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HENKLE V. GREGORY: A LANDMARK STRUGGLE AGAINST STUDENT GAY BASHING

ARMEN H. MERJIAN*

> The systematic failure of the public school system in the United States to protect these students means that they are left to choose between struggling in isolation to survive the harassment as they seek an education or escaping the hostile climate by dropping out of school. The burden these students bear is exacerbated in many cases by the rejection of their families, condemnation within their communities, being demonized by individual teachers and administrators, and rejection by members of the adult lesbian, gay, bisexual, and transgender communities who are too scared of being identified themselves to offer support to gay youth.
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> Human Rights Watch, "Hatred in the Hallways"[1]

> States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
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> United Nations Convention on the Rights of Children.[2]

Although estimates of the number of lesbian, gay, bisexual, and transgender ("LGBT") youth in the United States vary, most researchers place the figure somewhere between five and six percent, or as many as two million school-age children nationwide.[3] They are in every state and every county, from the largest cities to the smallest towns. And they are living in fear. They fear the grinding physical and verbal abuses that await them in school each day. And they fear the

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* Member, New York and Connecticut Bars. B.A. Yale University 1986; J.D. Columbia University 1990. The author is a civil rights and poverty lawyer at Housing Works, Inc., the largest provider of HIV/AIDS services in the State of New York. The author would like to thank Derek Henkle and Jon Davidson for their invaluable assistance.

[1] Human Rights Watch, *Hatred in the Hallways* (2001), *available at* http://www.hrw.org/reports/2001/uslgbt/Final-02.htm [hereinafter *Hatred in the Hallways*].

[2] Convention on the Rights of the Child, G.A. Res. 44/25, Annex, ¶1, U.N. Doc. A//RES/44/25 (November 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2/crc.htm (last visited June 3, 2008).

[3] *Hatred in the Hallways*, *supra* note 1.

disregard or animus of school officials, whose responses often range from denial and inaction, to blaming—and further victimizing—the targets of this harassment, to actively participating in the harassment.

As the discussion below reveals, physical and verbal abuse of LGBT students is rampant throughout the United States. Given that this abuse occurs during the critical, formative stages of adolescent life, peer harassment is profoundly destructive to the hearts, minds, and bodies of untold numbers of LGBT youth across America. The systematic failure of school officials nationwide to address and prevent this victimization is nothing short of a national emergency. Protection from such abuse is a basic human right, yet the federal government has failed to adopt specific measures to prevent it. Meanwhile, only nine states have adopted laws expressly prohibiting harassment or discrimination against students based upon sexual orientation—with most leaving gender identity once again out in the cold—meaning that most LGBT students lack adequate legal protection against peer abuse.[4]

UBIQUITOUS HARASSMENT

Every two years, the Gay, Lesbian and Straight Education Network ("GLSEN") conducts a national survey documenting the experiences of LGBT students in America's secondary schools. The most recent GLSEN survey—released in 2008—demonstrates that peer harassment and violence based upon sexual orientation and gender identity remain epidemic in the United States, and have actually worsened in several categories. Indeed, in the most recent report, nearly two-thirds of the students reported feeling unsafe at school because of their sexual orientation, and 38% felt unsafe because of the way in which they expressed their gender.[5] Almost half of the students had experienced physical harassment on the basis of sexual orientation, and 30% on the basis of gender expression.[6] Perhaps most alarming of all, more than one in five students, 22.1%, were physically assaulted because of their perceived sexual orientation,[7] up from 17.6%

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[4] *See* Asaf Orr, *Harassment and Hostility: Determining the Proper Standard of Liability for Discriminatory Peer-to-Peer Harassment of Youth in Schools*, 29 WOMEN'S RIGHTS L. REP. 117, 121 (2008).

[5] JOSEPH G. KOSCIW ET AL., THE 2007 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS, xi, (2008), *available at* htttp://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1290-1.pdf [hereinafter *GLSEN 2007*].

[6] *Id.* at xviii.

[7] *Id.* at xi.

two years earlier,[8] and one in seven, 14.2%, because of their gender expression,[9] up from one in nine.[10]

These findings echo studies from the 1980's and 1990's in which, among other things, 28% of LGBT youths surveyed feared that they would be physically attacked at school, with males and females equally fearful; 38% feared verbal harassment at school; and 14% reported that they been hit by another youth because of their sexual orientation.[11] A study of Massachusetts high school students published in *Pediatrics* in 1998 found that lesbian, gay, and bisexual youth were "almost five times as likely to have missed school because of fear about safety," were "more than four times as likely to have been threatened with a weapon on school property," and were "more than three times as likely to have attempted suicide in the past 12 months."[12] In a 1999 CBS poll, one-third of the eleventh-grade students surveyed reported that they knew of incidents of harassment of gay and lesbian students.[13] Twenty-eight percent of those students admitted making anti-gay comments themselves.[14]

A 2001 report by Human Rights Watch, entitled "Hatred in the Hallways," reached similar conclusions:

> Nearly every one of the 140 youth we interviewed described incidents of verbal or other nonphysical harassment in school because of their own or other students' perceived sexual orientation. For many lesbian, gay, bisexual, and transgender youth, relentless verbal abuse and other forms of harassment are 'all part of the normal daily routine'. . . .[15]

The report added that it is also "common for lesbian, gay, bisexual, and transgender youth to suffer physical assaults because of their sexual orientation or gender identity."[16]

In addition to the physical and verbal abuse, over half of the LGBT students, 54.8%, in the GLSEN survey had clothing, books, and other property deliberately stolen or damaged in the past year, with one in seven reporting that this happened frequently or often.[17] Fifty-five percent reported at least one instance of

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[8] *SEE* JOSEPH G. KOSCIW ET AL., *THE 2005 NATIONAL SCHOOL CLIMATE SURVEY*, AT XIII (2006), *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/585-1.pdf [hereinafter *GLSEN 2005*].

[9] *GLSEN 2007*, *supra* note 5, at xiii.

[10] *GLSEN 2005*, *supra* note 8, at xiii.

[11] Anthony R. D'Augelli, *Development and Contextual Factors and Mental Health Among Lesbian, Gay, and Bisexual Youths*, *in* RECENT RESEARCH ON SEXUAL ORIENTATION 37 (A.E. Omoto & H.M. Kurtzmann, eds.), *available at* http://www.hhdev.psu.edu/hdfs/faculty/pubs/Omoto1.pdf.

[12] Robert Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents*, 101 PEDIATRICS 895, 900 (1998).

[13] *Out But Not Down*, ANCHORAGE DAILY NEWS, June 24, 1999.

[14] *Id.*

[15] *Hatred in the Hallways*, *supra* note 1.

[16] *Id.*

[17] *GLSEN 2007*, *supra* note 5, at 33.

