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### Keynote: The Protection of LGBT Youth

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## KEYNOTE

### THE PROTECTION OF LGBT YOUTH

Craig Konnoth

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# KEYNOTE

## THE PROTECTION OF LGBT YOUTH

Craig Konnoth\*

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\* Associate Professor of Law, University of Colorado School of Law. I thank the University of Pittsburgh Law Review for publishing these remarks. The text of this Essay comprises my verbatim remarks, with very light footnotes. I also thank Jane Thompson and Matt Zafiratos for fantastic assistance in procuring documents on short notice.

## I. THE INTERSECTION OF TWO METAPHORS: MEDICINE AND CHILDHOOD IN LGBT RIGHTS

First, thanks to the University of Pittsburgh Law School, and in particular, Mary Crossley, for having me here today. To be at a conference like this is a profound, touching, and unprecedented experience. I mean that in my personal and professional capacity, but also in a more general sense.

To explain why that is the case, consider the LGBT intersections at which this conference is situated—the conference involves LGBT *health* and LGBT *children*—both of which are treacherous axes in the history of queer rights. Thus, before I get to the substance of my talk, I want to acknowledge for a moment how far we have come to even be able to talk about both health and LGBT children at the same time.

### A. *Medicine*

In many ways the LGBT community was invented through—and in—medicine.<sup>1</sup> Prior to the ascendancy of modern medicine in the late nineteenth century, homosexuality was not widely recognized as a conceptual category.<sup>2</sup> Even the definition of sodomy, historians tell us, depending on the theologian in question, applied to a diverse group of non-procreative practices, sometimes included sex with contraceptive *intent* to masturbation.<sup>3</sup>

In the mid-1800s, homosexuality appeared to have emerged as a distinct concept, but different terms were used to describe it. Karl Heinrich Ulrichs, the German writer and activist, used the term *Urning*, or Uranian, to describe himself and those like him in 1862.<sup>4</sup> But homosexual as a term only gained traction when sex

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<sup>1</sup> I emphasize the caveat. In some ways, situating LGBT history too firmly in medicine denies the pre-clinical history of same sex sexualities. See DAVID M. HALPERIN, ONE HUNDRED YEARS OF HOMOSEXUALITY 15 (1990) (arguing that the coining of the medical term was a particular inflection point in homosexual identity); see also Craig J. Konnoth, *Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s*, 119 YALE L.J. 316, 325–26 (2009) (borrowing from Halperin to argue that “a medicalized homosexual ‘identity’” developed along with other kinds of identity, such as religious identity). But see generally JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) (discussing same-sex relationships in Medieval Christian Europe).

<sup>2</sup> Brent Pickett, *Homosexuality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 5, 2015), <https://plato.stanford.edu/entries/homosexuality/#His>.

<sup>3</sup> Domenico di Mauro, *Regulation Sexual Behavior*, in INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES (Neil J. Smelser & Paul B. Baltes eds., 2001), <https://www.sciencedirect.com/science/article/pii/B0080430767045502#!>.

<sup>4</sup> Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 63 n.151

researcher Richard von Krafft-Ebing used the term in “Psychopathia Sexualis” in 1886, a book that was widely translated and circulated in Europe and the United States.<sup>5</sup> Over the next decades, researchers from Freud to Jung applied a medical model to homosexuality—and many sought to cure it.<sup>6</sup> Thus, fifty years ago, researchers calmly described in the Proceedings of the Royal Society of Medicine how to cure homosexuals through aversive therapy: “[S]hocks were given to the forearm from a battery-operated shock box.”<sup>7</sup> The narrative of sickness was reinforced by the devastation AIDS wreaked on the community. Courts, including the Supreme Court, used the notion that gays were sick in order to deny them rights—from immigration to employment.<sup>8</sup>

Unsurprisingly, then, the modern gay rights movement wanted nothing to do with medicine. Frank Kameny, father of the gay rights movement in the United States, for example, argued that gays “ha[d] been defined into sickness,” and that medicine should be avoided.<sup>9</sup> Even today, scholars such as Ed Stein and bioethicist Lance Wahlert have taken a dim view of the “reunification” of medicine and sexuality studies through, for example, studies of homosexual etiology.<sup>10</sup>

### B. Children

If the image of the homosexual as sick was the silver bullet for gay rights opponents in the early years of the movement, the threat of the homosexual as a *child* proved to be their atom bomb in recent years.

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(1995). The Austrian Journalist Karl Maria Kertbertny used the term “homosexual” in a publication in 1869. Hubert Kennedy, *Karl Heinrich Ulrichs, First Theorist of Homosexuality*, in SCIENCE AND HOMOSEXUALITIES 26, 30 (Vernon A. Rosario ed., 1997).

<sup>5</sup> RICHARD VON KRAFFT-EBING, PSYCHOPATHIA SEXUALIS vi–vii, 240 (Franklin S. Klaf trans., Stein & Day 1965).

<sup>6</sup> C.G. JUNG, THE ARCHETYPES AND THE COLLECTIVE UNCONSCIOUS 85 (Herbert Read et al. eds., R.F.C. Hull trans., Princeton Univ. Press 2d ed. 1968); Eric de Kuypere, *The Freudian Construction of Sexuality: The Gay Foundations of Heterosexuality and Straight Homophobia*, 24 J. HOMOSEXUALITY 137 (1993).

<sup>7</sup> John Bancroft & Isaac Marks, *Electric Aversion Therapy of Sexual Deviations*, 61 PROC. ROYAL SOC'Y MED. 796, 796 (1968).

<sup>8</sup> Konnoth, *supra* note 1, at 335–36 (describing such cases).

<sup>9</sup> *Id.* at 347–48. Kameny was engaged in a broader debate within the movement as to whether to continue to rely on the medical establishment to help develop gay rights or move to a different approach.

<sup>10</sup> EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 301 (1999); Lance Wahlert, *The Painful Reunion: The Remedicalization of Homosexuality and the Rise of the Queer*, 9 J. BIOETHICAL INQUIRY 261, 266 (2012).

In the 1960s and early 1970s, the gay rights movement was progressing apace. States were repealing their anti-sodomy laws at the highest rate ever.<sup>11</sup> Miami Dade was one of many other cities nationwide to pass an antidiscrimination ordinance in 1977.<sup>12</sup> However, this ordinance triggered opposition, most fatally by celebrity singer Anita Bryant who started the Save Our Children campaign.<sup>13</sup> The strategy was simple—to prove that homosexuals were amoral, promiscuous, and defiant of traditional gender roles, but most importantly, that they were a specific danger to children.<sup>14</sup> The strategy was to focus on stories of what Bryant called “child recruitment and child abuse.”<sup>15</sup> Save our Children went on to overturn the Miami-Dade ordinance by a huge margin and other ordinances in St. Paul, [Minnesota], Wichita, [Kansas], and Eugene, Oregon.<sup>16</sup> The danger of childhood corruption, undermining innocence, and turning children gay was also a prominent theme in Colorado Amendment 2’s campaign.<sup>17</sup>

This approach is not the vestige of a past generation. In 2008, the California Supreme Court ruled that the state constitution mandated marriage equality.<sup>18</sup> The campaign for Proposition 8 to overturn the ruling was met with limited success—until an ad came out where a child came to a mother, saying that she learned at school “how a prince *married* a prince, and *I can marry a princess!*”<sup>19</sup> Supporters of equality

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<sup>11</sup> WILLIAM N. ESKRIDGE JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 137–65, 201 (2008).

