Constructing the Dangerous Queer Child

Richard S. Price
Weber State University
richardprice@weber.edu
Twitter: @AdvInCensorship

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Abstract: Public schools have long been a site of conflict between the straight state and LGBTQ youth. Queer youth have fought for the right to exist within the school safely and openly. Through an exploration of free speech adjacent lawsuits involving queer youth, I seek to understand the arguments used by schools to justify repressive actions that place queer youth outside of the acceptable category of citizenship. Through the use of common tropes, schools seek to present various justifications including that queer youth do not or should not exist, that they are too sexual or politically divisive, and even that such repression is necessary to protect queer students from bullying and attack. Schools utilize these tropes to create an image of queer children who are dangerous to the neutral (straight) school environment.

Introduction

On 10 September 2007 a twelfth-grade student[1] was called to Principal David Davis's office at Ponce de Leon High School.[2] The girl had broken down in tears to a teacher's aide relaying a story of younger girls telling her that "dykes" were "nasty," "gross," and "sick." Instead of inquiring about this incident of harassment, Davis asked her if she was a lesbian, which she confirmed, and informed her that she should not be one. He asked if her parents knew

[1] Though she was identified in some of the litigation paperwork, as a minor she was identified only as Jane Doe by the District Court and I have followed that practice.
[2] The introductory story is drawn from the court decision as well as various filings in the case.

and, when she said no, he took down her parents' number so that he could call and out her. She was informed to stay away from the other girls. He would later claim this was to avoid further harassment but the girl naturally understood it as a command to not bother other students with her lesbianism.

On the next school day, the girl was absent for a family health issue but her friends, knowing what transpired in Davis's office, believed she had been suspended. They began to organize support for her including writing "GP" or "gay pride" on their bodies (usually hands and arms), pro-gay messages on clothing, and made various statements in the hallways. When the students learned that a local anti-gay preacher was giving a "morality assembly" they planned to protest it if it had anything to do with gay rights (it ended up being about drunk driving and no protest occurred).

At this point Davis engaged in what can only be described as a witch hunt. He brought in roughly thirty students to interrogate them about their sexual orientation and participation in the "gay pride movement." He also checked student bodies for any writing on them, including having some lift their shirts. Students testified to various elements of the interrogation including pointed questions about their sexuality, how the Bible condemned homosexuality, and whether they engaged in any pro-gay advocacy. At the end of September 2007, Davis suspended a total of eleven students on the supposed basis of their disruption and belonging to an illegal organization. When one mother inquired about why her daughter had been suspended, Davis informed her that he "could send her off to a private Christian school" or to juvenile detention if the mother wished and "if there was a man in your house, your children were in church, you wouldn't be having any of these gay issues."

The experience in Ponce de Leon High School is likely an extreme reaction that few queer students faced. However, the institutional harassment, abuse, and refusal to support queer students is all too common. GLSEN surveys have long found that queer students are harassed at high rates and met, at best, with indifference from schools. At worst, situations like Ponce de Leon occur where the school is the one aggravating the harassment. In GLSEN's 2019 survey it found that 59% of respondents reported some kind of discriminatory policies or practices including punishment for public affection, dance restrictions, prevented from writing about LGBTQ issues, and limitations on use of bathrooms.[3] Utilizing litigation records primarily, I seek to explore how schools justify this discriminatory treatment. Ultimately, schools deploy a number of rhetorical tropes to categorize queer students as dangerous to the well-being of the school and thus justifiably restricted. The dangerous queer child must be hidden away or risk damage to the educational system as a whole.

Centering Schools

Public schools are an important site of American politics because "debates about education have long acted as a proxy for arguments about whose values will shape the nation's future."[4] After all, public schools are the state institutions that we spend the most time interacting with. Tens of millions of students attend every year. Unsurprisingly, then, what the schools teach and how they teach it is often a source of controversy.[5] What is less well developed is the idea

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[3] GLSEN. 2019. *The 2019 National School Climate Survey*, 41. Available at https://www.glsen.org/sites/default/files/2020-11/NSCS19-111820.pdf

[4] Hartman, Andrew. 2015. *A War for the Soul of America: A history of the Culture Wars*. University of Chicago Press, 200.

[5] See, Petrzela, Natalia Mehlman. 2015. *Classroom Wars: Language, Sex, and the Making of Modern Political Culture*. Oxford University Press; Zimmerman, Jonathan. 2002. *Whose America? Culture Wars in the Public Schools*. Harvard University Press.

that schools themselves are actually governing institutions. Schools fundamentally seek to create good Americans out of each new generation. An element of this is replicating proper sexual and gender citizenship. In other words, schools are an instrument of the straight state in ways that Margot Canady illustrated for the armed forces, welfare administrators, and immigration officials. Canada demonstrated how a "homosexual-heterosexual binary … was being inscribed in federal citizenship" at mid-century.[6]

Arguably the school system is a key to maintaining this binary that Canady discusses. In socializing children into proper Americans, schools replicate the heteronormative ideal of the broader society. Catharine Lugg notes that a foundational scholar in educational sociology wrote in 1932 that "[n]othing is more certain than that homosexuality is contagious"[7] and thus the school must purge all homosexuality from the school environment. In the 1950s and '60s federal postal inspectors who infiltrate mailing lists for physique magazines notified employers that they had gay men on the payroll; many teachers were dismissed summarily based upon this alone.[8] Some states engaged in more sophisticated surveillance to root out gay teachers. Florida's Johns Committee spent years entrapping gay and lesbian teachers to have them fired.[9] When the Washington Supreme Court upheld the firing of James Gaylord it concluded that homosexuality was inherently immoral, even though decriminalized in Washington, and that "students could treat the retention by the school board as indicating adult approval of his homosexuality."[10] Nor