"cyberbullying" in the past year—receiving threatening or harassing emails or text messages from other students[18]—up from 41% two years earlier.[19] Human Rights Watch concludes:

> Gay youth spend an inordinate amount of energy plotting how to get safely to and from school, how to avoid the hallways when other students are present so they can avoid slurs and shoves, how to cut gym class to escape being beaten up—in short, how to become invisible so they will not be verbally and physically attacked. Too often, students have little energy left to learn.[20]

LACK OF OFFICIAL INTERVENTION AND PROTECTION

As is apparent from the figures above, teachers and officials have proven themselves unable or unwilling to stem the tide of harassment and violence. "The most common response to harassment," Human Rights Watch found, "is no response."[21] Time after time, teachers and officials who either witness the harassment or learn of the harassment from LGBT students turn a blind eye, assuming the posture that "boys will be boys" and "girls will be girls." In the GLSEN study, only 17.6% of students reported that staff who observed homophobic remarks intervened frequently to address the homophobia.[22] Indeed, staff members were less likely to intervene regarding remarks about sexual orientation or gender expression than racist or sexist remarks.[23]

Indifference and inaction in the face of harassment has the dual effect of emboldening the harassers and further alienating the victims, students already wrestling with alienation from society, classmates, and often their own families. As a result, LGBT students are frequently left with no recourse, and no faith in the ability or willingness of school officials to protect their most basic rights. Not surprisingly, then, the majority of LGBT students who are harassed or assaulted in school never report the incidents to school officials.[24]

Worse than inaction, moreover, LGBT students report that an alarming number of school officials actually participate in the harassment themselves. Nearly two-thirds of students in the GLSEN survey reported hearing homophobic comments from their teachers and other school staff.[25] Human Rights Watch similarly found that

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[18] *Id.*

[19] *GLSEN 2005*, *supra* note 8, at 27.

[20] *Hatred in the Hallways*, *supra* note 1.

[21] *Id.*

[22] GLSEN 2007, *supra* note 5, at 20.

[23] *Id.*

[24] *Id.* at xiii. (The report found that 60.8% of students targeted for harassment or assault never reported the incidents to school authorities.).

[25] *Id.* at 21.

> teachers and administrators turned their backs, refusing to take reports of harassment, refusing to condemn the harassment, and failing to hold accountable students who harass and abuse. Some school officials blame the students being abused of provoking the attacks because they 'flaunt' their identity. Other school officials justify their inaction by arguing that students who 'insist' on being gay must 'get used to it.' And finally, some school officials encourage or participate in the abuse by publicly taunting or condemning the students for not being 'normal.'[26]

LASTING PHYSICAL AND EMOTIONAL HARM

Verbal abuse and hate speech, threats and physical assault are self-evidently harmful for any human being. No studies are required to conclude that peer harassment undermines the ability of students to participate and succeed in school, and that it is harmful to their mental health. For adolescents already struggling with demonization by society and typically, rejection by their families, peer harassment can be devastating.

> Each day, most gay youth walk into their schools wondering what they will have to face – taunts, food thrown in the face, lewd mockery in the locker room, being slammed 'accidentally' against lockers during the change in classes – all in front of teachers who hear and see no evil. For some, the burden of coping each day with the endless harassment is too much. They drop out of school. Some commit suicide. Others just barely survive as they navigate the open hostility of peers and the deliberate indifference of school officials. They try to do well academically, but much of their energy is focused on surviving another day.[27]

Students who have been verbally harassed or physically assaulted on the basis of their sexual orientation are almost three times more likely to have missed at least one day of school in a given month, and those experiencing such abuse based upon gender expression are twice as likely to have missed at least a day.[28] Indeed, LGBT students are five times more likely than students in the general population to have missed at least one day of school because of feeling unsafe.[29] At its worst, peer harassment has led LGBT students to drop out of school altogether, to run away from home, to engage in high risk behaviors and substance abuse, and to contemplate or commit suicide. "For many young people, school means showing up under attack on a daily basis and feeling alone, feeling that school officials will not protect them and are frequently part of the problem," says Jon Davidson, Legal Director at Lambda Legal, the largest and oldest national legal

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[26] *Hatred in the Hallways*, *supra* note 1.

[27] *Id.*

[28] GLSEN 2007, *supra* note 5, at xiii.

[29] *Id.*

organization committed to LGBT civil rights.[30] "One of our clients was so fearful of abuse in the hallways that she would actually walk outside between classes, even in the snow," Davidson explained.[31] "She was so fearful of abuse or violence in the bathrooms that she would make sure to go before school and then hold it in all day to avoid the bathrooms, which not only caused pain, but led to a kidney infection."[32]

The case of Derek Henkle, a high school student in Reno, Nevada, demonstrates, as no statistics or dry legal analysis ever can, the destructive power of queer bashing in America's schools. Concomitantly, it illustrates the hurdles that queer students who challenge the status quo must leap to secure their human right to protection "from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation."[33]

DEREK HENKLE

Derek Henkle was born in Denver, Colorado and raised, from the age of three, in a middle class suburb of Reno, Nevada with his parents and two younger siblings.[34] By the age of five or six, Henkle began to suspect that he was different. By the age of twelve, he began to understand the nature of that difference. As Henkle explains, "I wasn't the traditional male. I wasn't doing the sort of sixth-grade male stuff that heterosexual males do. I think I knew that I was different. Everyone else realized that I was different, and that they didn't fit in with me."[35]

Henkle excelled in school, earning a place in Pine Middle School's gifted and talented program.[36] Although he was not "out" at the time, beginning in the sixth grade, Henkle began to suffer homophobic abuse from his classmates. They called him a "fag" and a "sissy," and frequently attacked him in the hallways. "I stopped going to my PE [physical education] class and started going to home economics instead," Derek explained, "because changing in the locker room . . . it was just too abusive."[37]

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[30] Telephone Interview with Jon Davidson (May 5, 2006) [hereinafter *Davidson Interview*].

[31] *Id.*

[32] *Id.*

[33] Convention on the Rights of the Child, Article 19, Paragraph 1, *supra* note 2.

[34] Telephone Interview with Derek Henkle (Aug. 9, 2006) [hereinafter *Henkle Interview*]. The background facts provided in the ensuing pages were gleaned from an interview with Mr. Henkle himself; interviews with Mr. Henkle's lawyer, Jon Davidson; and a review of the papers and proceedings in the case of Henkle v. Gregory, CV-N-00-050-RAM (D. Nev.), unless otherwise attributed.

[35] *Frontline, Assault on Gay America* (undated PBS television broadcast), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/assault/interviews/henkle.html [hereinafter *Frontline*].

[36] Compl., Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2000) (CV-N-00-050-RAM) [hereinafter *Compl.*] *available at* http://www.lambdalegal.org/our-work/in-court/complaints/henkle-v-gregory.html

[37] *Henkle Interview*, supra note 34.