<sup>12</sup> B. Drummond Ayres Jr., *Miami Votes 2 to 1 to Repeal Law Barring Bias Against Homosexuals*, N.Y. TIMES (June 8, 1977), <https://www.nytimes.com/1977/06/08/archives/miami-votes-2-to-1-to-repeal-law-barring-bias-against-homosexuals.html>.

<sup>13</sup> ESKRIDGE, *supra* note 11, at 211; FRED FEJES, GAY RIGHTS AND MORAL PANIC 2, 69 (2008); Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 640 (2013).

<sup>14</sup> Rosky, *supra* note 13, at 650–51.

<sup>15</sup> Morton Kondracke, *Anita Bryant Is Mad About Gays*, NEW REPUBLIC, May 7, 1977, at 13–14.

<sup>16</sup> FEJES, *supra* note 13, at 153–79.

<sup>17</sup> Equal Rights—Not Special Rights (Colorado for Family Values, Colorado) 1992, at 1, 2, *reprinted in* Robert F. Nagel, *Playing Defense*, 6 WM. & MARY BILL RTS. J. 167 app. A (1997); *see also* Romer v. Evans, 517 U.S. 620, 635–36 (1996) (detailing stereotypes of gay individuals used in passing Amendment 2, and overturning Amendment 2).

<sup>18</sup> Adam Liptik, *California Supreme Court Overturns Gay Marriage Ban*, N.Y. TIMES (May 16, 2008), <https://www.nytimes.com/2008/05/16/us/16marriage.html>.

<sup>19</sup> Kevin Drum, *Why Prop 8 Passed*, MOTHER JONES (Aug. 3, 2010), <https://www.motherjones.com/kevin-drum/2010/08/why-prop-8-passed/> (emphasis added).

turned on the community when they believed the sexuality of children, and even worse, of *their* children, were at stake.<sup>20</sup> Proposition 8 passed.<sup>21</sup>

### C. *The Intersection*

The narratives of homosexuality as disease and children as vulnerable to homosexuality have interacted in pernicious ways to produce the landscape we are encountering today. Homosexuality is harmful *specifically* to children, on the account of antigay activists, because homosexuals are pedophiles.<sup>22</sup> In 2002, for example, *Regent University Law Review* published an article entitled *Child Molestation and the Homosexual Movement*.<sup>23</sup> In their brief in a case involving the ban on gay scoutmasters in the Supreme Court, the Family Research Council filed a brief in which the word “pedophile” or some related word appeared thirty-one times in a thirty-page brief.<sup>24</sup> As another brief sensationally explained, “the Boy Scout setting appears to be an ideal place for certain pedophiles, especially male homosexual pedophiles, to pursue potential boy victims, with overnight camp-outs in secluded locations providing ample time and opportunity for intimate contact.”<sup>25</sup>

But the health hazards were not restricted to child abuse. Homosexuality itself was a disease—and abuse leads to an even more serious health hazard—homosexuality. As one organization put it, “[p]edophilia plays a key role in the development of future homosexuals.”<sup>26</sup> This causal claim, has relied on medical studies with serious flaws—including one published in the *Journal of the American Medical Association* (“JAMA”).<sup>27</sup> Religious activists have developed a theory to explain this claim. As the Family Research Council (“FRC”) explains, “the origins

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<sup>20</sup> *Id.*

<sup>21</sup> Chris Cillizza & Sean Sullivan, *How Proposition 8 Passed in California and Why It Wouldn't Today*, WASH. POST (Mar. 26, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/03/26/how-proposition-8-passed-in-california-and-why-it-wouldnt-today/>.

<sup>22</sup> Steve Baldwin, *Child Molestation and the Homosexual Movement*, 14 REGENT U. L. REV. 267 (2002).

<sup>23</sup> *Id.*

<sup>24</sup> Brief of Family Research Council as Amicus Curiae in Support of Petitioners, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699).

<sup>25</sup> Brief of Public Advocate of the United States et al. as Amici Curiae in Support of Petitioners, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228590, at \*5.

<sup>26</sup> *Id.* at \*25.

<sup>27</sup> See generally William C. Holmes & Gail B. Slap, *Sexual Abuse of Boys: Definition, Prevalence, Correlates, Sequelae, and Management*, 280 J. AM. MED. ASS'N 1855 (1998).

of the homosexual impulse [is] an uncompleted gender identity seeking after its own sex to replace what was not fully developed.”<sup>28</sup> Encounters with gay individuals, on their account help produce new homosexuals.

Thus, antigay groups sought to stamp out any gay-affirming behavior around children. They warned that “grooming young students for ‘coming out’ as homosexuals, bisexuals and ‘transgenders’ is a central plank of the homosexual education movement.”<sup>29</sup> Similarly, being raised by parents in a same-sex relationship poses a “clear danger . . . to children’s development.”<sup>30</sup> A child with same-sex parents or role models will have stunted gender development and will turn gay as they will never be able to “understand true femininity or true masculinity.”<sup>31</sup>

Thus, gayness itself is as a contagious disease that affected children’s health. Indeed, the Chief Justice of the United States Supreme Court made precisely this analogy in 1978.<sup>32</sup> In a case where [a] university refused to recognize a gay student organization that sought to repeal the state anti-sodomy law, Chief Justice Rehnquist wrote: “The question is . . . akin to whether those suffering from measles have a constitutional right, in violation of quarantine regulations, to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined.”<sup>33</sup>

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<sup>28</sup> Robert H. Knight, *Answers to Questions About the Defense of Marriage*, INSIGHT (Mar. 22, 1996), <https://web.archive.org/web/20000816013737/http://www.frc.org/insight/is96c2hs.html>. The FRC publication, entitled “Answers to Questions About the Defense of Marriage,” provides the following question and answer sequence:

- Q: But studies show that homosexuals are born that way. How then can you blame them for their condition?
- A: Nobody is “blaming” anyone for having homosexual desires. The “genetic” studies that have been publicized have been conducted by self-styled homosexual activists or have been misrepresented in the media.

*Id.*

<sup>29</sup> Peter LaBarbera, *Top 10 Strategies Used by Homosexual Activists in Schools*, INSIGHT (1999), <https://web.archive.org/web/20000815204326/http://www.frc.org/insight/is99f4hs.html>.

<sup>30</sup> See Robert H. Knight, *How Domestic Partnerships and “Gay Marriage” Threaten the Family*, INSIGHT (June 1994), <https://web.archive.org/web/20000816050421/http://www.frc.org/insight/is94f5hs.html>.

<sup>31</sup> *Id.*

<sup>32</sup> *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978) (Rehnquist, C.J., dissenting) (arguing against the denial of writ of certiorari for *Gay Lib v. Univ. of Mo.*, 558 F.2d 848 (8th Cir. 1977)).

<sup>33</sup> *Id.* at 1084.