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[6] Canaday, Margot. 2019. *The Straight State: Sexuality and Citizenship in Twentieth-Century America*. Princeton University Press, 3.
[7] Lugg, Catherine A. 2016. *US Public Schools and the Politics of Queer Erasure*. Palgrave Macmillan, 5 (quoting Willard Waller, *The Sociology of Teaching*, 147).
[8] Johnson, David K. 2019. *Buying Gay: How Physique Entrepreneurs Sparked a Movement.* Columbia University Press, 118-19.
[9] Faderman, Lillian. 2015. *The Gay Revolution: The Story of the Struggle*. Simon and Schuster, 41-49.
[10] Gaylord v. Tacoma School District, 559 P.2d 1340, 1347 (Wash. 1977).

did schools stop at regulating queer teachers. Students themselves were to be corrected and straightened out whether by school discipline or through the social realities of the school environment. In the early 1990s, Jamie Nabozny experienced likely what generations of queer students have when he reported the latest in a series of verbal and physical attacks in school: the principal responded that "boys will be boys" and that he brought it on himself by being openly gay in school.[11] This all speaks to a vision of public schools as generators of straight citizens.

Stephen Engel's framing of the lesbian and gay rights movement around the concept of citizenship is helpful. Rather than see citizenship as limited to bundle of rights, "the citizen is a person subject to the state's sight or recognition, identification, and classification."[12] This sifts focus "away from the rights claimant and toward those institutions that constitute, exercise power over, and enable the citizen."[13] The question, thus, turns upon how the government sees subjects within its control and influence. Engel's theory is particularly apt for exploring the place of queer kids within schools. It directs attention to the institutional treatment of queer children, how the school sees its space and what identities have legitimate place within it.

This paper is far too limited to trace this issue over the scope of even relatively recent history. Catharine Lugg did some of this work tracing the queer erasure within schools over time.[14] The gay and lesbian rights movement stayed carefully away from issues of queer youth for its early decades. This was not out of ignorance; after all, who would know better the difficulties queer youth faced than queer adults. Likely it resulted from two broad realities. First,

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[11] Ball, Carlos A. 2010. *From the Closet to the Courtroom: Five LGBT Rights Lawsuits that have Changed Our Nation*. Beacon Press, 72.
[12] Engel. Stephen M. 2016. *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives.* New York University Press, 7.
[13] Engel, *Fragmented Citizens*, 7.
[14] Lugg, *US Public Schools and the Politics of Queer Erasure*.

resources were limited. After all by the early 1980s gay men and lesbians were still subject to police harassment and violence, sodomy laws were on the books in about half the states, they had little protection from discrimination in employment or housing, and similar issues. And that is all without factoring in the decimation inflicted by AIDS. But there was also a cultural and political reality. For decades one of the most consistent attacks on gay and lesbian activism, especially gay men, was the pedophile myth. For example, in her 1977 Save Our Children campaign to overturn Miami-Dade's civil rights ordinance, Anita Bryant ran an advertisement proclaiming "There is no 'Human Right' to Corrupt our Children." She also gave regular interviews claiming to have files of evidence "confirming that children are lured in homosexual activity in schools by homosexual teachers."[15] Bryant helped solidify the Christian Right's slogan, "Gays can't reproduce, so they have to recruit."[16] In this environment, any organized activism to assist gay and lesbian youth ran the risk of serious backlash.[17]

By the 1990s this reticence began to disappear. In large part this is likely due to the fact that queer youth came out in increasing numbers. As they faced repression and abuse from schools, they sought assistance from movement organizations that simply could not ignore the plight. This paper, however, turns less upon the rights claims made by queer youth and instead looks to the arguments schools made to justify their repression of queer students. In how they justified their denial of queer children as citizens of the public sphere. I rely primarily on litigation records in free speech (limits on clothing, prom dates, political advocacy) or speech adjacent (limits on school libraries, refusal to recognize gay straight alliances) cases. Examining

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[15] Faderman, *The Gay Revolution*, 337.
[16] Faderman, *The Gay Revolution*, 338.
[17] This is not to say that grassroots activism did not exist. The most significant of which was Virginia Uribe's Project 10 in the Los Angeles School District in the 1980s.

the records and documents preserved in litigation files allows me to explore these justifications and identify common arguments that together show certain institutional strategies of repression.

This method offers certain advantages, though with obvious limitations. The major limitation is that litigation is rare. Certainly, only a tiny fraction of students subject to abuse ever bring a suit. Litigation, however, is key to cutting through the largely invisible world of school operations. Finding documentation of these fights is nearly impossible without litigation. The nature of litigation files could be a double-edged sword. After all, most filings are prepared by lawyers who necessarily filter facts and issues into legally cognizable language that may not reflect the "true" reason for action. This does not concern me for two reasons. First, filings are still the ultimate statement of the school or district and represent the official declaration of its position. Second, litigation files retain more than just the legal paperwork. In addition to testimony there is often documentary evidence that express the thoughts of administrators and teachers at the time of the event. In fact, where these initial justifications differ from later more legalized ones, we can tease out interesting lessons about what the district considers legally sufficient. The other major limitation is that access to federal litigation files is only easy and relatively cheap for cases post 2005 (for most federal courts).[18] This limits the scope of the study though some earlier litigation is partially available and supplemented with additional sources. The appendix lists the cases and provides basic information about them including any reported decisions.

Some Basic Law

[18] PACER varies in scope of coverage by courts but in my experience most litigation files after 2005 are present in PACER. If files are not available in PACER access becomes significantly more expensive through the National Archives.

As the material deals with legal challenges, it helps to establish some basic doctrines for context. All of the cases discussed here are speech based or speech adjacent. As all the cases are based in schools, the key speech doctrine originates with *Tinker v. Des Moines*.[19] In holding that children wearing black armbands as an antiwar protest is protected speech, the Supreme Court declared that schools must show that speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" to punish it.[20] *Tinker*'s disruption rule offered significant protection to student expression on campus but the decades since have not been kind to that speech in certain circumstances. In *Bethel School District v. Fraser*, the Court held that schools could punish sexually vulgar or lewd student speech without consideration of *Tinker*.[21] The Court has also allowed censorship or punishment of student speech where it is school sponsored or can reasonably be attributed to the school and where the speech advocates the use of illegal drugs.[22] In queer student speech cases, typically only *Tinker* and *Bethel* are directly relevant.