Because he was so gifted intellectually, and because he was desperate to leave the abuse of his middle school, Henkle was permitted to skip eighth grade, entering the "School Within a School" program at Galena High School in Reno, Nevada in the autumn of 1994. In this program, Henkle would spend his first year of high school attending classes with other gifted young students making the early transition to high school. Henkle enjoyed that first year, joining the Speech and Debate Club, making friends, and coming to grips with his own sexuality, including coming out to his parents. More than anything, though, he longed for friends who were going through the same tumultuous struggles as he, to support and advise him as a queer adolescent in a homophobic world. "I was desperately trying to find others like me, and there was no one. That was a tremendously isolating experience."[38]

After his freshman year at Galena, Henkle began to attend queer student meetings at the University of Nevada at Reno. In the autumn of 1995, an independent producer for a local cable access show attended one of the meetings to film a piece on gay students coming out, entitled "Set Free." Henkle appeared on the show for a brief moment, posing a question of "about 12 words" to one of the participants in the piece.[39] His appearance did not go unnoticed among his high school peers.

> Someone at my school saw that show. They confronted me the next day and said, "Hey, I saw you on TV with a bunch of fags. Are you a fag?" And I said, "Well, yeah, I am." It spread like rapid-fire through my high school. By the end of the day, every kid that attended that high school knew that I was gay. So I was out of the closet, and everyone knew it. Verbal stuff started on a daily basis. It was even more intense, now that they knew that I actually was gay. I had actually said it, and they didn't like that . . . .[40]

Following his appearance on the show, Henkle was subjected to a barrage of homophobic abuse, intimidation, and assaults from Galena students. On the bus ride home the very next day, students began what would become an unremitting pattern of harassment. A typical bus ride to or from school involved students hitting him, pushing him, threatening him, throwing objects at him, and spitting on him.[41] In one incident, a student actually brought a prop—latex gloves—which he pulled out inside of the bus. Calling Henkle an "AIDS whore," the student proceeded to lambaste Henkle in front of the other riders, announcing that he was using the latex gloves because he was worried about "getting AIDS" from touching Henkle or Henkle's bags.[42]

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[38] *Id.*

[39] *Id.*

[40] Frontline, *supra* note 35.

[41] Compl., *supra* note 36.

[42] Henkle Interview, supra note 34.

Henkle reported each incident, carefully logging his complaints, but school officials did nothing, emboldening his tormentors.

> I was writing and keeping a big log of daily harassment reports. Every day, I was going into the principal's office and writing down what happened — this person spit food on me, this person pushed a lunch cart into my side, this person pushed me into a locker, these people drew pictures of stick figures bending over and engaging in anal sex with each other. At least once a day, I was in the principal's office, writing a harassment report. And they did nothing about any of them. It gave the students permission to openly harass me, knowing that there wasn't going to be consequences for it. And each time, it got worse and worse and more intense.[43]

Henkle's bus driver, Stephanie Green, also reported the incidents of abuse that she had witnessed, meeting repeatedly with a school official and pleading for something to be done to end the harassment. But school officials did nothing. In an act of true kindness and compassion, and in the face of official inaction, Ms. Green even began driving Henkle directly to his door: students had begun to exit at his stop, or to run from the stop immediately before his, in order to further harass and abuse him.[44]

About one month after Henkle's appearance on the cable access show, several male students at Galena approached Henkle in the school parking lot and called him a "fag," a "butt pirate," a "fairy," and a "homo."[45] Then, as Henkle explains:

> They said, 'Let's string up the fag and tie him to the back of our truck and drag him down the highway.' They took a lasso out and started throwing it around my neck. They got it around my neck three times, and I was able to get it off. All I can remember is being surrounded by these people, and how I was scared to death for my life. I did not know what was going to happen, and all I could do was just keep walking. And they were calling me a fag and throwing a rope around my neck, and genuinely wanted to hurt and kill me. I didn't know how to deal with that. I just finally was able to break free from them, and got into the school. There was a substitute teacher for my class, and I told her to lock the door, because I was afraid that they were going to come in, and harm [me] . . . even in front of a teacher . . . . I actually made her like lock the door. I called the administration from the in-house phones.[46]

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43 Frontline, *supra* note 35.

44 Henkle Interview, supra note 34.

45 Compl., supra note 36, at 6-7.

46 Frontline, *supra* note 35.

Henkle waited in fear for a school official to rescue him, and to address the situation, but nearly two hours passed without relief.[47] Finally, the assistant vice principal appeared. When Henkle told her what had happened, she burst into laughter upon hearing Henkle's almost incoherent protestations.[48]

> I was humiliated. I was embarrassed. I felt that people were trying to kill me, and I didn't know how to deal with that. The administration decided to deal with it in the morning, because it was too close to the end of the school day, and sent me home on the same bus as these kids.[49]

In fact, although school officials knew the names of some of the perpetrators, they neither launched an investigation nor took action for months. Only after Henkle was driven out of Galena did officials take any action. Meanwhile, Ms. Green not only drove a traumatized Henkle to his home that day, but she personally walked him to his door.[50]

Years later, during discovery in Henkle's lawsuit against the school district, a witness came forward to testify that the students who had assailed Henkle in the parking lot had actually made plans to "finish the job." These students subsequently met and hashed out a plot to kill Henkle by hanging him from a gazebo not far from the parking lot.[51] "They were emboldened to do so," Henkle explained, "by the fact that the school officials did nothing to address the incident in the parking lot."[52] The officials' inaction, Henkle observed, "was like pouring gasoline on a fire, signaling their tacit consent to the abuse, and signaling to the students that they could get away with anything."[53] The plan was perhaps foiled by Henkle's transfer out of Galena shortly after this incident.

That same autumn, classmates continually harassed and intimidated Henkle in his mandatory English class. His classmates repeatedly wrote the word "fag" on the board and sent notes to Henkle calling him a "fag."[54] Classmates also drew pictures of men engaged in explicit sex acts on the board and then pointed out the pictures to Henkle in front of other classmates. Henkle's English teacher was aware of this abuse, but did nothing to stop it.[55] In fact, she admonished Henkle that his sexuality was a private matter not to be discussed with other students. "This was a consistent refrain from the school authorities," said Henkle.[56] Indeed, school authorities persuaded Henkle's teachers, parents, and even his therapist to follow the school's recipe for dealing with the matter: urge Henkle to stay in the

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47 Henkle Interview, supra note 34.

