

# Cyberbullying and the Innocence Narrative

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*This Article critically examines recent debates about the bullying and harassment of gay teens. A string of suicides in the fall of 2010 yielded a wide range of legal reforms at both the state and federal levels. The accompanying debates, however, have largely employed one-dimensional accounts of the difficulties faced by gay teens, excluding more nuanced, complex, and empowered accounts of teenage sexuality. Although many gay teens are certainly vulnerable to bullying and harassment, these entrenched narratives of innocence and vulnerability have been used to justify both strong protectionism — e.g., through questionable hate crimes prosecutions — and ubiquitous paternalism — e.g., through “antibullying” monitoring and reporting — while obscuring the sexual agency of gay teens. This Article will (1) track the persistent use of a gay teen innocence narrative in several legal and cultural contexts; (2) explore how recent antibullying efforts reify such innocence at the potential expense of gay teens’ social and sexual agency; and (3) situate this filtering of gay teens’ experiences within the broader context of the LGBT rights movement.*

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## INTRODUCTION

Recent debates about antigay bullying have offered overly simplistic accounts of gay teens<sup>1</sup> and the development and maintenance of their sexual

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<sup>1</sup> I generally use the term “gay teen” throughout this Article to refer to same-sex attracted teenagers who adopt — or are presumed to adopt — the sexual orientation labels “gay,” “lesbian,” or “bisexual.” I do this primarily to reflect the terminology largely used in popular bullying discourse, aware of the potential contingency and under-inclusiveness of the label as applied to youth with at least some degree of same-sex attractions. See, e.g., RITCH C. SAVIN-

identities. A wide range of legal initiatives to combat bullying have prefigured vulnerable and sexually innocent victims in need of state, school, and family protection, and have largely overlooked more nuanced, complex, or empowered accounts of teenage sexuality. This oversight is unfortunate. As we increasingly seek to combat antigay bullying through legislation, educational policy, and criminal prosecution, a narrow focus on the innocence of gay teens may limit their capacity to explore their desires, and may shift attention away from resources that might foster the successful negotiation of identity and an often-complicated social landscape. This Article examines this selective representation of gay teen agency and identity in the bullying debate and explores what is lost in the process.

A string of suicides by gay teens in the fall of 2010 brought nationwide attention to the struggles of gay, lesbian, bisexual, and transgender youth. In the wake of these incidents, a wide range of antibullying laws and regulations have been enacted to prevent, monitor, and punish bullying,<sup>2</sup> and public figures as diverse as President Barack Obama, Ellen DeGeneres, and Kim Kardashian have spoken out in support of such initiatives.<sup>3</sup> States have amended their laws to criminalize off-campus “cyberbullying,” given school officials broader authority to punish bullying, and conditioned educational funds on the implementation of rigorous antibullying programs.<sup>4</sup> Congress is currently considering similar legislation,<sup>5</sup> and the Federal Communications Commission (“FCC”) and Department of Education have each sought to condition school funding on greater bullying oversight.<sup>6</sup>

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WILLIAMS, *THE NEW GAY TEENAGER* 44 (2005) (concluding that 15–20% of adolescents have some degree of same-sex orientation, that less than half of those have exclusive or near-exclusive same-sex orientation, and that only 3–4% embrace a gay or bisexual identity). To the extent that clarity, gender distinctions, or particular theoretical approaches call for different terms, I use them as well.

<sup>2</sup> See, e.g., Yamiche Alcindor, *States Look to Enact Cyberbullying Laws*, USA TODAY (Mar. 19, 2012, 12:24 PM), <http://www.usatoday.com/news/nation/story/2012-03-18/state-cyberbullying-laws/53626736/1>. For an excellent, frequently updated summary of state and federal cyberbullying laws, see SAMEER HINDUJA & JUSTIN W. PATCHIN, *STATE CYBERBULLYING LAWS: A BRIEF REVIEW OF STATE CYBERBULLYING LAWS AND POLICIES* (2013), available at [http://www.cyberbullying.us/Bullying\\_and\\_Cyberbullying\\_Laws.pdf](http://www.cyberbullying.us/Bullying_and_Cyberbullying_Laws.pdf).