A speech adjacent doctrine involves the right to read and whether the removal of books from a library can raise constitutional concern. While the lower federal courts have dealt with the issue many times,[23] the Supreme Court has issued only one decision on this issue. In *Board of Education v. Pico*, the Island Trees School District removed eleven books from the school library because of "objectionable" content. While the Court ruled against the district, no opinion

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[19] Tinker v. Des Moines Independent School Distric*t*, 393 U.S. 503 (1968).
[20] Tinker, 393 U.S. at 509.
[21] Bethel School District v. Fraser, 478 U.S. 675 (1986).
[22] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988); Morse v. Frederick, 551 U.S. 393 (2007).
[23] See Presidents Council, Dist. 25 v. Community School Board, 457 F.2d 289 (2nd Cir. 1972); Minarcini v. Strongsville City chool, 541 F.2d 577 (6th Cir. 1976); Right to Read Defense Committee v. School Committee of Chelsea, 454 F. Supp. 703 (D. Mass. 1978); Salvail v. Nashua Bd. of Education, 469 F. Supp. 1269 (D. N.H. 1979).

commanded a majority. Justice William Brennan's plurality opinion concluded that the right to speak includes within it a right to receive information. "[T]he right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them" and "[m]ore importantly, the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights" because free speech requires the ability to acquire information. [24] This right is particularly important in the context of a school library because a library is "a place dedicated to quiet, to knowledge, to beauty" and students must be free to explore ideas within.[25] The board could not exercise an unfettered control over the content of the library even if it might have a similar control over curriculum. Brennan held that the question of whether a removal of books offended the First Amendment turned upon the intent behind the removal. He suggested that removal would be legitimate where the books "were pervasively vulgar" or the decision "was based solely upon the 'educational suitability' of the books.[26] The dispositive question was whether the board "intended by their removal decision to deny [students] access to ideas with which [the board] disagreed, and if this intent was the decisive factor in [the board's] decision."[27] While Brennan's opinion lacked a majority, it has been treated by lower courts as controlling.[28]

The final speech adjacent issue revolves around student groups. At the college level, gay and lesbian student groups won an impressive record of victories demonstrating that colleges

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[24] Pico, 457 at 867.
[25] Pico, 457 U.S. at 868.
[26] Pico, 457 U.S. at 871.
[27] Pico, 457 U.S. at 871.
[28] See, Case v. Unified School District No. 233, 895 F.Supp. 1463 (D. Kan. 1995); Counts v. Cedarville School District, 295 F.Supp.2d 996 (W.D. Ark. 2003); Sund v. City of Wichita Falls, 121 F.Supp.2d 530 (N.D. Texas 2000).

must allow all students to organize recognized groups on an equal basis.[29] Whether this doctrine would apply in public schools has never been settled because an easier route to legal recognition was granted by Congress: the Equal Access Act (EAA).[30] Passed in 1984, the EAA provides that federally funded secondary schools must allow equal access to all extracurricular student clubs. Schools are allowed to prohibited clubs that would "materially and substantially interfere with the orderly conduct of educational activities within the school." Apart from that the only other option is to prohibit any club that is outside the curriculum. In 1990, the Supreme Court gave the EAA a broad reading holding that it is triggered anytime "any student group that does not *directly* relate to the body of courses offered by the school" is recognized.[31] This would include any club that paralleled a specific course, where students were required to participate as part of a class, or where academic credit is given for participating. The Court specifically rejected the school's attempt to claim that a service, chess, or scuba club were curriculum related because they advanced the broad institutional goals of engaged educated young people.[32] While motivated by conservative religious groups seeking to protecting Christian organizing in schools, the EAA's far greater impact has been in protecting GSAs.

Justifying Repression

Queer Kids Don't (or Shouldn't Exist)

[29] Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543 (11th Cir. 1997); Gay Lib v. University of Missouri, 558 F.2d 848 (8th Cir. 1977); Gay Students Organization v. Bonner, 509 F.2d 652 (1st Cir. 1974).
[30] 20 U.S.C. § 4071.
[31] *Bd. of Educ. v. Mergens, 496 U.S. 226, 240 (1990).*
[32] *Mergens, 496 U.S. at 243-44.*

Project 21, a grassroots organization, decided to donate two books to Kansas City area schools as part of its goal "to ensure that America's youth are provided with fair, accurate and unbiased information regarding sexual orientation … and the contributions of gay, lesbian and bisexual cultural and historical figures."[33] The key novel was *Annie on My Mind* by Nancy Garden.[34] Published in 1982 the book broke new ground in queer young adult (YA) literature. A handful of gay and lesbian themes emerged in YA since 1969 but "too many of these were marred by stereotypical characters and predictable plots centered about the inherent misery of gay people's lives."[35] Nancy Garden sought to alter the genre by writing a book about two lesbian teens who found both love and hope in their relationship. The donation backfired with a number of districts not only refusing the book but removing copies that they discovered were already in their libraries.