48 *Id.*

49 Frontline, *supra* note 35.

50 Henkle Interview, supra note 34.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 Henkle Interview, supra note 34.

closet and avoid any discussion of his sexual orientation. "Their answer to the problem," said Henkle, "was 'just don't talk about it and it won't be a problem.'" They made me feel that I had no right to discuss what I was going through, and that I was to blame for what was happening to me . . . they just shut me down to the world."[57]

In December of 1995, Henkle went to the Galena discipline office to report another incident of homophobic harassment.[58] Ironically, at that very moment, several students ran by the office, hurled homophobic epithets at him, and threw a mechanical pencil at Henkle, which missed Henkle and stuck in the wall behind him. A school administrator who witnessed the incident filed a report, yet school officials made no effort to investigate the incident or discipline the perpetrators, even after Henkle suffered an emotional breakdown in the vice principal's office.[59]

> I was on the floor uncontrollably crying. I didn't know what to do. I wasn't safe anywhere. I was hated by everyone at the school yet forced to go there. Each day, I suffered a 45-minute bus ride of terror, followed by a whole day of horror, at the critical age of puberty. I didn't know if I would survive.[60]

FORCED OUT OF HIS HIGH SCHOOL

Henkle did his best to ignore the abuse. Refusing to be intimidated or silenced, he spoke openly with students about his sexual orientation and wore buttons on his backpack that stated "We Are Everywhere," and "Out."[61] On more than one occasion, however, school officials reiterated that Henkle should not discuss his sexual orientation with other students, a typical example of "blaming the victim." The abuse, hostility, and indifference ultimately proved too much for Henkle. Fearing further harassment and assault, together with official indifference or hostility, Henkle asked to leave Galena at the end of the fall 1995 semester.[62]

School officials decided to transfer Henkle to Washoe High School in Reno, Nevada, an "alternative high school" for struggling students, wholly inappropriate for a student of Henkle's stature. As a condition of the transfer, a school official told Henkle that he must treat his sexuality as a private matter and he must not discuss it with anyone at his new school.[63] Henkle attended Washoe from January through May of 1996.[64] "I went from the top rung of the ladder at Galena to the

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[57] *Id.*
[58] Compl., supra note 36.
[59] Compl., supra note 36.
[60] Henkle Interview, supra note 34.
[61] Compl., supra note 36.
[62] *Id.*
[63] Henkle Interview, supra note 34.
[64] *Id.*

bottom of the ladder at Washoe," said Henkle.[65] At Galena, Henkle was in a program that "tracked" for college, with field trips to the university, visits to advanced science labs, and lectures from college professors. At Washoe, he was tracking for a GED. "We had only four hours of instruction a day at Washoe, with teachers sometimes reading to us from sixth-grade text books," said Henkle. "Friday at Washoe was movie day."[66]

During this time, says Henkle, the principal repeatedly told him not to discuss his sexual orientation with others.[67] What is more, during a meeting in the principal's office, the principal told Henkle to "stop acting like a fag."[68] Henkle and another "straight" student had been horsing around in art class, playing with a piece of plastic netting and dancing around the class. The teacher took the netting away and told the straight student to sit down, sending Henkle to the principal's office for precisely the same offense.[69]

Frustrated by the utter lack of educational opportunity at Washoe—"I wanted to do speech and debate, drama, and other challenging things"[70]—Henkle requested a transfer to a traditional, not an "alternative," high school suited to his educational goals and abilities. The principal, Henkle explains, informed him that such a transfer was not possible in light of the fact that Henkle was openly gay.[71] Eventually, however, the move was approved. Henkle was transferred to Wooster High School in Reno for the fall 1996 semester. Once again, Henkle was instructed not to disclose his sexual orientation at his new school. "This is a bedroom matter, not a classroom matter," he was told.[72]

Things went fairly well at the new school for the first month or two. Although Henkle did not discuss his sexual orientation, students at Wooster High eventually learned that he was gay from his classmates at Galena.[73] Once again, Henkle was subjected to unrelenting abuse, intimidation, and physical assault from his classmates. During one such incident, a student approached Henkle in the parking lot during lunchtime and began punching him in the face, calling him a "bitch" and a "fag."[74] The numerous students witnessing this attack egged on the assailant, who left Henkle bleeding from his nose, lip, ear, and head.[75] Henkle

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65 *Id.*
66 *Id.*
67 Compl., supra note 36.
68 *Id.*
69 Henkle Interview, supra note 34.
70 *Id.*
71 *Id.*
72 Henkle Interview, supra note 34.
73 Compl., supra note 36.
74 *Id.*
75 *Id.*

would eventually require medical attention and miss several days of school as a result of this attack.[76]

Two school police officers witnessed the entire incident, but did nothing to intervene on Henkle's behalf. Although they knew the chief assailant, they refused to arrest him or to discipline any others in the group.[77] The officers discouraged Henkle from reporting the incident as a hate crime and from calling the Reno Police Department to report the crime.[78] In fact, they informed Henkle that if he called the police, they would call and tell them not to come because "we have jurisdiction over this matter."[79] They also discouraged him from filing a report with the school, and would not permit him to file a complaint without his parents' permission.[80] Henkle was not dissuaded. He later filed a complaint with the district attorney, who brought charges against the assailant. Eventually, the assailant pled guilty to a hate crime, receiving community service without jail time and writing Henkle a court-ordered letter of apology.[81]

The abuse at Wooster continued. In math class, students repeatedly harassed Henkle, calling him a "fag" and throwing spit balls at him each day. The teacher's response to this abuse was actually to leave the classroom and go into his office. "After he turned a blind eye," Henkle explained, "the abuse and the violence actually escalated."[82] A student in another of Henkle's classes was dating one of the participants in the lassoing incident at Galena High School. In front of Henkle's entire class, she threatened to get her boyfriend to come to Wooster to "finish the job" on Henkle.[83]

FORCED OUT OF THE ENTIRE SCHOOL SYSTEM

In February of 1997, in the middle of the semester, school officials removed Henkle from Wooster High School without first finding another school to take him. Weeks passed with Henkle stuck in limbo, without a school. Truancy officers even called Henkle's parents to investigate his absence from school, any school.[84] Eventually, the school district placed Henkle, at the age of sixteen, in an adult education program at Truckee Meadows Community College in Reno. The program was, of course, entirely outside of the Reno high school system, but authorities thought that an adult setting might provide Henkle a "safe environment."[85] Henkle's enrollment in the community college rendered him

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[76] *Id.*
[77] *Id.*
[78] *Id.* at 13.
[79] Henkle Interview, supra note 34.
[80] Compl., *supra* note 36.
[81] Henkle Interview, supra note 34.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*

ineligible for a high school diploma. In addition, the adult education program was designed to help adult students obtain a GED. On practice tests, however, Henkle already scored more than high enough to pass the GED test, but at the age of sixteen, he was too young to take the exam—seventeen was the minimum age requirement.[86] The classes were thus worthless for Henkle.

Henkle decided, instead, to take courses at the community college itself. Meanwhile, he began work as a full-time production assistant on the morning show at KTVN, a local television station, as well as working for a local PBS affiliate. His days began early at the station and often ended late at the community college, or immersed in homework. Legally emancipated from his parents at the age of seventeen, in the summer of 1997, Henkle moved to Atlanta, Georgia, where he began working at a local gay youth service organization called "Youth Pride."[87] The organization provided Henkle with a strong support system, and helped ease the pain of his high school ordeal.