<sup>3</sup> Brian Bond, *President Obama: It Gets Better*, WHITE HOUSE BLOG (Oct. 21, 2010, 11:30 PM), <http://www.whitehouse.gov/blog/2010/10/21/president-obama-it-gets-better>; Ellen DeGeneres, *An Important Message from Ellen About Bullying*, ELLEN DEGENERES SHOW (Oct. 5, 2010), <http://www.ellentv.com/2010/10/06/an-important-message-from-ellen-about-bullying/>; Kim Kardashian, *It Gets Better!!!*, KIM KARDASHIAN: OFFICIAL WEBSITE (Oct. 13, 2010), <http://kimkardashian.celebuzz.com/2010/10/13/kim-kardashian-simon-huck-it-gets-better-gay-youth-video/>.

<sup>4</sup> See *infra* notes 51–55 and accompanying text; see also Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, AM. CRIM. L. REV. (forthcoming 2013) (manuscript at 39–41), available at <http://ssrn.com/abstract=2155814> (summarizing state legislative attempts to “Get[] Tough on Bullying”).

<sup>5</sup> See Safe Schools Improvement Act of 2013, S. 403, 113th Cong. (2013).

<sup>6</sup> See *In re Sch. & Libraries Universal Serv. Support Mechanism*, 26 FCC Rcd. 11819, 11822 (2011); Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office of Civil Rights, to Colleague 1 (Oct. 26, 2010), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

The suicide of Rutgers University freshman Tyler Clementi has figured prominently in the national bullying debates.<sup>7</sup> Clementi, a “shy, bespectacled violinist,”<sup>8</sup> took his life a few days after his freshman roommate, Dharun Ravi, used a webcam to spy on Clementi’s sexual encounters and publicized what he saw via his Twitter account.<sup>9</sup> In the aftermath of Clementi’s suicide, New Jersey passed the “Anti-Bullying Bill of Rights,”<sup>10</sup> United States Senator Frank Lautenberg introduced the Tyler Clementi Higher Education Anti-Harassment Act,<sup>11</sup> and Ravi was prosecuted and convicted for violating New Jersey’s “bias intimidation” statute.<sup>12</sup>

As Ravi’s criminal prosecution progressed, however, a different picture of Clementi emerged — one in which he appeared much more articulate, self-confident, and sexually adventurous than the lonely, closeted, and innocent teen prefigured in most discussions of the case. Clementi’s digital trail revealed, among other relevant details, that: (1) Clementi was not closeted; (2) Clementi’s “boyfriend”<sup>13</sup> was twelve years older than he was, had met Clementi on the gay-sex website adam4adam.com, and did not know Clementi’s last name; (3) Clementi had discussed the webcam incident with friends, the Residential Advisor in his dorm, and multiple community forum members on the website JustUsBoys.com; and (4) Clementi had his own adult webcam profile on the website cam4.com.<sup>14</sup> These aspects of Clementi’s life by no means diminish the pain he undeniably was suffering, nor do they forgive Ravi’s behavior, but they do suggest that the legal reforms pursued in Clementi’s name reflect an incomplete, one-dimensional account of his social and sexual experiences.<sup>15</sup> This Article will show how this inno-

<sup>7</sup> Antibullying laws have, however, been dedicated to the memory of other teenagers like Megan Meier and Seth Walsh. See, e.g., Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Cong. (2009); A.B. 9, 2011–2012 Sess. (Cal. 2011); *Seth’s Law*, EQUALITY CAL., <http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=6586657> (last visited Feb. 2, 2013).

<sup>8</sup> Sandy Banks, *Social Networks Bring Us Closer to Isolation*, L.A. TIMES (Oct. 5, 2010), <http://articles.latimes.com/2010/oct/05/local/la-me-banks-20101005>.

<sup>9</sup> See *infra* Part I(A).

<sup>10</sup> N.J. STAT. ANN. § 18A:37-13.2 (West 2011).

<sup>11</sup> Tyler Clementi Higher Education Anti-Harassment Act of 2011, S. 540, 112th Cong. (2011).