## II. STATE REGULATION OF LGBT YOUTH

I offer this history, in part, to comment on how extraordinary it is that a mere decade after the passage of Proposition 8, we are standing in Pittsburgh discussing the health of LGBT children. But this history also forms the starting point of my analysis. Many of you are medical experts who already are deeply familiar with the pathologies that LGBT children face. As a legal expert, my goal here is to show how behavior by the state towards its LGBT children creates these pathologies and how it can cure them.

This state behavior is best characterized using three archetypes. The first was persecution involving attacks on the identity and resources connected to LGBT children. While that phase is still ongoing, many states have shifted to a neutral mode, prohibiting harmful behavior connected to the government. I argue that our future lies in a remedial phase, which, with a few exceptions, is still aspirational.

### A. *Persecution*

First, persecution. At the unholy intersection between the imagined malleability of childhood and the infection of homosexuality sprang oppressive state regulation. The goal of the regulation was to obliterate LGBT identity.

#### 1. Covering, Passing, Conversion, and Prophylaxis in Schools

What exactly do I mean by obliteration? In his magnum opus, “Stigma, Notes on the Management of Spoiled Identity,” Erving Goffman argues that society engages in acts of stigma that cause an individual to seek to hide their identity in various ways.<sup>34</sup> In more recent work, Kenji Yoshino built upon Goffman’s work to offer three stages in the discrediting of identity.<sup>35</sup> The first stage is conversion, where the state or society demands that the individual lose their identity completely and assimilate into the majority.<sup>36</sup> The second is passing, where the individual *pretends* to others that she has assimilated, though they themselves know that they are still in the minority.<sup>37</sup> The third is covering, where the individual openly avows her minority

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<sup>34</sup> See, e.g., ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 94 (2009) (“[B]ecause of the great rewards in being considered normal, almost all persons who are in a position to pass will do so on some occasion by intent.”).

<sup>35</sup> See generally KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002).

<sup>36</sup> Yoshino, *supra* note 35, at 784.

<sup>37</sup> *Id.* at 811.

identity, but won't display its traits.<sup>38</sup> For example, a gay couple might acknowledge they are gay but will not hold hands; a racial minority or immigrant might choose different words to express themselves. Each stage involves the internalization of stigma, of recognizing that one's identity is, to use Goffman's term, spoiled.

When it came to children, the state, through its agents or its money, has imposed stigma that has spoiled the identity of LGBT youth in each of these ways. For example, where students evinced non-normative identities, counselors in many school districts advised conversion therapy.<sup>39</sup> Similarly, Medicaid, we know, has supported clinics that have provided conversion therapy, most famously those of Michele Bachmann's husband.<sup>40</sup> And many therapists engage in Sexual Orientation Change Efforts ("SOCE") under the aegis of state licenses.<sup>41</sup>

Children also have incentives to pass—bullies in school, both other students and teachers—to whom the school turns a blind eye, might make coming out difficult. Data from Washington D.C., for example, showed that bullying of LGBT students was nearly twice that for non-LGBT children at 31%.<sup>42</sup> Nearly half of LGBT children will have their property stolen or damaged at school—again, twice as many as their straight counterparts.<sup>43</sup>

Similarly, school policies encourage identity covering. Thus, a girl might be out as transgender and might present openly as having transitioned. But school

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<sup>38</sup> *Id.* at 836.

<sup>39</sup> *Keeton v. Anderson-Wiley*, 664 F.3d 865, 865, 869 (11th Cir. 2011) (upholding decision to dismiss a school counselor who filed a lawsuit for the right to engage in, *inter alia*, conversion therapy).

<sup>40</sup> Corky Siemaszko, *Clinic Run by Michele Bachmann's Husband Hit with Violations*, NBC NEWS (Mar. 24, 2017), <https://www.nbcnews.com/news/us-news/clinic-run-michele-bachmann-s-husband-hit-violations-n738181>. In Bachman's case, it is unclear whether the money went directly to treatment programs. *Id.* However, legislation has been introduced to prohibit the use of Medicaid money for these practices. Davis Richardson, *Medicaid Still Funds Discredited Conversion Therapies—One Lawmaker Hopes to Change This*, OBSERVER (Apr. 1, 2019), <https://observer.com/2019/04/sean-maloney-defunding-conversion-therapies-medicaid-legislation/>.

<sup>41</sup> Prohibition of Medicaid Payments for Conversion Therapy, H.R. 1981, 116th Cong. (2019); see Richardson, *supra* note 40.

<sup>42</sup> Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38(7) J. YOUTH ADOLESCENCE 1001, 1002 (2009).

<sup>43</sup> *Id.*

policies might require her to cover certain aspects of her identity by requiring her to go into a boy's bathroom or dress like a boy.<sup>44</sup>

Yoshino has helpfully shown how covering can shade into passing, which might shade into conversion. The question isn't just a matter of incentives. That is to say, someone might even choose to convert, if they can, to avoid the psychological burdens of passing and covering. But more than this, our identity may be formed in part through what we do. For example, if living as a trans girl involves using the girl's bathroom, and forcing her to use the boy's bathroom changes her social role in that particular context to that of a boy, then, with respect to that activity, she is effectively converted.<sup>45</sup>

Children present additional considerations that Goffman and Yoshino's tripartite structure does not reach. Right wing activism focuses not on conversion or passing after someone became gay, but on *preventing* gayness in the first place. Stigma worked through *prophylaxis*, *ex ante*, rather than conversion, passing, or covering demands *ex post*.

A clear example of such prophylactic intervention is Medicaid's discriminatory refusal to provide gender confirmation treatment for transgender individuals of all ages, even though similar procedures are available to women undergoing mastectomies or intersex children.<sup>46</sup> Prohibiting such gender confirmation is, of course, a form of prophylaxis—the individual is not allowed to “convert,” at least physically.

But conservatives were even more concerned with (at least as they saw it) spiritual conversion, by preventing children from becoming gay, from catching the contagion of homosexuality. Their focus was on schools—which made sense.<sup>47</sup>

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<sup>44</sup> Doe v. Yunits, GLAD, <https://www.glad.org/cases/pat-doe-v-yunits/> (last visited Oct. 2, 2019).

<sup>45</sup> See Yoshino, *supra* note 35, at 865. Yoshino further bifurcates this approach to identity construction as weak or strong performativity. *Id.*

<sup>46</sup> See, e.g., Craig Konnoth, *Rewritten Opinion*, Smith v. Rasmussen, in FEMINIST JUDGMENTS: REWRITTEN HEALTH LAW OPINIONS (Seema Mohapatra & Lindsay F. Wiley eds., Cambridge Univ. Press (forthcoming 2020)) (rewriting a Fifth Circuit opinion that affirmed a state agency ban on providing coverage).

<sup>47</sup> See LaBarbera, *supra* note 29 (“‘Of all the advances of the homosexual agenda,’ proclaimed the Family Research Council, ‘perhaps none is more disturbing than the penetration of the nation’s schools . . . .’”). For an excellent overview of curricular limitations in schools, see Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1490–94 (2017).