> I had attempted suicide twice. It was a tremendously isolating thing. There weren't many people who had experienced what I was going through. This profoundly affected my ability to trust people, to form healthy relationships, and to interact with my own family. There is always a part of my brain waiting for the next attack, a phenomenon that can be consuming.[88]

With remarkable perseverance and compassion, however, Henkle was determined not to let his experiences overwhelm him. Instead, in numerous speaking engagements, he used his experiences to reach out to others, to educate and inform, to help queer youth deal with their struggles, and to help schools prevent and address all forms of bigotry and abuse against students who are in any way "different." Speaking on an American Bar Association panel, Henkle met a civil rights lawyer handling a student gay-bashing lawsuit that had facts very similar to his own situation. Henkle had spoken to numerous attorneys in Reno about his case, but no one would go near it. In fact, every lawyer he consulted advised him that the case could not be brought. But now he had hope. In 1999, while working at Turner Broadcasting Company, Henkle began to meet with lawyers from the Atlanta chapter of Lambda Legal. They referred the case to Jon Davidson of Lambda Legal's Los Angeles office, and Davidson began the task of preparing the case for filing.[89]

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[86] Henkle Interview, supra note 34.

[87] *Id.*

[88] *Id.*

[89] *Id.*

HENKLE V. GREGORY

In January 2000, Henkle filed suit in the District Court of Nevada against the Washoe County School District ("School District") and several school officials, later amending the papers in May of 2000.[90] Recounting the ugly and incessant abuse to which he was subjected, Henkle alleged that the "Defendants were aware of the verbal and physical harassment and abuse, and had the authority to institute corrective and preventative measures, but Defendants repeatedly and intentionally failed to take the necessary measures to stop it."[91]

"Rather than appropriately addressing the harmful behavior of other students," Henkle alleged, "Defendants shifted Plaintiff from school to school throughout the District," and they did so because of Henkle's "sexual orientation, sex, and expression about his sexual orientation."[92] As a result, "Defendants deprived [Henkle] of the benefits of a high school education, and caused his transfer at the age of 16 out of the Washoe County School District to an adult education program that could not provide [him] with a high school diploma."[93] "The lack of a high school diploma" would have a "serious adverse impact on [Henkle's] professional, economic, and academic future."[94] In addition, the defendants caused Henkle to suffer "severe and extreme emotional distress and psychological damage" along with "bodily injury," from physical violence to "insomnia, loss of appetite" to "suicide attempts."[95] The physical and emotional abuse was so severe, Henkle explained, that he was diagnosed with post-traumatic stress disorder.[96]

Henkle's chief claims stemmed from the United States Constitution: the defendants had denied him Equal Protection under the Fourteenth Amendment[97] on the basis of his sexual orientation and his sex, and they denied him his First Amendment[98] right to free speech "by censoring and chilling [his] speech," by "deterring him from exercising his First Amendment rights," and by retaliating against him when he did so.[99] The Defendants also violated Title IX of the Education Amendment Act of 1972,[100] which prohibits discrimination based upon sex in educational settings,[101] and they negligently failed to protect Henkle.[102]

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[90] Compl., supra note 36.

[91] *Id.* at 3.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 15.

[95] Compl., supra note 36 at 14.

[96] Compl., supra note 36 at 14.

[97] U.S. CONST. amend. XIV, §1. The Equal Protection clause grants all Americans "the right to be free from invidious discrimination in statutory classifications and other governmental activity." *See also* Harris v. McRae, 448 U.S. 297, 322 (1980).

[98] U.S. CONST. amend. I.

[99] Compl., supra note 36, at 21-22.

[100] 20 U.S.C. § 1681(a) (1972).

[101] Compl., supra note 36, at 19-20.

Henkle sought not only compensatory and punitive damages, but an order directing the Washoe County School District to award him a high school diploma.[103]

"What we have here," Davidson announced, "is a school district's complete abdication of its responsibility to protect all young people in its care."[104] "Unfortunately, the problem of harassment against gay youth is ubiquitous in schools across the country. This lawsuit will show that there is a heavy price to pay for allowing students to live in fear and suffering because of anti-gay abuse."[105]

THE SCHOOL DISTRICT MOVES TO DISMISS

In June of 2000, the School District and the individual officials moved to dismiss all of Henkle's constitutional and civil rights claims, the heart of his lawsuit.[106] They could not very well deny the outrageous abuse that Henkle had been forced to endure, or claim that they had taken appropriate measures to end the abuse. What they could have done, however, is to issue an apology to Henkle, award him his diploma, and offer fair compensation for his suffering. Instead, they sought to establish, for Henkle and all other queer students in his shoes, that no constitutional or civil rights claims can be brought against the District or its officials, no matter how outrageous the abuse, and the neglect.

Henkle could not advance an equal protection claim, the School District argued, because a plaintiff cannot sue under both the Equal Protection Clause and Title IX. Relying upon *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,[107] the School District argued that Title IX subsumes and thus precludes the equal protection claim.[108] As the Supreme Court later explained, however, under *Sea Clammers*, a party is only precluded from bringing an equal protection claim if that constitutional claim is "virtually identical" to the statutory claim—in this case Title IX—and if Congress clearly intended to foreclose the constitutional claim.[109] Henkle's first constitutional claim alleged a violation based upon sexual orientation. Unless the School District was prepared to concede that Title IX prohibits discrimination based upon sexual orientation, rather than simply "sex"—a concession that, as Henkle pointed out, Title IX defendants "rarely

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[102] *Id.* at 23. 20 U.S.C. § 1681(a) (1972).

[103] Compl., supra note 36.

[104] Press Release, Lambda Legal, Lambda to Sue Reno School Officials for Failing to Protect Gay Student (Jan. 27, 2000), http://www.lambdalegal.org/news/pr/lambda-to-sue-reno-school.html (last visited Sept. 15, 2009).

[105] *Id.*

[106] Defs.' Mot. to Dismiss First, Second, Third, Fourth, Seventh, and Eighth Claims for Relief and Claims for Punitive Damages at 6-10, Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2000) (CV-N-00-050-RAM) [hereinafter *Mot. to Dismiss*] (on file with the author).

[107] Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).

[108] Mot. To Dismiss, *supra* note 106, at 17.

[109] Smith v. Robinson, 468 U.S. 992, 1009 (1984).

if ever made"[110]—then the School District could not argue that the constitutional claim was identical to the Title IX claim.