<sup>12</sup> N.J. STAT. ANN. § 2C:16-1 (West 2011); see also Megan DeMarco, *Dharun Ravi Found Guilty in Rutgers Webcam Spying Trial*, NJ.COM (Mar. 16, 2012, 12:02 PM), [http://www.nj.com/news/index.ssf/2012/03/dharun\\_ravi\\_found\\_guilty\\_in\\_ru.html](http://www.nj.com/news/index.ssf/2012/03/dharun_ravi_found_guilty_in_ru.html).

<sup>13</sup> The court kept confidential the identity of the man captured on the webcam with Clementi. See Alexi Friedman et al., *Ravi Webcam Spying Trial: M.B. Wondered If He, Clementi Were Part of Inside Joke*, NJ.COM (Mar. 2, 2012, 3:45 PM), [http://www.nj.com/news/index.ssf/2012/03/ravi\\_lawyer\\_cross-examines\\_mb.html](http://www.nj.com/news/index.ssf/2012/03/ravi_lawyer_cross-examines_mb.html).

<sup>14</sup> See *infra* Part I(C).

<sup>15</sup> Although this Article focuses specifically on the representation of gay teens within antibullying debates, it is important to note that some of the dynamics presented here are not unique to gay teens. For example, much bullying coverage has reduced the trend of teenage suicides to a bullying problem without, for example, acknowledging the presence of serious mental illness, and the teens in question have been portrayed in an almost exclusively angelic, innocent light. See, e.g., Ahrens, *supra* note 4, at 26 (“Some of these stories are likely more complicated than ‘this student was bullied and, as a result, committed suicide.’”). The most prominent counter-narratives are provided by Emily Bazelon’s reporting on the suicide of fif-

cence narrative has been deployed in several legal contexts ostensibly to protect gay teens like Clementi. In each context, the relevant actors insist upon the vulnerable innocence of gay teens and filter out more empowered, or at least more nuanced, alternative accounts of gay teen experiences. Many gay teens are undoubtedly bullied in school, online, and at home, but it does no justice to gay teens — whether thriving, suffering, or both — to reduce their experiences to a simple bully/victim framework, and to seek punitive antibullying measures at the expense of promoting a more diverse range of capability-enhancing resources.

Part I of this Article will (1) explore the innocence narrative that has dominated legal and cultural discussions of Tyler Clementi's experiences; (2) show how Ravi's conviction ultimately hinged upon the jury accepting Clementi's innocence and vulnerability; and (3) flesh out some of the important facts and issues sidelined by such a narrative. Although the sexually explicit details of Clementi's story might be seen as demeaning or disrespecting his memory, they instead are intended to illuminate more fully how Clementi viewed his own sexuality, and how he used the various resources available to him to develop sexual and social connections. These explorations of sexual agency, combined with Clementi's largely overlooked struggle with depression, further complicate the bully/victim, cause/effect relationship posited by most accounts of his suicide. I am of course in no position to say why precisely Clementi took his own life, but to the extent that legal and cultural attention to Clementi's experiences has failed to grapple with the considerable complications to the innocence narrative, it has occluded important lessons about the pleasures and pains of teenage sexuality, the role of the Internet in negotiating sexual identity, and the complexities of teenage notions of privacy.

Part II will show how the entrenchment of the innocence narrative in both enacted and proposed antibullying reforms risks codifying an inherent vulnerability of gay teens. It will first show how proposals to increase parent, school, and website operator oversight over online harassment collectively threaten resources for gay teens to explore affirmatively their sexual identities. It will then demonstrate in more detail how New Jersey's Anti-Bullying Bill of Rights, propelled to bipartisan passage following Clementi's death, converges with these paternalistic measures and reinforces an innocence narrative of gay teens. It will walk through the mandatory procedures