Indeed, for the 90% of Americans who attend public schools, schools are their greatest point of their interaction with the state in the course of their entire lives.<sup>48</sup>

For conservatives, school was also where students could learn to become gay. Activists permeated schools, they claimed, “with messages and programs designed to teach homosexuality as normative.”<sup>49</sup> A condom demonstration was seen as “condemning [children] to death by AIDS” by encouraging deviant sex.<sup>50</sup> They thus mobilized to counter the contagion before it even began—and their successes were numerous. The South Carolina Comprehensive Health Education Program provides that the mandatory health education programs to be implemented by local school boards “may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.”<sup>51</sup> Alabama and Texas require that their programs “emphasi[ze] that ‘homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense.’”<sup>52</sup>

Additionally, numerous states have laws that require parents to be notified before children may participate in classes involving sex, sexuality, and HIV, including in jurisdictions such as D.C. and Massachusetts.<sup>53</sup> This chilling effect has resulted in the excision of Shakespeare’s “Twelfth Night,” because there is cross dressing in it, and Walt Whitman’s “Leaves of Grass,” for its homoeroticism.<sup>54</sup> Some

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<sup>48</sup> Jack Jennings, *Proportion of U.S. Students in Private Schools is 10 Percent and Declining*, HUFFPOST (Mar. 28, 2013), [https://www.huffpost.com/entry/proportion-of-us-students\\_b\\_2950948](https://www.huffpost.com/entry/proportion-of-us-students_b_2950948).

<sup>49</sup> LaBarbera, *supra* note 29.

<sup>50</sup> See *Teaching Fear: The Religious Right's Campaign Against Sexuality Education*, PEOPLE FOR THE AM. WAY FOUND. (Sept. 1996), <http://www.pfaw.org/report/teaching-fear-the-religious-rights-campaign-against-sexuality-education/> (quoting Dr. Robert L. Simonds of the pro-family organization Citizens for Excellence).

<sup>51</sup> S.C. CODE ANN. § 59-32-30(A)(5) (2016).

<sup>52</sup> TEX. HEALTH & SAFETY CODE ANN. § 85.007(b)(2) (West 2015); see also Eric Berger, *Danburg Files Bill Seeking Sodomy Law's Removal*, CHRON (Jan. 20, 2001), <https://www.chron.com/news/houston-texas/article/Danburg-files-bill-seeking-sodomy-law-s-removal-2006401.php> (noting that the two-to-one decision of a three-judge panel of the Fourteenth Court of Appeals that the Texas sodomy law violated the state’s constitution is being appealed); see also MISS. CODE ANN. § 37-13-171(2)(e) (2019); see also N.C. GEN. STAT. ANN. § 115C-81(e)(3) (West 2009) (repealed 2017); JASON CIANCOTTO & SEAN CAHILL, *LGBT YOUTH IN AMERICA’S SCHOOLS* 80 (2012).

<sup>53</sup> CIANCOTTO & CAHILL, *supra* note 52, at 79.

<sup>54</sup> *Id.* at 81.

jurisdictions proposed eliminating all books with pro-gay themes from the library.<sup>55</sup> Further, both federal and state policies, including the No Child Left Behind Act, encourage the use of Internet blocking technology to prohibit harmful material.<sup>56</sup> Due to school interpretation and technological inadvertence, this often involves blocking any LGBT-related material.<sup>57</sup>

Finally, schools attempt to prohibit gay straight alliances (“GSAs”) as hotbeds of homosexual recruitment. While it might appear that such prohibitions violate the First Amendment—after all, how can you outlaw a student club based on its point of view about homosexuality—some courts have upheld bans to prevent “deviate sexual acts” and “lascivious carriage.”<sup>58</sup> GSA prohibitions show how the various forms of stigma come together. Stamping out GSAs force gay students to “cover” their identity, undermining their efforts to form a strong community. Conservatives also hope this will help wavering GSA members to convert back to “normalcy.” But more importantly, GSA prohibitions are prophylactic. As one antigay activist said: “Homosexuals can’t reproduce, so they recruit” through GSAs.<sup>59</sup>

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<sup>55</sup> *Id.* at 82.

<sup>56</sup> Melinda D. Anderson, *How Internet Filtering Hurts Kids*, THE ATLANTIC (Apr. 26, 2016), <https://www.theatlantic.com/education/archive/2016/04/internet-filtering-hurts-kids/479907/> (“The ACLU discovered from students that web filters were routinely blocking access to groups such as GLSEN and the Gay-Straight Alliance Network, along with LGBT anti-bullying resources like It Gets Better and the National Day of Silence.”).

<sup>57</sup> *Id.*

<sup>58</sup> *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652, 662 (1st Cir. 1974).

<sup>59</sup> James Brooke, *To Be Young, Gay and Going to High School in Utah*, N.Y. TIMES (Feb. 28, 1996), <https://www.nytimes.com/1996/02/28/us/to-be-young-gay-and-going-to-high-school-in-utah.html>; Hemant Mehta, *Anti-LGBTQ Speaker: Homosexual Men Use Gay-Straight Alliances to “Recruit” Teens*, FRIENDLY ATHEIST (Nov. 23, 2017), <http://friendlyatheist.patheos.com/2017/11/23/anti-lgbtq-speaker-homosexual-men-use-gay-straight-alliances-to-recruit-teens/>; Andy Birkey, *Barb Anderson: Gay-Straight Alliances Are Used by LGBTs to Recruit Heterosexuals*, TWIN CITIES DAILY PLANET (Feb. 26, 2015), <https://www.tcdailyplanet.net/barb-anderson-gay-straight-alliances-are-used-lgbts-recruit-heterosexuals/>; see also David Badash, *Anti-Gay Parents Tell TN School Board Gay-Straight Alliances Will Be Used To ‘Recruit’ Children*, THE NEW CIVIL RIGHTS MOVEMENT (Feb. 9, 2016), [https://www.thenewcivilrights\\_movement.com/2016/02/gsa\\_update/](https://www.thenewcivilrights_movement.com/2016/02/gsa_update/) (“People who want to start a gay club in our high school say it will be all about coming together because of common interest to talk about diversity and political issues. . . . But the teachers and administrators and parents need to know that the GSA is a youth recruitment strategy carefully laid out by gay activists that carefully avoids addressing the health issues involved. The mainstream media won’t report it, but the Internet is packed with truths about the radical gay political agenda and lifestyles. In order to get what they want, they’re targeting kids. If you’ve ever heard of Kevin Jennings, he’s the founder of the GLSEN (Gay Lesbian Straight Education Network). In 2006, they had a conference up in Massachusetts where they bused in middle school and high school kids

## 2. Outside Schools

LGBT children, of course, experience problematic outcomes in other institutional contexts besides schools. Students receiving Medicaid through CHIP, for example, might encounter discriminatory providers. The antidiscrimination provision of the ACA, Section 1557, does not protect sexual orientation, and, thanks to recent regulatory changes by the Trump Administration, will soon stop protecting trans children as well.<sup>60</sup>

Even more vulnerable are LGBT children who are in state institutions such as foster care, where they form 5–10% of the population.<sup>61</sup> The kinds of harm they face fall within the stigma model of conversion, passing, conversion, and prophylaxis. Given the lack of external oversight—for example, from parents—LGBT foster children experience even worse outcomes. Reports exist of children being beaten by other residents while staff watched, taunted by foster parents, staff, and other residents because of the homosexuality, sexually assaulted, and forced to undergo conversion therapy.<sup>62</sup> According to one study, 100% of these children in New York City homes reported verbal harassment and 70% physical abuse.<sup>63</sup>

Given this treatment, it is therefore unsurprising that LGBT children seek to escape institutional contexts. According to one study, one-third of LGBT youth reported missing an entire day of school in the previous month because they felt

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that were members of the GSA, and they were subjected to stuff like fisting, rimming, oral sex, anal sex. The GLSEN does not belong in our schools.”).