In addition, the majority of courts, including every district court in the Ninth Circuit, the circuit in which *Henkle* was filed, had ruled that Title IX did not preclude a claim for constitutional violations at school.[111] In passing Title IX, finally, Congress had certainly not expressed any intent to strip future plaintiffs of the right to bring constitutional claims, a prerequisite for a finding of preclusion under Title IX.[112]

Not only were the equal protection claims barred, the defendants asserted, but there was no basis for a Title IX claim either. School officials are immune from Title IX claims, they argued, unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[113] Henkle was harassed by male students, and school officials could not have known that "abuse by students of the same sex violated a clearly delineated Title IX right."[114] In other words, even if boys were abusing Henkle verbally and physically—including, notably, throwing a lasso around his neck and apparently attempting to murder him—school officials could not have known that this was a violation of Henkle's constitutional or statutory rights, since it was male on male harassment and violence.

In his complaint, however, Henkle never alleged that the abuse he suffered was somehow limited to male-on-male harassment. Rather, he broadly alleged that "students" and "classmates" committed these acts of harassment.[115] In addition, Henkle alleged that the defendants themselves "'discriminated against and harassed Plaintiff on the basis of sex.'"[116] The failure to prevent harassment was irrelevant to the latter charge. Finally, at least one court in the Ninth Circuit had ruled that, as in workplace harassment claims, "same sex" student harassment was indeed actionable against school officials.[117]

As for Henkle's First Amendment claim, the School District argued that, under established case law, speech "may be regulated or suppressed if it disrupts or

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[110] Pl. Derek Henkle's Opp'n to Defs.' Mot. to Dismiss Claims Pursuant to Fed. R. Civ. P. 12(b)(6) at 8, Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2000) [hereinafter *Opp'n*] (on file with the author).

[111] *See, e.g.*, Crawford v. Davis, 109 F.3d 1281, 1283-84 (8th Cir. 1997); Seamons v. Snow, 84 F.3d 1226, 1233-34 (10th Cir. 1996); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723-24 (6th Cir. 1996); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1380-81 (N.D. Cal. 1997); Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1466 (N.D. Cal. 1995); *see also* Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465, 1474 (1998).

[112] Zwibelman, *supra* note 111, at 1481.

[113] Mot. to Dismiss, *supra* note 106, at 13.

[114] *Id.* at 14.

[115] Opp'n, *supra* note 110, at 17.

[116] *Id.*

[117] Oona R.-S. v. Santa Rosa City Schs., 890 F. Supp. 1452, 1466 (N.D. Cal. 1995).

may disrupt the learning and academic environment."[118] Henkle's own allegations showed that "substantial disruption resulted from or as a result of Henkle's sexual orientation speech," so authorities had every right to suppress it.[119] In support of this argument, the School District cited *Clark v. Dallas Independent School District*,[120] a case in which speech was permissibly prohibited where the students were broadcasting messages with *bullhorns*, thus disrupting school activities.[121]

A more quintessential case of blaming the victim—this time by the School District's lawyers rather than its school officials—would be hard to find. Henkle had not disrupted the learning environment with his speech, which was never abusive, loud, or delivered through a bullhorn. Instead, the mere expression of his sexual orientation and beliefs had led his *victimizers* to cause disruption—disruption to *Henkle's* "learning and academic environment."[122] To blame Henkle for the disruption of his abusers was, as his lawyers contended, a "startling assertion . . . that completely subverts free speech in the schools by granting other students a 'heckler's veto' to decide through violent methods what speech will be heard."[123] "[D]efendants' legal attack," they pointed out, "is premised on precisely the type of anti-gay bias that plaintiff seeks to remedy in this lawsuit."[124]

Decades ago, the Supreme Court established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[125] If an individual quietly expressing pro-Catholic, pro-Italian, or pro-Vietnamese views were subjected to repeated violence and abuse, would the School District fairly argue a right to suppress such views on the grounds that they were disruptive? As one court has explained, disruption "must come from the speech itself," and "threatened disruption by others as a result of speech may not serve as a justification [for suppressing or punishing the speech]."[126] In such situations, the Seventh Circuit has observed, "[t]he school's proper response is to educate the audience rather than squelch the speaker."[127]

THE RULING

On February 28, 2001, Magistrate Judge Robert A. McQuaid, Jr. issued his decision.[128] Agreeing with the defendants, and despite the weighty arguments

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[118] Mot. to Dismiss, *supra* note 106, at 17.

[119] *Id.* at 18.

[120] Clark v. Dallas Indep. Sch. Dist., 671 F. Supp. 1119, 1122 (N.D. Tex. 1987), *amended by* 701 F. Supp. 594 (N.D. Tex. 1988), *appeal dismissed without opp'n*, 880 F.2d 411 (5th Cir. 1989), *vacated*, 806 F. Supp. 116 (N.D. Tex. 1992).

[121] *See id.*

[122] *Id.*

[123] Mot. to Dismiss, *supra* note 106, at 20.

[124] *Id.*

[125] Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 506 (1969).

[126] Scruggs v. Keen, 900 F. Supp. 821, 833-34 (W.D. Va. 1995).

[127] Hedges v. Wauconda Cmty Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1993).

[128] Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001).

described above, he ruled that Henkle's equal protection claims were subsumed by his Title IX claims and were thus precluded.[129] The judge's agreement with the defendants ended there. Quoting the Supreme Court, Judge McQuaid observed that "[s]chool officials cannot suppress expressions of feelings with which they do not wish to contend."[130] Defendants could not reasonably argue that Henkle's speech "caused a 'substantial disruption of or material interference with school activities,'" or that such disruption was likely to occur.[131] It appeared from the allegations, moreover, that Henkle's "constitutionally protected speech was a substantial motivating factor in adverse action directed at him."[132] Henkle's First Amendment claims would not be dismissed.

Judge McQuaid also refused to find defendants immune from liability on the grounds that they did not know Henkle had a "clearly established right" to be free of the vicious abuse he suffered.[133] "If Defendants' argument were to be accepted," McQuaid ruled, "it would allow future Defendants to abuse the 'clearly established right' standard so that each time a new fact situation arose they would be entitled to qualified immunity."[134] Did officials honestly believe that threatening, abusing, harassing, spitting upon, assaulting, and lassoing Henkle violated none of his rights?

Finally, to obtain punitive damages, Henkle was required to demonstrate the officials' actual knowledge of the abuse and a deliberate indifference—a conscious or reckless disregard—of the consequences.[135] Based upon the facts alleged, Judge McQuaid ruled, Henkle might well be able to prove those elements at trial. His claim for punitive damages would proceed.

THE SETTLEMENT

Having lost its motion to dismiss, and facing an ugly trial that it could not win, in August 2002, the School District agreed to settle the case. The School District agreed to pay Henkle $451,000 in damages for the discrimination and abuse he suffered, the largest pre-trial award of its kind in history.[136] Henkle immediately donated $15,000 of this amount to Lambda to establish a public

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[129] *Id.* at 1072-75 (among other things, the court simply ignored Henkle's argument that, unless defendants and the court were prepared to concede that Title IX prohibits discrimination based upon sexual orientation, the court could not find that his claim for Equal Protection based upon sexual orientation was preempted by Title IX).