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teen-year-old Phoebe Prince, whose bullies were subsequently prosecuted, and on the suicide of seventeen-year-old Tyler Long, who was prominently featured in the movie *Bully*. See, e.g., Emily Bazelon, *The Problem with Bully*, SLATE (Mar. 29, 2012, 6:44 PM), [http://www.slate.com/articles/news\\_and\\_politics/bulle/2012/03/bully\\_documentary\\_lee\\_hirsch\\_s\\_film\\_dangerously\\_oversimplifies\\_the\\_connection\\_between\\_bullying\\_and\\_suicide\\_.html](http://www.slate.com/articles/news_and_politics/bulle/2012/03/bully_documentary_lee_hirsch_s_film_dangerously_oversimplifies_the_connection_between_bullying_and_suicide_.html) [hereinafter Bazelon, *The Problem with Bully*] (criticizing the 2011 movie *Bully* as overly simplistic); Emily Bazelon, *What Really Happened to Phoebe Prince?*, Entry 3, SLATE (July 20, 2010, 10:13 PM), [http://www.slate.com/articles/life/bulle/features/2011/what\\_really\\_happened\\_to\\_phoebe\\_prince/the\\_untold\\_story\\_of\\_her\\_suicide\\_and\\_the\\_role\\_of\\_the\\_kids\\_who\\_have\\_been\\_criminally\\_charged\\_for\\_it.html](http://www.slate.com/articles/life/bulle/features/2011/what_really_happened_to_phoebe_prince/the_untold_story_of_her_suicide_and_the_role_of_the_kids_who_have_been_criminally_charged_for_it.html) [hereinafter Bazelon, *What Really Happened*].

in the New Jersey antibullying law and explore the potential impact of the resulting system of regulatory surveillance. By mandating a multi-level hierarchy of reporting, investigation, and data collection about bullying, New Jersey's antibullying law creates a framework for viewing the harassment of gay teens only in terms of a normalized bully/victim binary. To the extent that actual gay teens' experiences do not map onto this framework — and many do not — these complexities are kept confidential and/or excluded from “official” statistics on bullying in New Jersey.<sup>16</sup>

Part III will conclude by situating the antibullying movement within the broader LGBT rights movement, and by examining the ways in which the gay teen innocence narrative may have supported its efforts. As suggested by citation to Clementi's suicide in the California same-sex marriage and Don't Ask, Don't Tell litigations,<sup>17</sup> high rates of bullying and suicide can yield arguments that formal constitutional protections might alleviate the suffering of a substantial number of LGBT youth, and the plight of LGBT youth reinforces the idea that sexual orientation is immutable at younger and younger ages. In addition to neutralizing such arguments from conservatives, these same connections between the plight of gay youth, marriage equality, and the immutability of sexual identity can address skepticism from a number of scholars and advocates about the normative desirability of marriage and reliance on essentialist ontologies of identity formation. Although strategically useful in the near term, the innocence narrative ultimately may do a considerable disservice to gay teens through both its potential psychological consequences and its discounting of teenagers' desire to take a more proactive role in forming networks of support, friendship, and intimacy. I do not believe that LGBT advocates are unconcerned about the material betterment of today's LGBT youth, but there may be some degree of conflict between the fair representation and empowerment of gay teens and the formal equality goals of the LGBT rights movement.

This Article is neither meant to downplay the risk of suicide among gay teens, nor to minimize the consequences of such loss on family and friends. Its goal instead is to flesh out some of the consequences of focusing exclusively on the weaknesses of gay teens in the process of advocating social and legal reforms. Adolescence is undeniably a very difficult time for many teenagers (regardless of sexual orientation), but it is also an opportunity for many of them to engage actively with the people and communities at their fingertips and, in the process, develop a richer understanding of what they desire and whom they aspire to be. To the extent we focus exclusively on the hardships and ignore the possibilities, we may unwittingly threaten access to crucial resources — online and off — that can help gay teens chart their own paths to happy and healthy lives.

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<sup>16</sup> N.J. STAT. ANN. § 18A:17-46 (West 2011); *see infra* Part II(B).

<sup>17</sup> *See infra* notes 214–18 and accompanying text.

## I. THE INNOCENCE NARRATIVE

The narrative we use to describe a particular issue provides a framework for understanding its normative implications, circumscribes the range of possible approaches to dealing with that issue, and sidelines aspects of that issue incompatible with the dominant storyline.<sup>18</sup> Narrative is thus both normative and performative: it produces what it purports to represent in service of a particular set of ideological commitments.<sup>19</sup> It may be a vehicle for coherence, rationality, and ultimately, political action, but narrative can also do “epistemic violence”<sup>20</sup> by means of silence and exclusion.