<sup>60</sup> Compare Nondiscrimination in Health Programs and Activities, 45 C.F.R §§ 92.1–92.2 (2016), with Nondiscrimination in Health and Health Education Programs or Activities, 45 C.F.R. §§ 92.1–92.2 (2019).

<sup>61</sup> CIANCOTTO & CAHILL, *supra* note 52, at 30.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

unsafe.<sup>64</sup> Seventy-eight percent run away from foster homes because of the hostile treatment they receive.<sup>65</sup> And indeed, many LGBT children run away from home.<sup>66</sup>

As a result, reports agree that about one-third of all homeless youth are LGBT—a massive number given that only 5% of youth self-identify as LGBT.<sup>67</sup> Indeed, according to those who work at shelters, many government-funded, the number of LGBT youth they have been seeing has increased in the last ten years, mostly among trans individuals.<sup>68</sup> Yet, LGBT youth tend to avoid shelters where they face yet more discrimination. Some shelters treat LGBT children as predators or as “diseased” and isolate them or kick them out.<sup>69</sup> Thus, one shelter forced LGBT children to wear orange to distinguish themselves from the general population.<sup>70</sup> LGBT children’s belongings are often stolen, destroyed, or urinated on.<sup>71</sup> And trans individuals are often assigned to shelters that do not conform with their identified gender.<sup>72</sup>

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<sup>64</sup> JOSEPH G. KOSCIW ET AL., GLSEN, THE 2015 NATIONAL SCHOOL CLIMATE SURVEY 4 (2016), <https://files.eric.ed.gov/fulltext/ED574808.pdf>.

<sup>65</sup> ROB WORONOFF ET AL., OUT OF THE MARGINS: A REPORT ON REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE 19 (2006).

<sup>66</sup> *Gay and Transgender Youth by the Numbers*, CTR. FOR AM. PROGRESS (June 21, 2010), <https://www.americanprogress.org/issues/lgbt/news/2010/06/21/7980/gay-and-transgender-youth-homelessness-by-the-numbers/>.

<sup>67</sup> *Id.*

<sup>68</sup> Deborah Coolhart & Maria T. Brown, *The Need for Safe Spaces: Exploring the Experiences of Homeless LGBTQ Youth in Shelters*, 82 CHILD. & YOUTH SERVS. REV. 230, 230 (2017).

<sup>69</sup> Shannon Wilber, *Invest Upstream to Promote the Well-Being of LGBT Youth*, in A NEW JUVENILE JUSTICE SYSTEM 172 (Nancy E. Dowd ed., 2015).

<sup>70</sup> Alex Morris, *The Forsaken: A Rising Number of Homeless Gay Teens Are Being Cast Out by Religious Families*, ROLLING STONE (Sept. 3, 2014), <https://www.rollingstone.com/culture/culture-news/the-forsaken-a-rising-number-of-homeless-gay-teens-are-being-cast-out-by-religious-families-46746/>.

<sup>71</sup> Coolhart & Brown, *supra* note 68, at 234.

<sup>72</sup> Kristen A. Prock & Angie C. Kennedy, *Federally Funded Transitional Living Programs and Services for LGBTQ-Identified Homeless Youth: A Profile in Unmet Need*, 83 CHILD. & YOUTH SERVS. REV. 17, 18 (2017).

Thus, LGBT children are more likely to be on the streets.<sup>73</sup> To afford this, they engage in survival sex at greater rates.<sup>74</sup> They also suffer abuse at the hands of antigay street gangs.<sup>75</sup> But perhaps most problematic is another set of actors—the police.

Homeless youth—disproportionately LGBT—have frequent encounters with the police.<sup>76</sup> They have nowhere to engage in activity most of us take for granted—drinking or sexual encounters—and are often arrested for such behavior.<sup>77</sup> Trans individuals especially are subject to arrest, sometimes for “false personation”—that is, giving a chosen name that comports with their gender identity, rather than their birth name.<sup>78</sup> And police arrest youth they find with condoms for solicitation.<sup>79</sup>

But police encounters don’t just occur on streets. After wave upon wave of school shootings, security guards and police are omnipresent in schools. LGBT students are more likely than other students to be designated as problem children.<sup>80</sup> They are punished more harshly than gender-conforming heterosexuals.<sup>81</sup> Punishments range from expulsion, police stops, juvenile arrest, conviction, and adult arrest and adult conviction.<sup>82</sup> Overall, one study finds, LGBT students are 1.25 times to 3 times more likely to face criminal sanctions for similar offenses as straight

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<sup>73</sup> *Gay and Transgender Youth by the Numbers*, *supra* note 66.

<sup>74</sup> Prock & Kennedy, *supra* note 72, at 17; Nicholas Forge & Geoffrey L. Ream, *Homeless Lesbian, Gay, Bisexual and Transgender (LGBT) Youth in New York City: Insights from the Field*, 93 CHILD WELFARE 7, 16 (2014).

<sup>75</sup> Forge & Ream, *supra* note 74, at 11.

<sup>76</sup> Kaitlin Banner, *Breaking the School to Prison Pipeline*, in A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM 17 (Nancy E. Dowd ed., 2015).

<sup>77</sup> As youth are on the street, they are subject to more arrests for use of marijuana, pot or drinking as they lack privacy. Forge & Ream, *supra* note 74, at 11. Further, they are arrested because of survival sex, accused of false personation for not presenting the gender on their identity documents, and police use condoms on kids as evidence of sex work. *Id.*

<sup>78</sup> Jason Grant, *Transgender Woman Charged with ‘False Personation’ Sues NYPD*, N.Y.L.J. (Jan. 22, 2019), <https://www.law.com/newyorklawjournal/2019/01/22/transgender-woman-charged-with-false-personation-sues-nypd/?slreturn=20191022143500>.

<sup>79</sup> Forge & Ream, *supra* note 74, at 11.

<sup>80</sup> Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 J. AM. ACAD. PEDIATRICS 49 (2011).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

students.<sup>83</sup> Further, some of the most common offenses that led to arrest, such as dress code violations, disproportionately affect LGBT gender non-conforming students.<sup>84</sup> Students perceived as male get suspended for wearing heels, students perceived as female are prohibited from coming to prom in tuxedos.<sup>85</sup> And where those proscriptions are flouted, the criminal system justice system often steps in.

Police encounters produce their own problems. Youth in juvenile or even adult prisons face similar problems as they do in schools, foster homes, and shelters—but now, they cannot escape. Even after release, the encounters prolong homelessness. Those with a criminal record can have limited access to Section 8 housing and stable employment.<sup>86</sup>

Thus, the oppressive behavior of the state does not end at the schoolhouse door. Behind the school and its agents, an ever-expanding bureaucracy stands ready to enforce stigmatizing policies upon LGBT students. When the first round of stigmatization by the school or foster home fails, a second round comes into play through the police, yielding to vicious cycles of homelessness, underemployment, and exclusion.