[130] *Id.* at 1074 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

[131] *Id.* at 1075.

[132] *Id.* at 1076.

[133] *Id.*

[134] *Henkle*, 150 F. Supp. 2d at 1072-75.

[135] *Id.* at 1077-78.

[136] Press Release, Lambda Legal, Groundbreaking Legal Settlement is First to Recognize Constitutional Right of Gay and Lesbian Students to be Out at School & Protected From Harassment (Aug. 28, 2002) [hereinafter *2002 Press Release*], http://www.lambdalegal.org/news/pr/groundbreaking-legal.html (last visited Sept. 9, 2009).

education campaign to empower lesbian, gay, bisexual, and transgender youth to address harassment and violence.[137] The rest he would use to secure a college education, an education that had been foreclosed by his banishment from the Washoe school system. To this end, the School District agreed to place a letter in Henkle's academic file acknowledging that the abuse he suffered directly affected his academic performance.[138]

In addition, the School District agreed to eighteen critical and groundbreaking changes to its policies regarding students, teachers, administrators, and school police.[139] Among other things, the School District amended its policy on student freedom of expression to expressly recognize students' rights to disclose their sexual orientation at school, and to discuss related issues in school settings.[140] The School District's policy on discrimination and harassment was amended to require regular student training on these issues, and regular training of all school staff on the prevention of and proper response to harassment and intimidation.[141] Under the new policy, if school staff witness behavior in violation of the School District's policy on discrimination and harassment, they are required to take prompt measures to stop the behavior; to report the incident to the District's Legal Division, and to report to law enforcement any such conduct that is violent or criminal. Finally, the School District's prohibition on discrimination or harassment based upon race, color, national origin, sex, sexual orientation, age, disability, or religious preference was expressly amended to cover discrimination and harassment based upon non-conformity to gender stereotypes. These changes, affecting tens of thousands of students in the Washoe County School District, would serve as a national model for preventing and addressing intimidation and harassment in the schools.[142]

Davison said: "Today's settlement tells schools across the country that they must allow gay students to be fully out and must protect them from discrimination."[143] "Lesbian and gay students are coming out at younger ages. This settlement provides the first real blueprint for how schools can meet their legal obligations as this trend continues."[144] "I'm signing this agreement today on behalf of the 84% of my peers who are assaulted daily while trying to go to school," said Henkle.[145]

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137 Henkle Interview, supra note 34.

138 2002 Press Release, *supra* note 135.

139 *Id.*

140 *Id.*

141 *Id.*

142 Davidson Interview, *supra* note 30; *see also* 2002 Press Release, *supra* note 135.

143 2002 Press Release, *supra* note 135.

144 *Id.*

145 *Id.*

> This settlement will help make sure other students don't go through what I did in Reno. Gay and lesbian students face hostility from other students, and even from school staff, every day in schools across the country. I was deprived of my education because of this, but I'm pleased that this settlement will show other students that they can fight for their rights to be open and honest about who they are, to be protected from harassment and abuse, and as a result to have basic access to an education.[146]

After the settlement, Henkle embarked on a press campaign "to make this a living room issue."[147] Among other venues, Henkle appeared on the Today Show, Good Morning America, the NBC Nightly News, and the O'Reilly Report. During an interview on the O'Reilly Report, Bill O'Reilly—taking a page out of the Washoe County 1996 First Amendment playbook—advised Henkle and any other young, queer listeners that the answer was to stay completely in the closet:

> And I have to tell you, Mr. Henkle, I mean, we don't want any American ever to be tortured or harassed by anyone, but I am going to say again: Do not define your sexuality out there, you guys or girls listening, in any way. It's not going to be good for you.[148]

O'Reilly lectured Henkle that while he was right to file the lawsuit, he was blameworthy for discussing his sexual orientation at school, thereby inviting trouble:

> O'REILLY: And you did the right thing. You filed a lawsuit. You did the right thing.
> Now, let's get back to the closet deal. You knew—you knew that once you pronounced yourself gay that it wasn't going to go down, you were going to get a lot of flak. Why [sic] was the point? Why did you do it?
> HENKLE: Well, you know, I think that asking a student to stay in a closet in order to go to school is a lot like . . .
> O'REILLY: I'm asking you to shut up about sex.
> HENKLE: . . . asking an African-American . . .
> O'REILLY: No, no, no, no.
> HENKLE: . . . student to paint their skin white in order to go to school.
> O'REILLY: No.
> HENKLE: And, Bill, I really . . .
> O'REILLY: That's an invalid comparison.
> HENKLE: It's not about sex. It's—and it's not about sex.
> O'REILLY: Mr. Henkle, listen to me for a minute.
> HENKLE: I wasn't talking about sex on my school campus.
> O'REILLY: Sure you are.
> HENKLE: What I was saying—no, I wasn't. I was saying . . .

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146 *Id.*

147 Henkle Interview, supra note 34.

148 *O'Reilly Factor, Back of the Book* (Fox News Network television broadcast Sept. 23, 2002) available at http://www.jimgilliam.com/2004/08/oreilly_lied_about_outfoxed.php.

O'REILLY: You're saying you're gay.
HENKLE: . . . I was gay, which is . . .
O'REILLY: You're talking about sex.[149]

NOT ALONE

Sadly, as the studies cited earlier in this article demonstrate, Henkle's story is not remotely unique. Similar cases abound, with school districts throughout the country aggressively defending their disregard or malfeasance and seeking to severely restrict the rights of LGBT students to obtain legal redress. Indeed, in the spring of 1996, at the same time that Henkle was wrestling with discrimination at his high school, lawyers at Lambda were awaiting the decision of the Court of Appeals for the Seventh Circuit in the analogous case of *Nabozny v. Podlesny*.[150]

Jamie Nabozny realized that he was gay in the seventh grade, a fact his classmates in Ashland, Wisconsin soon discovered as well. Classmates began verbally and physically abusing him, routinely referring to him as a "faggot," hitting him, and spitting on him.[151] Despite Nabozny's pleas for help, the response of school officials was at best flaccid, and the abuse only worsened during that seventh-grade year. In a science classroom, two students pushed Nabozny to the floor and performed a mock rape as twenty other students watched and laughed. Nabozny escaped to the principal's office, where, he told the court, the principal told him that "boys will be boys" and that if he was "going to be so openly gay," he should expect such behavior from his classmates. No action was ever taken against the perpetrators.[152]

In the eighth grade, the abuse continued. Shortly into the school year, several students attacked Nabozny in the bathroom. Nabozny's parents met with the principal and the perpetrators. The latter denied the incident ever occurred, and no action was taken against them. Meanwhile, the principal told Nabozny's parents that he should expect such incidents because he was "openly" gay.[153] Similar incidents followed, accompanied by similar meetings between Nabozny's parents and the principal. Each time, Nabozny identified the perpetrators, and each time, the principal pledged to take action and failed to do so. With the harassment spiraling out of control, a district attorney advised Jamie to take a week and a half off from school. When he returned, the abuse continued, driving Jamie to attempt suicide. After he was released from the hospital, Nabozny finished eighth grade at a Catholic school.[154]

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149 *Id.*
150 Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.* at 451-52.