Innocence and vulnerability serve as the pillars of socio-legal narratives surrounding youth sexuality. From preoccupations with child sexual abuse in the 1980s,<sup>21</sup> to child pornography in the 1990s,<sup>22</sup> to sexual predators in the 2000s,<sup>23</sup> “[c]ultural rhetoric insists, more than ever, on the innocence of children.”<sup>24</sup> As Kathryn Bond Stockton has emphasized, the “normative child” is “innocent,” and this innocence must be “safeguard[ed] at all

<sup>18</sup> This Article is informed by several scholarly areas touching on these ideas. For the poststructural/queer theoretic approach to narrative as part of a larger focus on social discourse, see generally EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990) (exploring the consequences of “closet” narratives on the day-to-day lives of gay men and sexual discourses more broadly). For literature exploring the role of narrative in the law, see *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 15–17, 75–76, 136, 165 (Peter Brooks & Paul Gewirtz eds., 1996); Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”); Robin West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. REV. 145, 146 (1985). Cultural psychologists sometimes employ a “narrative” approach to identity in order to relate individual life stories to “master” cultural narratives. See generally *THE STORY OF SEXUAL IDENTITY* (Phillip L. Hammack & Bertram J. Cohler eds., 2009); Phillip J. Hammack & Bertram J. Cohler, *Narrative, Identity, and the Politics of Exclusion: Social Change and the Gay and Lesbian Life Course*, 8 SEX RES. & SOC. POLICY 162 (2011).

<sup>19</sup> See SEDGWICK, *supra* note 18, at 48 (describing historical narratives of sexuality as “delineat[ing]” and “pass[ing] over in silence” a “space of contradiction”); Cover, *supra* note 18, at 10 (“The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior.”).

<sup>20</sup> Gayatri Chakravorty Spivak, *Can the Subaltern Speak*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 280 (Cary Nelson & Lawrence Grossberg eds., 1988).

<sup>21</sup> See, e.g., ROGER N. LANCASTER, *SEX PANIC AND THE PUNITIVE STATE* 46–56 (2011) (recounting the “satanic ritual abuse” scares of the 1980s).

<sup>22</sup> See Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 231, 251–52 (2001) (documenting the increase in child pornography prosecutions and mainstream cultural attention to child pornography).

<sup>23</sup> See, e.g., Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L. 130, 130–31 (2011) (“Since this new terminology first emerged in the 1990’s [sic], the word ‘predator’ has become a term of art in legal regulation, and a mainstay in media reports and in the popular imagination.”).

<sup>24</sup> Adler, *supra* note 22, at 229; see also LANCASTER, *supra* note 21, at 61 (“[I]nnocence — a euphemism for child sexlessness — has become the new watchword, apparently more valued than children themselves.” (emphasis in original)); KATHRYN BOND STOCKTON, *THE QUEER CHILD* 5 (2009) (referring to innocence as “our default designation for children”); Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 294 (referring to “innocence” and “incapacity” as “the reigning cultural metaphors” in relation to young people).

cost.”<sup>25</sup> Protecting this “sphere of purity”<sup>26</sup> around children (defined both broadly and malleably) has become a uniquely nonpartisan responsibility of our legal culture. Where the purported objective of legislation is to protect childhood sexual innocence, legislators have consistently rallied together to define new crimes, stiffen sentences, and mandate sex offender registration.<sup>27</sup> Contrary voices have been quickly and publicly condemned.<sup>28</sup>

The following sections will explore how the innocence narrative feeds into an epistemology of gay youth dominated by fragility and blind to experiences of resilience, eloquence, and exploration. Same-sex attracted teenagers, to the limited extent they have figured at all in legal discourse, have like other minors been cast as “weak and defenseless,” and within this “doom and gloom” caricature, the “‘not so troubled typical gay teen’ remain[s] largely invisible.”<sup>29</sup> Focusing on the positive aspects of teenage sexuality perhaps makes gay teens less sympathetic candidates for state protection,<sup>30</sup> but if the end goal of the antibullying movement is to improve the lives of actual teenagers, we may ultimately do epistemic violence — and perhaps concrete harm — in failing to acknowledge the diverse, complex, and sometimes unseemly day-to-day experiences of gay youth.