### 3. Health Effects

I'm in a roomful of medical professionals, so I don't have to go into the health effects of the problems I outline here. But it might help to conceptualize them. The state behavior I outlined above—enforced covering, passing, conversion, and prophylaxis—has both expressive and material or physical impacts.<sup>87</sup>

First, state behavior is expressive. It marks the status of LGBT individuals in the community. The state tells an observer where LGBT individuals fall in the pecking order. It tells them what attitudes to hold about LGBT individuals, whether LGBT individuals are insiders or outsiders. For *students* in particular, the behavior of state-employed figures in authority—be they teachers, administrators, or police

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<sup>83</sup> *Id.* at 54.

<sup>84</sup> Jan Hoffman, *Can a Boy Wear a Skirt to School?*, N.Y. TIMES (Nov. 6, 2009), <https://www.nytimes.com/2009/11/08/fashion/08cross.html>.

<sup>85</sup> *Id.*

<sup>86</sup> *Criminal Record Requirements for HUD Housing Programs*, AFFORDABLE HOUSING ONLINE, <https://affordablehousingonline.com/guide/criminal-records-housing/hud-requirements> (last visited Jan. 16, 2020).

<sup>87</sup> Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1540, 1572 (2017).

officers—tells them how to think about being LGBT. In some cases, of course, the student internalizing these lessons is herself LGBT.

Second, state behavior has material and physical effects on LGBT children. It determines how LGBT children are treated—whether with violence or not. It determines whether their belongings are stolen or destroyed. It determines whether they become homeless or not.

Clearly, the two kinds of effects interact with and reinforce each other. Observing the physical treatment of someone in society tells you their status—depriving someone of resources doesn't just cause them suffering, but also sends a message about where they stand. And depriving someone of social status can make society treat them badly in physical and material ways.

As a result, individuals can experience both psychological and physical harms (which, of course, themselves, are interrelated). As researchers have found among LGBT children, verbal harassment is a predictor of stress reactions including severe anxiety and eating or sleep disturbances as well as social emotional difficulties, including depression, loneliness, and alienation. These psychological effects, in turn, can produce material harms—affecting academic performance, encouraging homelessness, substance abuse, eating disorders, and even suicide.<sup>88</sup> LGBT youth far outstrip their peers in all these measures—suicidal attempts and ideation, PTSD within the previous twelve months, and major depression—are double or triple among LGBT students when compared to straight/cisgender classmates.<sup>89</sup> And, of course, the stressors I outline above all too often produce violence, homelessness, and survival sex with related complications such as exposure related illnesses, STIs, traumas, and lack of access to medical care. Thus, the expressive and material effects of the law can both produce physical and mental harms.

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<sup>88</sup> Katie Swanson & Maribeth Gettinger, *Teachers' Knowledge, Attitudes, and Supportive Behaviors toward LGBT Students: Relationship to Gay-Straight Alliances, Antibullying Policy, and Teacher Training*, 13 J. LGBT YOUTH 326, 328 (2016).

<sup>89</sup> Stephen T. Russell & Jessica N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 ANN. REV. CLINICAL PSYCHOL. 465, 471 (2016) (finding that 31% of LGBT youth exhibit suicidal behavior at some point in their lives, whereas the national rate among youth is 4.1%).

Persecution				
	Conversion	Passing	Covering	Prophylaxis
Schools	Counselors Medicaid State license	Bullying Property damage	Bathroom policies Dress codes	Medicaid refusals Curriculum GSAs
Outside Schools:	Reports about coerced counseling and prayer in foster care <ul style="list-style-type: none"> <li>• Foster care</li> <li>• Detention</li> <li>• Streets</li> <li>• Police</li> </ul>	Bullying Property damage	Bathroom policies Dress codes Incorrectly assigned shelters and facilities	Segregation of LGBT population Treatment of LGBT population as diseased

### B. The Neutral State

I have spoken at some length about how the state causes health problems—largely because lawyers like focusing on problems. But I want to briefly gesture at the solutions. The first stage of solutions involves neutrality by the state. The state achieves this neutrality by prohibiting harmful behavior, but not mandating pro-LGBT behavior. In other words, it prohibits its agents from demanding covering, passing, conversion, or prophylaxis.

A few examples. The First Amendment and Equal Access Act—initially passed to force schools to recognize *religious* student organizations—are used to prevent schools from discriminating against Gay Straight Alliances.<sup>90</sup> There have been victories—some quite recent.<sup>91</sup> Title IX claims, which prohibit gender discrimination in educational settings, have also met with success.<sup>92</sup> Take, for example, a recent case in which a trans student claimed that preventing her from accessing bathrooms

<sup>90</sup> U.S. CONST. amend. I; Equal Access Act, 20 U.S.C. § 4071 (2018).

<sup>91</sup> 20 U.S.C. § 4071; *Gay-Straight Alliance of Munster High Sch. v. Sch. Town of Munster*, No. 1:14-cv-00172 (N.D. Ind. 2014); *B.N.S. v. Sch. Bd. of Lake Cnty.*, No. 5:13-cv-00205 (M.D. Fla. 2013).

<sup>92</sup> 20 U.S.C. § 1681 (2018).

that conform to her identified gender violated Title IX.<sup>93</sup> She argued that she was a girl being forced to use the boys' bathroom.<sup>94</sup> The school claimed she was a boy, and was being treated like any other boy.<sup>95</sup> Siding with the student, the Fourth Circuit explained that the Department of Education determined a child's sex by her gender identity.<sup>96</sup> Because "the varying physical, psychological, and social aspects" of gender justified deference to the Department's reading, the child was to be considered a girl under the law, and was therefore suffering gender discrimination.<sup>97</sup> Other cases involving transgender discrimination have also succeeded on a disability discrimination theory—courts held that discrimination based on gender identity disorder or gender dysphoria constituted disability discrimination.<sup>98</sup>

Bullying has also been successfully addressed in many cases. Some schools have adopted anti-bullying policies, some specifically enumerating sexual orientation, as have seventeen states.<sup>99</sup> In other cases, parents have successfully filed state negligence claims when school administrators knew about serious bullying and did nothing.<sup>100</sup> They have also argued that the school's deliberate indifference to the bullying that *gay* students and gender non-conforming students suffer constituted an equal protection and Title IX violation.<sup>101</sup>

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<sup>93</sup> *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).

<sup>94</sup> *Id.* at 715.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 722.

<sup>97</sup> *Id.*

<sup>98</sup> Rebecca Buckwalter-Poza, *When Disability Rights Are Transgender Rights*, PAC. STANDARD (May 25, 2017), <https://psmag.com/social-justice/next-frontier-fight-for-trans-rights>.

<sup>99</sup> *State Maps*, GLSEN, <https://www.glsen.org/article/state-maps> (last visited Sept. 27, 2019).

<sup>100</sup> *Jury Verdicts and Settlements in Bullying Cases*, PUB. JUSTICE (Dec. 2017), <https://www.publicjustice.net/wp-content/uploads/2018/01/2018.01.08-Winter-2017-Edition-Bullying-Verdicts-and-Settlements-Final.pdf>.