In justifying one removal in Olathe, Kansas, Superintendent Ronald Wimmer stated that it was the school's duty "to protect students from information distributed by special interest groups."[36] When students objected he explained to them that the removal, which failed to follow district policy, was necessary "because of controversy at the time in the outside area and Olathe."[37] He stressed that the controversy was the result of outside agitators and that he had a duty to protect children from a special interest agenda defined as "contrary of the best interest of

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[33] Case v. United, Robert Birle to Ronald Wimmer 16 July 1993, Exhibits to Wimmer Deposition (#209).
[34] The other novel was Frank Mosca's *All American Boys*. This book would play no real role in the litigation because it was never in the library's collection and thus there was no removal of it.
[35] Jenkins, Christine A and Michael Cart. 2018. *Representing the Rainbow in Young Adult Literature: LGBTQ+ Content since 1969*. Lanham, MD: Rowman & Littlefield, 17.
[36] Case v. United. Book Donation Guidelines, 13 December 1993, Exhibits to Memorandum in Support of Plaintiffs Summary Judgment (#122).
[37] Statements made at 19 January 1994 meeting, recorded by Amanda Greb. Box 67 Folder 5; American Civil Liberties Union (ACLU) – Western Missouri Records (K0298). The State Historical Scoeity of Missouir Research Center-Kansas City.

the school district, an agenda that is so narrow in scope that is to advance the cause of a particular entity in and of itself irrespective of the purpose of the school. In other words, that the special interest group's motives and/or content and material is so designed as to advance their cause without regard to the benefit of students."[38] Wimmer worked hard to avoid explicitly stating the agenda to be one of converting children, though he admitted that he "consider[ed] homosexuality to be a not normal sexual orientation."[39] And if that was the goal, he could believe he was succeeding because he had no knowledge of gay students in his district.[40]

The Olathe School Board members were far less circumspect in explaining their justifications for removing *Annie on My Mind*. Ronald Hinkle read *Annie* and concluded it had little educational value, musing "what would this do for the children of our district?"[41] After all, he stated that he was unaware of any gay students in the District, with an implicit assumption being that only gay students could find interest in such reading.[42] Hinkle was clear that it is not okay to be gay "because engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems" and separate from any of these concerns "it's contrary to the moral standard of our community."[43] Only heterosexual people met the moral standard of Olathe, Kansas.[44] All four members who voted to remove *Annie* echoed a similar moral judgment. Janet Simpson stated that homosexuality is unnatural[45] and Robert Drummond, an administrator and psychology

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[38] Case v. United, Deposition of Wimmer (#196) 135.
[39] Case v. United, Deposition of Wimmer (#196), 230.
[40] Case v. United, Deposition of Wimmer (#196), 17. He did admit that one former student testified in defense of *Annie* at the Board meeting and identified himself as gay. That was the only evidence he said he had of gay students in the district.
[41] Case v. United Deposition of Hinkle (#202), 56.
[42] Case v. United Deposition of Hinkle (#202), 24.
[43] Case v. United Deposition of Hinkle (#202), 122, 123.
[44] Case v. United Deposition of Hinkle (#202), 125.
[45] Case v. United Deposition of Simpson (#192), 50.

professor at a local Christian college, concluded that "[h]omosexuality, from my sense of things, is not necessarily one of the healthy, normal, functioning aspects of human behavior" and that it was akin to schizophrenia or bipolar disorder.[46] Not only did they fail to acknowledge even the possibility of queer students, each echoed the basic point that the school had a duty to avoid exposing students to the fact that gay people existed unless it was to show the negative consequences of the "choice."

We can see this in how the book was described. Hinkle concluded that *Annie*'s depiction of a happy high school lesbian couple was intended "to promote or could tend to promote and glorify this relationship for others to adopt and accept is not realistic and it was not well-done for the high school setting."[47] This is a common argument for book challengers: that the simple inclusion of a book promotes the content and conveys a message of support to students.[48] Marriott worried that "if that book would have remained on the shelf, it would have appeared that the Board of Education was, in fact, approving that lifestyle by, in effect, approving the book, and I couldn't go along with that."[49] Board members assumed, and sometimes explicitly stated, that the school had a duty to the community to ensure only straight students came out of the school. Simpson repeatedly stated that the only kinds of books that the school should have about homosexuality should be factual ones with factual defined as demonstrating that "choosing an alternative lifestyle has consequences. That it is a very difficult lifestyle, if it is chosen, and that students should be aware of the fact that choosing this lifestyle can affect them physically, mentally, socially, and emotionally."[50] Each of the four board members concluded that

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[46] Case v. United Deposition of Drummond (#194), 24, 25.
[47] Case v. United Deposition of Hinkle (#202), 132.
[48] Knox, Emily J.M. 2015. *Book Banning in 21st-Century America*. Rowman & Littlefield.
[49] Case v. United Deposition of Marriott (#198), 94.
[50] Case v. United Deposition of Simpson (#192),108.

homosexuality was wrong and dangerous, thus students must be protected against it. They did this in the name of the community and much of the community weighed in with supportive messages echoing similar concerns.

Where the idea that queer students did not exist was assisted by the fact that none of the student plaintiffs identified as LGBTQ in Olathe this was not as easy in cases where out students sought to form gay straight alliances (GSA). When a lesbian high school student in Salt Lake City sought to form a GSA she ran headlong into the state's homophobia. The school and state narrative sought to ignore the fact that queer students were demanding access and instead suggested it was the influence of outside groups, raising the specter of pedophilia. After holding an illegal closed-door session, the Senate President announced that this was not a gay and lesbian issue and that he had no problem with the right to live their lives as they wanted "as long as they don't inflict that on others." This raised the suggestion that some outside group was really pushing the organizing drive.[51] When students at two other high schools pushed to organize GSAs an education department attorney opined that the "more fuss that is made, the more exciting it becomes for kids to tweak the administration and their parents. The fastest way to get kids to wear strange clothes is to tell them they can't."[52] After the city board of education voted to ban all extracurricular clubs to avoid the reach of the Equal Access Act, one member announced that he did not "believe our young people should be placed in a position to deal with these kinds of issues" and that "This is a moral issue."[53] All of this spoke to a mindset that

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[51] Semarad, Tony. "Lawmakers Looking at Anti-Gay Club Bill." *The Salt Lake Tribune* 2/3/96, A4.
[52] Groutage, Hilary. "West, Highland Seek OK for Gay Clubs." *The Salt Lake Tribune*, 2/6/96, B1.
[53] Autman, Samuel A. "Gay Clubs Are Out, But so Are Others." *The Salt Lake Tribune* 2/21/96, A1.

fundamentally rejected the idea that queer youth existed. At times, in other places, this would be a weirdly nuanced perspective. For example, a board member in Lake County, Florida, expressed surprise that an eighth grader could be bisexual: "She states she is bi sexual. How does a 13 year old (now 14) know that? I understand gay, lesbian or transgendered, but bi, sorry can not rationalize how she knows."[54] He was willing to allow for other identities but bisexual was a step too far.