<sup>25</sup> STOCKTON, *supra* note 24, at 30. James Kincaid similarly observes: “The child needs us badly enough to justify our rushing in only because the child is ‘pure’: without the ability to understand, size things up, act.” JAMES R. KINCAID, *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* 208 (1998).

<sup>26</sup> Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 *LAW & SOC. INQUIRY* 529, 543 (2002).

<sup>27</sup> *See, e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (unifying state-run sex offender registry systems, creating national sex offender registries, and increasing federal criminal penalties for sex abuse). For scholarship documenting this trend at length, see generally LANCASTER, *supra* note 21; JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* (2002).

<sup>28</sup> For example, in 1998, the House of Representatives passed a resolution — 355 votes to zero — condemning the findings of a study in the American Psychological Association’s *Psychological Bulletin* that not all self-reported reactions to underage sexual activity were pervasively negative or intense. *See* H.R. Con. Res. 107, 106th Cong. (1999) (“[C]ondemn[ing] and denounc[ing] all suggestions in the article . . . that indicate that sexual relationships between adults and ‘willing’ children are less harmful than believed and might be positive for ‘willing’ children.”).

<sup>29</sup> SAVIN-WILLIAMS, *supra* note 1, at 179, 182, 221; *see also* Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1370 (N.D. Fla. 2008) (finding a school principal’s hostile conduct towards a lesbian student “particularly deplorable in light of studies which confirm the vulnerability of gay and lesbian students”); MARK MCCORMACK, *THE DECLINING SIGNIFICANCE OF HOMOPHOBIA* xxv (2012) (“[T]he traditional story of gay students in schools is one of marginalization and fear . . . . [These stories] do not describe what is going on with young people in Britain today, nor do they represent the *only* story to be told in schools in the United States . . . .”). Social scientists and cultural and developmental psychologists have begun to provide a more nuanced understanding of the experiences of sexual minority youth. *See generally* MARY L. GRAY, *OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA* (2009); SAVIN-WILLIAMS, *supra* note 1; Hammack & Cohler, *supra* note 18.

<sup>30</sup> *See, e.g.*, LANCASTER, *supra* note 21, at 62 (arguing that “‘innocence’ will serve as a perpetual catalyst for activism and intervention”); *cf.* SAVIN-WILLIAMS, *supra* note 1, at 55 (noting that academic researchers are more likely to get grant money if they focus on perils facing gay youth).

This section will (A) survey the innocence narrative that immediately developed following Tyler Clementi's death; (B) examine the deployment of innocence narratives in the prosecution of Dharun Ravi; (C) explore several complications to that narrative, which surface in Clementi's own digital trail; and (D) suggest some important aspects of teenage sexuality and social media use not captured by the innocence narrative.

### A. *Tyler Clementi*

Immediately following Tyler Clementi's disappearance, certain basic facts emerged about the last week of his life. On September 19, 2010, Clementi, an eighteen-year-old freshman at Rutgers University, asked his freshman roommate, Dharun Ravi, if he could have their dorm room to himself until midnight.<sup>31</sup> Ravi let him have the room, but he also pointed his laptop webcam in the direction of Clementi's bed, blacked out the laptop screen, and set his video chat software to accept automatically any incoming communication requests.<sup>32</sup> Ravi went to his friend Molly Wei's dorm room, and the two sent a chat request to Ravi's computer.<sup>33</sup> At 9:17 that evening, Ravi posted to his Twitter feed, "Roommate asked for the room till midnight. I went into molly's room and turned on my webcam. I saw him making out with a dude. Yay."<sup>34</sup> On September 21st, Ravi posted a similar message: "Anyone with iChat, I dare you to video chat me between the hours of 9:30 and 12. Yes, it's happening again."<sup>35</sup> The next day, Clementi posted the following message on his own Facebook page: "Jumping off the gw bridge sorry."<sup>36</sup>

In the following weeks and months, details about the webcam incident and its major players remained largely undeveloped, but nonetheless a consistent narrative of a lonely, vulnerable, closeted teenager emerged to fill in the gaps of Clementi's story.<sup>37</sup> A posting from the "progressive" blog *The Daily Kos* is illustrative:

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<sup>31</sup> Emily Bazelon & Kevin Lerner, *Dharun Ravi Should Cut a Deal*, SLATE (Feb. 14, 2012, 5:31 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2012/02/dharun\\_ravi\\_the\\_rutgers\\_student\\_who\\_spied\\_on\\_tyler\\_clementi\\_should\\_accept\\_the\\_plea\\_deal\\_from\\_new\\_jersey\\_authorities\\_.html](http://www.slate.com/articles/news_and_politics/crime/2012/02/dharun_ravi_the_rutgers_student_who_spied_on_tyler_clementi_should_accept_the_plea_deal_from_new_jersey_authorities_.html).

<sup>32</sup> *Id.*

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

<sup>34</sup> Kyle McGovern, *Dharun Ravi and Tyler Clementi Timeline: Former Rutgers Roommate in Dorm Room Spying Trial*, HUFFINGTON POST (May 22, 2012, 8:41 AM), [http://www.huffingtonpost.com/2012/02/24/dharun-ravi-tyler-clementi-timeline\\_n\\_1297056.html](http://www.huffingtonpost.com/2012/02/24/dharun-ravi-tyler-clementi-timeline_n_1297056.html) (grammar and syntax in original).

<sup>35</sup> *Id.* (grammar and syntax in original).

<sup>36</sup> *Tyler Clementi Left Facebook Status "Jumping off gw bridge sorry" After Rutgers Dorm Sex Hidden Video*, NJ.COM (Sept. 29, 2010, 8:03 PM), [http://www.nj.com/news/index.ssf/2010/09/tyler\\_clementi\\_left\\_facebook\\_s.html](http://www.nj.com/news/index.ssf/2010/09/tyler_clementi_left_facebook_s.html) (grammar and syntax in original).

<sup>37</sup> I do not mean to suggest that commentators *universally* adopted an overt innocence narrative. For more measured accounts, see, e.g., Katherine Franke, *Reflections on What to Make of Tyler Clementi*, GENDER & SEXUALITY LAW BLOG, COLUM. L. SCH. (Sept. 30, 2010), <http://blogs.law.columbia.edu/genderandsexualitylawblog/2010/09/30/reflections-on-what-to->

Put yourself in Tyler's shoes one moment. He shares an intimate moment with another boy, and possibly for the first time in his life, knows how right everything feels, how everything fits together just as it should, and all the garbage he's been fed about being gay suddenly disappears.

Then just as suddenly, he's cast from heaven into hell. His beautiful, romantic, intimate encounter is turned into a freakish sideshow when two other teens upload it to the internet.

Shamed, isolated, who can Tyler turn to? As shown by later events, he has no one, really.<sup>38</sup>

Rutgers Professor Michael LaSala sets a similar scene for his discussion of the incident:

Imagine being a very young boy, recognizing you have romantic feelings toward other boys. However, you come to realize to your horror that there is something wrong with these feelings — horribly wrong . . . . As you mature, and with much concentrated effort you become somewhat more comfortable with your feelings — comfortable enough to explore and act on your sexuality while away at college. You then find that this most intimate of acts, stigmatized by large segments of society, was secretly videotaped and broadcast to hundreds, perhaps thousands of people.<sup>39</sup>

*New York Magazine* writer Chris Rovzar also places the burden of being gay front and center in the discussion of Clementi's suicide:

As a young person feeling out his own sexuality, Tyler Clementi was saddled with a specific burden. There is nothing quite like the shame that comes along with being ridiculed for something you know is an unchangeable part of who you are. We don't know the specific pressures Clementi faced, but we do know gay teens in general are up to four times as likely to attempt suicide. When you add that to the fact that 40 percent of all suicides on college

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make-of-tyler-clementi/ ("Might we want to pause before indulging the impulse to turn to criminal law to punish the perpetrators of this awful event and remedy its deadly consequences?"); Ruth Starkman, *Dorm Life Is a Jungle: The Tragedy of Tyler Clementi*, HUFFINGTON POST (Oct. 1, 2010, 11:00 AM), [http://www.huffingtonpost.com/ruth-starkman/dormlife-is-a-jungle-the-\\_b\\_746722.html](http://www.huffingtonpost.com/ruth-starkman/dormlife-is-a-jungle-the-_b_746722.html) ("There is a huge lack of information about Clementi and why he took such extreme action after having stood up for himself and reached out to others — at least online.").