<sup>101</sup> *Doe v. E. Haven Bd. of Educ.*, 430 F. Supp. 2d 54, 55 (D. Conn. 2006); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 377 F. Supp. 2d 952, 970 (D. Kan. 2005); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107 (E.D. Cal. 2014); *Doe v. Brunswick Sch. Dep't*, No. 15-cv-00257-DBH, 2016 WL 8732370 (D. Me. Apr. 29, 2016); *S.Z. v. Ladue Sch. Dist.*, No. 15-cv-01220-CEJ (E.D. Mo. 2016); *Larose v. Lincoln Cty. Sch. Dist.* No. 2, No. 15-cv-00158 (D. Wyo. 2017); Leonard Greene, *City Pays Out \$700,000 to Brooklyn Teen Who Was Viciously Bullied, Blinded in School Cafeteria*, DAILY NEWS (Dec. 29, 2016), <https://www.nydailynews.com/new-york/education/nyc-pays-700g-teen-bullied-blinded-school-article-1.2928216>.

Outside schools, activists have scored some victories. The recently issued Prison Rape Elimination Act regulations prohibits various discriminatory acts in federal juvenile facilities.<sup>102</sup> Isolation of LGBT children must be a last resort.<sup>103</sup> Segregation and other assignment decisions cannot be made solely because of orientation or gender identity.<sup>104</sup> The regulations permit (but don't require) facilities to place trans individuals with others of the sex with which they identify.<sup>105</sup>

As in schools, activists have also argued that deliberate institutional indifference to the needs of LGBT children in correctional facilities and foster homes violate equal protection.<sup>106</sup> In the case of transgender children, they have also claimed that the Americans with Disabilities Act has been violated.<sup>107</sup> They have also beat back attempts to restrict gender confirmation services to children under CHIP (Children's Health Insurance Program).<sup>108</sup>

Yet, massive gaps remain. First, by prohibiting certain behavior, the law only prevents a certain group of actors—those employed by the state—from engaging in particular harmful activity. While this may alter certain material or physical conditions affecting LGBT children, the underlying stigma and negative attitudes remain unaffected. And the behavior of non-state actors such as other students and parents is never directly addressed.

Take bullying claims. Anti-bullying policies similarly often lack teeth and are unenforced. As for lawsuits, to claim that a school has been deliberately indifferent to bullying, plaintiffs must meet a high bar—only the most egregious claims, many ending in death, where plaintiffs can *prove* teachers *knew* about bullying, make it to court. These claims also require supportive parents or other adults to file suit—those without such support, who are the most vulnerable LGBT youth, are left unprotected. The Safe Schools Improvement Act, which would prohibit bullying, and the Student

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<sup>102</sup> Prison Rape Elimination Act, 108 Pub. L. No. 108-79, 117 Stat. 972 (2018).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* § 115.341.

<sup>105</sup> *Id.*

<sup>106</sup> Wilber, *supra* note 69, at 179–80.

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., Zack Ford, *Pennsylvania Lawmaker Doesn't Think Transgender Kids Deserve Healthcare*, THINK PROGRESS (Oct. 23, 2017), <https://thinkprogress.org/pennsylvania-transgender-kids-chip-ab00217e28ed/>.

Non-Discrimination in Education Act, which would do for LGBT discrimination what Title IX did for sex discrimination, have languished in Congress.<sup>109</sup>

Similarly, the First Amendment and the Equal Access Act don't require schools to have a gay straight alliance—they simply require that schools not discriminate among student groups.<sup>110</sup> Thus, the Salt Lake City Board in 1996 banned forty-six non-curricular clubs, including the Young Republicans, just so it could bar the gay-straight alliance without being accused of discrimination.<sup>111</sup>

### C. *The Remedial State*

To truly address the harms that LGBT students face, therefore, the state must take two kinds of affirmative steps. First, rather than just prohibiting harmful behaviors, it should affirmatively alter the attitudes and outlooks of state actors towards LGBT individuals. Then, it should engage private actors who interact with LGBT children.

First, the state should take steps to ensure the wellbeing of LGBT individuals. This includes actively creating GSAs at schools, training and requiring school counselors to offer LGBT supportive services to students,<sup>112</sup> enacting diversity initiatives to hire more LGBT educators, and introduce LGBT issues in the school curriculum, such as information about the Stonewall riots, or the marriage equality movement.

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<sup>109</sup> Jennifer Pike Bailey, *Student Non-Discrimination Act Reintroduced in Congress*, HUMAN RIGHTS CAMPAIGN (Mar. 21, 2018), <https://www.hrc.org/blog/student-non-discrimination-act-reintroduced-in-congress>.

<sup>110</sup> CIANCOTTO & CAHILL, *supra* note 52, at 129 (“According to the NCLB Act federal education funds cannot be used ‘to develop or distribute materials, or operate programs or courses of instruction directed at youth, which are designed to promote or encourage sexual activity, whether homosexual or heterosexual’ . . . [b]ut schools can still develop or implement curricula or programs designed to provide age-appropriate and comprehensive sex education . . .”).

<sup>111</sup> Kristen Moulton, *Salt Lake City Students Walk Out in Protest Over School Clubs Ban ‘Separate Church and State,’ Some Demonstrators Demand*, SPOKESMAN-REVIEW (Feb. 24, 1996), <https://www.spokesman.com/stories/1996/feb/24/salt-lake-city-students-walk-out-in-protest-over/>.

<sup>112</sup> Ryan M. Kull et al., *Preparing School Counselors to Support LGBT Youth: The Roles of Graduate Education and Professional Development*, GLSEN (Feb. 15, 2018), <https://www.glsen.org/article/preparing-school-counselors-support-lgbt-youth>; RYAN M. KULL ET AL., GLSEN, SUPPORTING SAFE AND HEALTHY SCHOOLS FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER STUDENTS: A NATIONAL SURVEY OF SCHOOL COUNSELORS, SOCIAL WORKERS, AND PSYCHOLOGISTS 21 (2019), <https://www.schoolcounselor.org/asca/media/asca/Publications/SupportingSafeHealthySchools.pdf>.

Studies show that each of these steps directly improves either the attitudes of teachers and students towards LGBT issues, or improves the physical or material circumstances of being LGBT, or both.<sup>113</sup> The importance of supportive teachers in particular cannot be overemphasized: supportive educators increase LGBT students' psychological attachment to school, decrease suicidality, and lower absenteeism.<sup>114</sup> Further, students imitate the pro-LGBT behavior of teachers.<sup>115</sup> Next, GSAs in schools lower LGBT victimization and make LGBT students up to three times as likely to come out.<sup>116</sup> Improvements in the curriculum lower antigay remarks and victimization and enhance feelings of safety.<sup>117</sup>

Some state laws have advanced these policies. California's 2011 FAIR Education Act and Illinois's 2017 SB 3249 require state school curriculum to incorporate LGBT history and current events.<sup>118</sup> Other states go beyond antidiscrimination policies to affirmative train their staff on LGBT issues. The NYC Department of Education's 2007 "Respect for All Initiative" provided 69 trainings for 1,000 educators from 250 schools for grade six and above in that year alone.<sup>119</sup>

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<sup>113</sup> Kathryn Alexandra Conrad, *Developing and Implementing a LGBT Family Studies Course: A Pre-Post Evaluation* (Aug. 2016) (unpublished Ph.D. dissertation, University of Tennessee, Knoxville), [https://trace.tennessee.edu/utk\\_graddiss/3903/](https://trace.tennessee.edu/utk_graddiss/3903/); *LGBT Issues in the Curriculum Promotes School Safety*, CAL. SAFE SCHOOLS COALITION (Oct. 19, 2016), <http://www.casafeschools.org/FactSheet-curriculum.pdf>.