In Okeechobee County, Florida, the district argued that state law required the teaching of abstinence only education and thus it could "restrict sex-based clubs … from the school's limited open forum because a student club organized around what immature students perceive to be their sexual orientation or preference at that early stage of their lives would materially and substantially interfere with the orderly conduct of the school's abstinence-based curriculum and would not protect student well-being."[55] The district in essence argued that the kids could not truly be queer and that their "perceptions" would harm the school environment and the students themselves. A variation on this argument in Nassau County, Florida, asserted that the district had the authority to refuse the GSA's name because "it does not permit any clubs whose name highlights sexual orientation."[56] In other words, there was no "straight" club and thus there could be no "gay" one. Sexual orientation was invisible to the school.

Sexualized Content

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[54] Carver Middle School Gay-Straight Alliance v. School Board of Lake County. Email of Bill Mathias, 4/26/13, Exhibit #4-14.
[55] Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County. Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction (#12), 9.
[56] Gay-Straight Alliance of Yulee High School v. School Board of Nassau County. Defendant's response in opposition to Plaintiffs' Motion for Preliminary Injunction (#2), 8.

When Taylor Victor wore a shirt with the statement "Nobody Knows I'm a Lesbian" to school in 2015 she was quickly removed from class and informed that the shirt was in violation of the dress code. As she navigated the process it was suggested that students could not display their "personal choices and beliefs on a shirt" and that it could even be "gang related."[57] As the process went on, however, an assistant principal would simplify things and inform her that the shit was "promoting sex" and "an open invitation to sex."[58] He informed her that "sexuality fell under the category of sex"[59] and would testify in his deposition that the word "lesbian" alone was prohibited as offensive and sexual.[60] Schools attempt this logic because it takes advantage of the *Bethel* framing: schools can ban sexual speech as inherently inappropriate and disruptive of the educational focus of the school.

Where the school in Victor's case noted that they punished similar shirts that declared heterosexuality, other schools did bother with even this pretextual equality. One superintended informed a parent of a girl punished for wearing "Some People Are Gay, Get Over It" shirt that "Pro-LGBT messages are sexual in nature and, therefore, prohibited by the dress code."[61] When Maverick Couch wore a "Jesus is not a homophobe" shirt the principal first attempted to claim that it was disruptive and suggested that it violated the separation of church and state because it "had to do with religion."[62] When a legal demand letter arrived, however, the justification for

[57] T.V. v. Beukelman. Complaint (#1), 4.
[58] T.V. v. Beukelman, Complaint (#1), 4.
[59] T.V. v. Beukelman, Complaint (#1), 4.
[60] T.V. v. Beukelman, Plaintiff's Reply to Defendants' Opposition to Motion for Preliminary Injunction (#19), Exhibit 24.
[61] Young v. Giles County Schools, Complaint (#1), 5.
[62] Couch v. Wayne Local School District, Complaint (#1), 5.

prohibiting the shirt shifted to an assertion that the message "was sexual in nature and therefore indecent and inappropriate in a school setting."[63]

Few took this argument farther than Principal David Davis in Holmes County, Florida, who opened this paper. Students began to engage in various forms of pro-LGBTQ speech after Davis told a lesbian student that "that [she] should not be gay and she should not tell people she is gay" and that "'gay pride' was a disgrace to the school."[64] Davis spent weeks investigating what he termed to be a disruptive and illegal organization of students, regularly interrogating them about their sexuality and similarly warning them to change their ways. As lawyers got involved, the school's defense largely centered on the idea of queer kids being inherently sexual suggesting that such messages as "support gay pride" could make children act out sexually.[65] He even stated that a rainbow with nothing else with it was sexually suggestive though a Confederate flag was fine.[66] He defended this standard based on a duty to the community: parents "believe by sending their kids to my school I will maintain an atmosphere that is conducive to learning, that I will protect their children from exposure to things they wouldn't particularly want them exposed to" and "so any sexual talk, whether it be lesbianism or heterosexualism or any other sexual talk, I would prefer that it was – that students didn't engage in those kinds of conversations."[67]

A standard early argument against GSAs was that they would act as the equivalent of a sex club for high school students. When the Lubbock, Texas, Independent School District

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[63] Couch v. Wayne Local School District, Memorandum in Support of Application for a Temporary Restraining Order and Preliminary Injunction (#3), Exhibit B.
[64] Gillman v. Holmes County, Complaint (#1), 6.
[65] Gillman, First Day Testimony (#76), 104-5.
[66] Gillman, First Day Testimony (#76), 106, 113. He did suggest that the Confederate flag could be banned if it became associated with an illegal organization of students.
[67] Gillman, First Day of Testimony (#76), 117-18.

refused to allow a GSA it justified the refusal based upon the state's law criminalizing sodomy,[68] sexual contact with minors, and the School's abstinence policy. "Allowing clubs based on sexual activity would be encouraging direct contravention of said laws."[69] As the definition of homosexual "is defined by the type of sexual intercourse" people engage in it would be nonsensical to allow a GSA.[70] To the School the only purpose of a GSA is sexual conduct because the central identity of gay, but not straight, students is their sexual conduct.