Shortly after he returned to public high school for his ninth grade year, Nabozny was assaulted in the bathroom. One student struck him in the knee, forcing him to fall into the urinal, whereupon another student urinated on him.[155] After meetings with the high school principal and Nabozny's parents, the school placed Nabozny in a special education class, despite the fact that the assailants were special education students. The school took no action against the perpetrators, treating Nabozny as the problem rather than addressing the abusive and indeed criminal conduct of its students. In the middle of his ninth grade year, Nabozny again attempted suicide.[156] After he was released from the hospital, Nabozny ran away to Minneapolis. When he returned to Wisconsin, Nabozny was ordered to return to the high school, since his parents could not afford a private school.[157]

The abuse continued. Students on the school bus routinely hurled epithets at Nabozny, such as "fag" and "queer," and pelted him with steel nuts and bolts.[158] When Nabozny's parents complained, the school changed his assigned bus seat, but the harassment continued.[159] Waiting outside of the school library, Nabozny was attacked by eight students, including one of the students who had attacked him in the bathroom. That same student kicked Nabozny in the stomach for five to ten minutes as other students looked on and laughed. The police liaison dissuaded Nabozny from filing charges. The school official in charge of discipline laughed and told Nabozny that he deserved what he got because he was gay.[160] Weeks later, Nabozny collapsed from internal bleeding as a result of the beating.[161]

After Nabozny and his lawyers at Lambda filed suit, the public school defendants vigorously opposed Nabozny's claims, at the same time seeking to establish legal precedent making it impossible for LGBT plaintiffs to prevail on similar claims. Among other things, they argued that "there is no allegation that any of the individual defendants participated in, directed or authorized any of the harassment."[162] The federal district court obliged the defendants, ruling that a school could not be held liable for the actions of students and that no equal protection claim was presented in Nabozny's case.[163]

The court also found that "[t]here is absolutely nothing in the record to indicate that plaintiff was treated differently by the defendants because of his gender."[164] But Nabozny had been treated differently because of his gender: the

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155 *Id.*

156 Nabozny v. Podlesny, 92 F.3d 446, 452 (7th Cir. 1996).

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 Reply Brief for Appellant, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (No. 95-3634), *available at* http://www.lambdalegal.org/our-work/in-court/briefs/nabozny-v-podlesny.html.

163 Lambdalegal.org, Lambda Summary of Case, http://www.lambdalegal.org/in-court/cases/nabozny-v-podlesny.html (last visited Sept. 3, 2009).

164 Nabozny v. Podlesny, 92 F.3d 446, 454 (7th Cir. 1996).

defendants admitted to several incidents in which, unlike the handling of Nabozny's complaints, claims of harassment by female students resulted in prompt discipline.[165] In addition, Nabozny had alleged that he was treated differently because of his sexual orientation, a claim the district court refused to acknowledge.

In July 1996, the Seventh Circuit reversed, ruling that the defendants had indeed violated Nabozny's constitutional right to equal protection, discriminating against him based upon gender and sexual orientation.[166] Among other things, the court noted that, "the defendants do not deny that they aggressively punished male-on-female battery and harassment,"[167] and concluded, "[w]e find it impossible to believe that a female lodging a similar complaint would have received the same response."[168] The court also recognized Nabozny's constitutional right to protection against discrimination based upon his sexual orientation.[169]

The case was sent back down to the district court. After a two day trial in Eau Claire, Wisconsin in November 1996, a jury of seven unanimously found school officials liable for not protecting Nabozny. Hours after receiving the verdict, the parties agreed to a settlement in which Nabozny received more than $900,000 in damages.[170]

Speaking on the importance of this case years later, Nabozny commented: "I think the most important change is the fact that it's empowered youth, and youth now realize that they don't have to put up with antigay harassment in schools."[171] One of those youths was Derek Henkle. Reading about Nabozny's case in *Out* magazine in the throes of his own ordeal, Henkle was "elated" to learn that someone in his very shoes was fighting back, with national legal counsel at his side.[172] "Jamie's case empowered me to seek justice in my own case," Henkle explained. "[I]n bringing my lawsuit, I was determined to reach an even greater number of queer youth . . . to reach those who might not have access to *Out* magazine."[173]

BRUTALITY AT A CRITICAL JUNCTURE

A gifted student was nearly destroyed. Treated as if he were the problem, Henkle was systematically brutalized and educationally marginalized while school officials looked on, looked away, or even encouraged this brutality. All of this

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165 *Id.* at 454-55.

166 *Id.* at 455.

167 *Id.*

168 Nabozny, 92 F.3d at 454-55.

169 *Id.* at 457-58.

170 *$900,000 Won by Gay Man in Abuse Case*, N.Y. TIMES. Nov. 21, 1996, at B11.

171 *Q and A with Jaime Nabozny*, LAMBDA LEGAL. June 1, 2000, http://www.lambdalegal.org/cgi-bin/iowa/documents/record2.html?record=682.

172 Telephone Interview with Derek Henkle (Aug. 9, 2006).

173 *Id.*

occurred in Henkle's mid-teens, at the very time he was wrestling with the weight of being gay in a rigidly straight world. As Henkle explains:

> To be a gay kid, there was this internal process that you're going through. Everything that you see around you is not like you. Your parents aren't like you. The commercials that you see on TV aren't like you. Your friends aren't like you. Nothing is like you. So you're going through this big internal process of, 'wow, I'm just so different from everything in my environment.' And then on top of that, you're being harassed in school.[174]

Since Henkle's high school days, some improvements have been made. LGBT student clubs and committees, along with "gay-straight" alliances, have been formed in many schools throughout the country. Following the blueprint established in *Henkle v. Gregory*, school districts in different parts of the country have implemented a "zero tolerance" policy for gay bashing and other school harassment and violence. The statistics set forth at the beginning of this chapter clearly demonstrate, however, that the efforts thus far have been grossly inadequate. The GLSEN report and others like it demonstrate that *Henkle* is at best an egregious exemplar of the rule in American schools. Henkle's case should serve as a clarion call to teachers, school officials, and all who care about civil and human rights. Indeed, we have a crisis on our hands, requiring swift and profound changes in the culture of hate, violence, and indifference in America's schools. The hearts, minds, and bodies of millions of youths in this country hang in the balance.

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[174] *Frontline: Assault on Gay America* (undated PBS television broadcast), http://www.pbs.org/wgbh/pages/frontline/shows/assault/interviews/henkle.html.