportsillustrated.cnn.com/magazine/news/20130429/jason-collins-gay-nba-player/#ixzz2RueB2o3l>.

²⁶⁹ Eva DuBuisson, *supra* note 17, at 348.