Inherently Political (and Politics is Disruptive)

In 2018, two seniors at Minarets High School submitted yearbook quotes. While complying with all of the applicable rules, they ran into trouble over the content of the quotes. One, a quote itself from Pink, "I think that the best day will be when we no longer talk about being gay or straight – it's not a 'gay wedding,' it's just a 'wedding.' It's not a 'gay marriage,' it's just 'a marriage.'" Second, "If Harry Potter has taught us anything, it's that no one deserves to live in a closet. What they don't know can't hurt them."[71] The yearbook advisor deleted both of their quotes, without notice, explaining that they were politically divisive: "Sexuality can be a divisive topic in school as well as the community. I feel that putting a quote like this would only cause unnecessary issues."[72] When Amber Hatcher decided to participate in the 2012 Day of Silence, she sought assurance that the silent protest activity would not be punished. The superintendent instructed the principal that "[s]ince this is classified as a protest … I will not

[68] The School filed this argument four months after the Supreme Court invalidated this law but argued that it was valid when the refusal occurred. Caudillo v. Lubbock Ind. Sch. Dist., 45, Defendants' Motion for Summary Judgment (#45), 14.
[69] Caudillo, Defendants' Motion for Summary Judgment (#45), 15.
[70] Caudillo, Defendants' Motion for Summary Judgment (#45), 15
[71] Madrid v. Chawanakee Unified School District, Complaint, 1.
[72] Madrid v. Chawanakee Unified School District, Complaint, 6.

approve the activity on our campuses."[73] On the morning of the Day of Silence the principal informed all staff that the "district has an absolute policy against protesting" on campus and any student engaging in the silent protest should be sent to the office.[74] Amber was sent to the office because she "was dressed in a shirt protesting the occasion."[75] Any declaration of protest, even a silent one, against anti-gay bullying was a political danger to the school environment.

When the Davis County School District in Utah voted to restrict access to Patricio Palacco's *In Our Mothers' House* in 2012 it invoked a form of this political logic. Ultimately, twenty-five challenges were filed against the picture book expressing clearly that their objections were to the idea that an elementary school library would ever have picture book about a family with two moms. The District, however, wanted to avoid too overt a declaration of institutional homophobia so a district lawyer[76] was sent to advise the committee that elementary libraries should be treated as little different from the curriculum. This was important because Utah law, at the time, prohibited any instructional materials containing "advocacy of homosexuality."[77] The District apparently interpreted this to apply to any book that portrayed queer people positively and restricted access to the dangerous picture book and preemptively ordered similar treatment for other queer-inclusive books in the library.[78] As such laws were defended, in part, as

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[73] Hatcher v. DeSoto County School District Board of Education, 4/12/12 email, Complaint (#1), Exhibit D.
[74] Hatcher, 4/20/12 email, Complaint (#1), Exhibit G.
[75] Hatcher, 4/23/12 email, Complaint (#1), Exhibit H. The district would ultimately argue that she was only punished for belligerent behavior in the office but that did not explain why she was sent there in the first place.
[76] It is impossible to say with certainty but having examined records of dozens of book reviews within schools I can say that I have never once seen a school district's attorney involved in the process. The fact that one was here, outside of school board policy, suggests they were sent there for a reason.
[77] A.W. v. Davis County Schools, Complaint (#2), Exhibit 9.
[78] Rogers, Melinda. "Utah Librarians fear decision about lesbian mom book sets bad precedent." *Salt Lake Tribune*, 1 June 2012.

necessary to avoid political controversy,[79] any depiction of positive lesbian characters would be a political choice.

Perhaps the oddest invocation of this too political trope occurred in Fulton, Mississippi, when Constance McMillen was forbidden to bring her girlfriend to prom or to wear a tux. In response to a legal demand letter the school board decided to cancel the prom rather than allow McMillen to bring her date. In justifying the cancellation,[80] the school argued that McMillen "wishes to make the Defendant District the site for a national constitutional argument over gay and lesbian rights."[81] In this frame the prom became "a social event that … was disruptive to the school environment because people are on all sides of the issue."[82] As the only "issue" involved was allowing a lesbian couple to attend, the District's argument amounted to an assertion that their simple presence placed the school itself on "one side" of a political division. Excluding them was by default neutral and nonpolitical. This argument that the prom was disruptive and thus any cancellation fell under *Tinker*'s exception to any expressive freedom issue was supported by administrators and board members testifying that they received many angry calls and emails. They eventually admitted that no disruption actually occurred at the school and, in fact, nearly all of these messages only came in after the decision to cancel was made.

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[79] Rosky, Clifford. 2017. "Anti-Gay Curriculum Laws." *Columbia Law Review* 117: 1461-1541.
[80] As the cancellation was the center of the lawsuit, the District never offered a coherent defense of the rule excluding same sex couples. At one point it claimed that the rule had nothing to do with gay dates but was about preventing male students from bringing male friends and drinking too much. This does not explain why, according to McMillen, the Superintendent informed her that if the girls brought male dates they would still be ejected if they "made anyone uncomfortable" such as by dancing together. McMillen v. Itawamba County School District. Motion for Preliminary Injunction (#4), Exhibit 1.
[81] McMillen v. Itawamba County School District, Response in Opposition (#21), 1.
[82] McMillen v. Itawamba County School District, Response in Opposition (#21), 1.

Each of these schools echo a similar message: the speech or even their presence in school is inherently political and should be squelched. They project a school as outside politics and by doing so inherently construct the school as a straight only space. Any inclusive policy would alter this inherently straight space and make it political.