<sup>114</sup> Alexandra Marshall et al., *Coping and Survival Skills: The Role School Personnel Play Regarding Support for Bullied Sexual Minority-Oriented Youth*, 85 J. SCH. HEALTH 85 (2015).

<sup>115</sup> CIANCOTTO & CAHILL, *supra* note 52, at 95; *see also* Ian K. Macgillivray, *My Former Students' Reflections on Having an Openly Gay Teacher in High School*, 5 J. LGBT YOUTH 72 (2008).

<sup>116</sup> CIANCOTTO & CAHILL, *supra* note 52, at 95.

<sup>117</sup> JOSEPH G. KOSCIW, GLESEN, *THE 2013 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS* 66 (2014), <https://files.eric.ed.gov/fulltext/ED570433.pdf>; Russell & Fish, *supra* note 89, at 474; Salvatore Ioverno et al., *The Protective Role of Gay-Straight Alliances for Lesbian, Gay, Bisexual, and Questioning Students: A Prospective Analysis*, 3 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 397, 406 (2017).

<sup>118</sup> CIANCOTTO & CAHILL, *supra* note 52, at 81; Russell & Fish, *supra* note 89, at 474 ("[R]esearch also indicates that LGBT-focused policy and inclusive curriculums are associated with better psychological adjustment for LGBT students . . . and have been shown to improve students' sense of safety . . . and feelings of acceptance . . . and to reduce victimization in schools."); *id.* at 477 ("[T]he presence of SOGI-inclusive nondiscrimination and antibullying laws or policies is associated with student safety and adjustment . . . and provides a foundation that enables schoolteachers, administrators, and other personnel to establish an institutional climate that supports the policies and practices noted above . . .").

<sup>119</sup> CIANCOTTO & CAHILL, *supra* note 52, at 91.

Training includes group discussions, mini-lectures, videos, and role-playing exercises, and participants were provided with materials to use with students.<sup>120</sup> Students are also trained, and schools collect data on bias incidents for follow-up.<sup>121</sup>

Non-school institutions must take similar steps. Although LGBT children are disproportionately homeless, fewer than half of federally funded homeless services offer LGBTQ specific services or provide information.<sup>122</sup> Services should include therapy case management, gender neutral bathrooms and sleeping areas, and access to medical treatment. Further, failure to come out and ask for these benefits shouldn't be a barrier to access—all children should be offered these services.

States might also create institutions dedicated to LGBT students. The Harvey Milk School created in New York in 1984 is one such example. Its graduation rate is much higher than the average for New York City schools, even though a significant number of the students are homeless and LGBT students are generally three times as likely to drop out.<sup>123</sup> Notably, such institutions are often met with significant opposition. In the early 2000s, for example, the *New York Times* strongly opposed the school.<sup>124</sup>

Finally, the state should intervene to affect the attitudes and behaviors of even private actors. First, the state might eliminate access to services that homophobic and transphobic parents might seek for their children. For example, fifteen states and D.C. have prohibited therapists from carrying out sexual orientation change efforts on minors within the scope of their license.<sup>125</sup> These bans do not extend to other treatment contexts, though state and even federal laws pertaining to fraud might

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Prock & Kennedy, *supra* note 72, at 21.

<sup>123</sup> *Harvey Milk School*, PUB. SCH. REV., <https://www.publicschoolreview.com/harvey-milk-high-school-profile> (last visited Oct. 14, 2019); AM. PSYCH. ASS'N, *FACING THE SCHOOL DROPOUT DILEMMA* (2012), <https://www.apa.org/pi/families/resources/school-dropout-prevention.pdf>.

<sup>124</sup> CIANCOTTO & CAHILL, *supra* note 52, at 107.

<sup>125</sup> Kelley Czajka, *With the Addition of New York, Conversion Therapy Is Now Illegal in 15 States*, PAC. STANDARD (Feb. 7, 2019), <https://psmag.com/news/with-the-addition-of-new-york-conversion-therapy-is-now-illegal-in-15-states>.

address the gap.<sup>126</sup> On this theory, because such therapies have not proven to be effective, advertising them as effective is a form of fraud.

Next, teachers and others have reported numerous parents who are supportive of their LGBTQ children to Child Protective Services, resulting in investigations.<sup>127</sup> Indeed, some parents who allow their nonconforming children to dress according to their chosen gender at home still require them to conform to their assigned gender at schools—parents whose children did not conform in public have been reported.<sup>128</sup> In other words, the state often intervenes when parents treat sexuality and gender identity in a way of which it does not approve.

While the state should continue exerting its power, its approach should be flipped—counselors and teachers who learn of homophobia and transphobia at home should be mandated reporters, and states should offer mediation and intervention services for families with LGBTQ children. Finally, when all else fails, the state should require parents of LGBT children to support their children when the parent's behavior results in the child having to leave home.

At the same time, it is important to remember that there are often deeper structural issues at work. LGBT children who are homeless are disproportionately racial minorities as well.<sup>129</sup> Most of them ran away, not just because of conflict because they were LGBT but because of other structural harms—deep poverty, mental illness, substance abuse.<sup>130</sup> Our law and institutions need to reach beyond mere discrimination to address these deeper underlying causes before we can protect our LGBT children.

### III. CONCLUSION

LGBT children are among the most vulnerable individuals in our society. While we have made advances on LGBT rights in courts, the barometer of true progress in hearts and minds lies in how much we protect LGBT children and how much we

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<sup>126</sup> *JONAH Conversion Therapy Case*, S. POVERTY L. CTR., [splcenter.org/seeking-justice/case-docket/michael-ferguson-et-al-v-jonah-et-al](http://splcenter.org/seeking-justice/case-docket/michael-ferguson-et-al-v-jonah-et-al) (last visited Jan. 17, 2020).

<sup>127</sup> Jamie Bruesehoff, *Defending Your Identity to the State: When Parents of Trans Kids Are Accused of Child Abuse*, HUFFPOST (Sept. 27, 2017), [https://www.huffpost.com/entry/defending-your-identity-to-the-state-when-parents\\_b\\_59cbccce4b0b99ee4a9c9a6](https://www.huffpost.com/entry/defending-your-identity-to-the-state-when-parents_b_59cbccce4b0b99ee4a9c9a6).

<sup>128</sup> *Id.*

<sup>129</sup> Michelle Page, *Forgotten Youth: Homeless LGBT Youth of Color and the Runaway and Homeless Youth Act*, 12 NW. J.L. & SOC. POL'Y 17, 20 (2017).

<sup>130</sup> H. Daniel Castellanos, *The Role of Institutional Placement, Family Conflict, and Sexuality in Homelessness Pathways Among Latino LGBT Youth in New York City*, 63 J. HOMOSEXUALITY 601, 601 (2016).

convince others that growing up gay is acceptable for children. To achieve this, the law cannot not just reverse its past persecution but must affirmatively reach out to protect, even celebrate LGBT youth.