For Their Own Good

While the superintendent told Rebecca Young's, who wore the "Some People are Gay, Get Over It" shirt discussed above, mother that it was sexual, the principal took a different tack. The principal immediately told her not to wear that shirt or anything else referencing LGBT rights to school "because it made her a target for bullying and provoked other students."[83] This framing would become an attempt to place the issue within *Tinker* arguing that the words invited attack and harassment that would disrupt the environment and that such harassment in the past "demonstrates that there was, and remains, clearly an issue and hostility toward gay, lesbian and transgender students within the Giles County Schools."[84] This echoes the justification offered by the principal of Cumberland High School in the first litigation victory for queer youth in schools in 1980, *Fricke v. Lynch*.[85] Aaron Fricke was forbidden to bring a male date to prom and the principal testified that it was necessary to avoid harm to Fricke or his date since Fricke had already been physically attacked in school.[86] While Rebecca Young's principal may have been genuine in his concern as there was extensive evidence of the school attempting to protect her from bully, Aaron Fricke remembered things quite differently including snide remarks from his

[83] Young v. Giles County Schools, Complaint (#1), 5.
[84] Young v. Giles County Schools, Defendants' Reply to Plaintiff's Response to Defendants' Motion for Relief From Order pursuant to Rule 60 (#25), 5.
[85] *Fricke v. Lynch*, 491 F. Supp. 381 (D. R.I. 1980).
[86] *Fricke*, 491 F. Supp. at 384.

principal and a refusal to offer him any protection as bullying and attacks his senior year were common.[87]

Whether genuine or not, this argument trope turns things around. Where most queer students are faced with institutional homophobia seeking to hide their sexuality or gender to protect the "normal" students, these schools claimed a desire to protect the students from the hate of other students. Of course, the consequence is the same: queer students should neither be seen nor heard within the school environment.

Discussion

Schools have historically been an enemy of queer students. For much of modern history, this would never have required justification from the school. The public policy of government as a whole was centered on a heteronormative citizenry. Thus, it would have just been business as usual to fire gay teachers to protect students from their contagious sexuality. Where students themselves demonstrated sexual perversions, in the lingo of the day, the school would be expected to straighten them out or remove them for the same unspoken need to protect the normal kids. It was only in the 1990s that schools began to have to come up with justifications for such treatment. The assumed must now be made visible to justify why the school did not recognize the equal citizenship of queer students.

Unsurprisingly, much of this justification is influenced by legal doctrines governing schools. The legal filings in Olathe, Kansas, justifying the removal of a lesbian young adult novel all centered on the lack of educational suitability to the book. This was language taken

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[87] Fricke, Aaron. 1981. *Reflections of a Rock Lobster: A Story About Growing Up Gay*. AlyCat Books, 77-84.

directly from the controlling Supreme Court precedent, *Board of Education v. Pico*. The moral disapproval of homosexuality that the board members were happy to testify to was never mentioned by the district's attorneys even though it was the depiction of a happy lesbian couple that made it supposedly unsuitable. When the prom in Fulton, Mississippi, was canceled rather than let a lesbian couple attend it was because the event had become a distraction to the district, not because the school discriminated against queer students. When a girl wore a declaration of her lesbianism on her shirt, she was punished for sexualized speech in the way that any student would be and not because she dared to declare a nonnormative sexual identity.

The full records, however, often expose a more complex story with school officials placing themselves as defenders of the heteronormative ideal that is assumed, unspoken, and thus neutral. The presence of queer students, speech, or books presented a danger to the duty of schools to replicate straight citizens, Thus, they began by essentially trying to deny the existence of queer kids at all. Within this is an assumption that children lack maturity to make the "choice" to accept "that lifestyle" and as such the only purpose of literature that presents LGBTQ stories or a GSA is to convert normal (or confused) children to the perversion of homosexuality (or, more recently, transgenderism). As queer kids came out in larger numbers over time, this narrative was more difficult to maintain and schools shifted to other means of trying to force them into at least a partial closet. The dominant narratives all turned on how the expression of queer orientations presented a danger to the school environment. Queer kids where inherently sexual in nature and thus must be repressed to preserve the non-sexual, but in reality heterosexual, environment of schools. Sexuality is too political, too divisive and any mention of it is dangerous to the tranquility of the school precisely because it challenges the accepted norm. Even school's that present a narrative of protecting the queer student through silencing them play

into this theme because at base the claim is that by being out the queer student is threatening straight students who legitimately can be expected to respond with bullying and violence. Reading these together the narrative can be an ideational point that queer kids should never exist and when they insist upon existing in their bothersome way they must be hidden away to preserve the normal, straight society that schools are intended to be.

Using litigation records, of course, can skew things. After all, most people cannot bring suit under their own resources. Additionally, queer kids need the support or a parent or guardian to bring suit (while minors) and that likely proves a significant barrier. GLSEN's data of school environments suggest that the behavior seen in these lawsuits are by no means unusual, however. Interestingly, queer kids nearly always "win" speech or speech adjacent cases. Of the cases used in this analysis, the students won all but one of them. Of course, won means quite different things. A few went through the full litigation and appellate process but most ended through settlement before any dispositive ruling of the court. These were certainly wins as they almost always came with some degree of substantive change within the school environment. But the nature of settlement can obscure this series of victories because the system of rights litigation in particular treats wins as equivalent to judicial decisions. Settlements then can obscure the legal victories that build to change.

However, GLSEN's own surveys find that students have reported dramatic improvements in school climate in the past twenty years and this is likely partly attributable to the litigation push as well as outside pressures from groups like GLSEN itself. We can see some evidence of this change in a 2017 lawsuit filed against Buffalo City Schools. The students alleged a deeply homophobic environment at McKinley High School demonstrated by the refusal to recognize a GSA or allow same-sex dates at prom, in addition to other verbal and nonverbal administrative

expression that gay students were second class citizens.[88] Within days of the lawsuit being filed the district announced a GSA would be recognized immediately and placed the principal on leave.[89] The district would quickly settle every element of the lawsuit in a way that suggested it was largely unaware of the McKinley High School environment before the suit.[90] This suggests that at least some schools are internalizing the victories that queer kids have built, helped along by opinion and generational changes.

[88] Elliott v. Buffalo City School District, Complaint (#1).
[89] Elliot, Opinion and Order (#29). This opinion dealt with the principal who sought to prevent dismissal claims against her. While the District settled easily, she suggested that the claims were false and had harmed her professional position as shown by her removal from a position she had held for three decades. The Court granted plaintiff's motion to dismiss.
[90] The litigation file is too thin to say for certain that this is the case. The complaint states that the ACLU did contact the district once regarding the GSA and it took no action.

Appendix

For all federal cases records I cite the case, the document, and the docket number where that document is found. For the one state court filing I do not have a docket sheet so only the document is identified. Below I have provided the basic details of all cases used in this analysis.

A.W. v. Davis County Schools (D. Utah, filed 13 Nov 2012) Docket #1:12-cv-00242
Brief description: School put LGBTQ inclusive picture book on restricted access and then began to restrict similar books. Case settled by school district paying plaintiff's attorney fees and ceasing censorship policy.
No reported decisions.

Carver Middle School Gay-Straight Alliance v. School Board of Lake County (M.D. Fla., filed 19 Dec 2013) Docket #5:13-cv-00623
Brief description: School district fought recognition of gay straight alliance arguing that as a middle school it did not qualify as secondary education under the Equal Access Act. The Eleventh Circuit ruled in favor of the GSA finding that under Florida law the school was a secondary school and thus the EAA applied.
Reported decisions:124 F. Supp. 3d 1254 (M.D. Fla. 2015); 842 F.3d 1324 (11th Cir. 2016); 249 F. Supp. 3d 1286 (M.D. Fla. 2017);

Case v. Unified School District 233 (D. Kan., filed 9 March 1994) Docket #2:94-cv-02100

Brief description: Students challenged the removal of an LGBTQ inclusive young adult novel from school libraries. School lost before the district court and appealed only on issue of plaintiff attorney fees.

Reported decisions: 895 F. Supp. 1463 (D. Kan. 1995); 157 F.3d 1243 (10th Cir. 1998).

Caudillo v. Lubbock Ind. Sch. Dist. (N.D. Tex., filed 8 July 2003) Docket #5:03-cv-00165

Brief description: District refused to recognize GSA on grounds that the group's internet material linked to sexual material and that the state's sodomy law and abstinence only education forbid recognition. District Court ruled for school and no appeal was sought.

Reported decision: 311 F. Supp. 2d 550 (N.D. Tex. 2004)

Couch v. Wayne Local School District (S.D. Ohio, filed 3 April 2012) Docket #1:12-cv-00265

Brief description: School forbid student from wearing a shirt saying "Jesus is not a homophobe." District settled and agreed to injunction against censoring the shirt and paid plaintiff's attorney fees.

No reported decisions

Elliott v. Buffalo City School District (W.D. N.Y., filed 10 May 2017) Docket #1:17-cv-00397

Brief description: Students filed suit arguing that in essence LGBTQ students were treated as second class citizens. The high school principal refused to act upon repeated requests for a GSA and took other anti-LGBTQ actions such as forbidding same-sex dates. The District removed the principal and immediately settled all claims.

No reported decision.

Hatcher v. DeSoto County School District Board of Education (M.D. Fla., filed 26 Feb 2013)
Brief description: Student sought to participate in the annual Day of Silence, a day to eliminate antigay bullying, and was denied and then punished for participating. The school district ultimately adopted policies to include sexual orientation and gender identity in the anti-harassment code and a freedom of speech policy. The case was dismissed after that.
Reported decision: 939 F. Supp. 2d 1232 (M.D. Fla. 2013)

Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County (S.D. Fla., filed 15 Nov 2006) Docket #2:0-6-cv-14320
Brief description: District denied GSA recognition claiming that the state's abstinence only program required it. District court ruled for GSA. Appeal filed but dismissed because of failure to prosecute appeal.
Reported decision: 571 F. Supp. 2d 1257 (S.D. Fla. 2008)

Gay-Straight Alliance of Yulee High School v. School Board of Nassau County (M.D. Fla., filed 02 Oct 2009) Docket #3:09-cv-00112
Brief description: District denied recognition to the GSA saying that the name itself was disruptive. District court issued preliminary injunction against school and ultimately school settled and agreed to recognize GSA without a name change and paying plaintiff's attorneys fees.
Reported decision: 602 F. Supp. 2d 1233 (M.D. Fla. 2009)

Gillman v. School Board of Holmes County (N.D. Fla., filed 31 Jan 2008)

Brief description: After students expressed support for gay rights in support of a lesbian student, the principal engaged in an extensive investigation questioning students about their sexuality and informing them that being gay was immoral and against the Bible. Ultimately suspected eleven students on grounds of disruption and belonging to an illegal gang. District court concluded that the school violated students' free speech rights.

Reported decision: 567 F. Supp. 2d 1359 (N.D. Fla. 2008)

Madrid v. Chawanakee Unified School District (Cal. Sup. Ct., filed 6 March 2019) Docket # MCV090168

Brief description: School removed two student yearbook quotes that supported gay rights because they were divisive. District settled suit agreeing to free speech and LGBTQ diversity training for staff.

No reported decision

McMillen v. Itawamba County School District (N.D. Miss., filed 11 March 2010) Docket #1:10-cv-00061

Brief description: Rather than allow a lesbian couple to attend prom the district canceled the event. A private prom was organized and the district court refused an injunction after the district represented that the couple would be allowed to attend that prom. The private prom was then cancelled and a sham prom was held for the girls and a few other students while the other rest of the school attended the real prom. The district's insurer settled the case paying damages and plaintiff's attorney fees.

Reported decision: 702 F. Supp. 2d 699 (E.D. Miss. 2010)

T.V. v. Beukelman (E.D. Cal., filed 15 Oct 2015) Docket #2:15-cv-02163

Brief description: Girl was prohibited from wearing a shirt with "Nobody Knows I'm a Lesbian" on it. The district settled agreeing to a allow the shirt, to provide free speech training, and paying plaintiff's attorney fees.

No reported decisions

Young v. Giles County Board of Education (M.D. Tenn., filed 23 Nov 2015) Docket #1:15-cv-00107

Brief description: Girl was prohibited from wearing a shirt with "Some People are Gay, Get Over It" on it. The district court issued a preliminary injunction and the school settled with agreement to amend the district policy.

Reported decision: 181 F. Supp. 3d 459 (M.D. Tenn. 2015)