<sup>38</sup> grimalkintoo, *The Death of Tyler Clementi*, DAILY KOS (Oct. 2, 2010, 9:41 AM), <http://www.dailykos.com/story/2010/10/2/123133/488>.

<sup>39</sup> Michael C. LaSala, *Tyler Clementi: Gay Bashed with the Bricks and Bats of Social Media*, PSYCHOL. TODAY (Sept. 29, 2010), <http://www.psychologytoday.com/blog/gay-and-lesbian-well-being/201009/tyler-clementi-gay-bashed-the-bricks-and-bats-social-media>.

campuses are by freshmen, it's clear this one was particularly vulnerable.<sup>40</sup>

Other media reaction similarly emphasized that Clementi was “shamed” through the airing of his sexual encounter — and more specifically his sexual orientation — over the Internet, culminating in his decision that suicide was the only viable option.<sup>41</sup> Legal academics have continued this theme, repeatedly referring to Clementi as being “outed” by Ravi and perpetuating the innocence narrative through similar assumptions about Clementi’s experiences.<sup>42</sup> Additionally, several commentators presumed that the person with whom Clementi had sex on September 19th and 21st was “another boy.”<sup>43</sup>

Following the suicide of Clementi and several other gay teens in the fall of 2010, numerous outreach programs were launched to combat gay teen bullying, suicide, and low self-esteem.<sup>44</sup> Perhaps the most prominent of these — columnist Dan Savage’s “It Gets Better Project” — has also been infused with the innocence narrative. The It Gets Better Project is a series of life-affirming YouTube videos featuring a tremendous range of public figures, from President Barack Obama,<sup>45</sup> to comedian Ellen DeGeneres,<sup>46</sup> to

<sup>40</sup> Chris Rovzar, *Tyler Clementi’s Suicide: More Than Cyber-Bullying*, N.Y. MAG. (Sept. 30, 2010, 6:52 PM), [http://nymag.com/daily/intel/2010/09/post\\_36.html](http://nymag.com/daily/intel/2010/09/post_36.html).

<sup>41</sup> In speaking out about four gay teen suicides in September 2010, Ellen DeGeneres stated that Clementi had been “outed as being gay on the Internet and he killed himself.” *After Suicide of Tyler Clementi, Ellen DeGeneres Speaks Out Against Bullying*, POPEATER (Oct. 1, 2010, 8:02 AM), <http://www.popeater.com/2010/10/01/ellen-degeneres-bullying-psa/>; see also Ed Pilkington, *Tyler Clementi, Student Outed as Gay on Internet, Jumps to His Death*, GUARDIAN (Sept. 30, 2010, 4:08 PM), <http://www.guardian.co.uk/world/2010/sep/30/tyler-clementi-gay-student-suicide?INTCMP=SRCH>; Ann Woolner, *Exposing Secrets and Shame*, OR. LIVE (Oct. 3, 2010, 10:58 AM), [http://www.oregonlive.com/opinion/index.ssf/2010/10/exposing\\_secrets\\_and\\_shame.html](http://www.oregonlive.com/opinion/index.ssf/2010/10/exposing_secrets_and_shame.html) (“[T]he suicide looks like a fatal combination of three factors: his roommate’s learning his secret, the widespread exposure of the secret and shame.”).

<sup>42</sup> See, e.g., Joe Greenhill, *From the Playground to Cyberspace: The Evolution of Cyberbullying*, 5 CHARLESTON L. REV. 705, 706 (2011) (“Clementi had yet to reveal his sexuality to friends and family, and this video served as his ‘coming-out party.’”); Terence J. Lau, *Towards Zero Net Presence*, 25 NOTRE DAME J.L. ETHICS & PUB. POL’Y 237, 238 (2011) (discussing Tyler Clementi and referring to the Internet as a place where “gay teens are outed”); Katharine Malone, Note, *Parody or Identity Theft: The High-Wire Act of Digital Doppelgangers in California*, 34 HASTINGS COMM. & ENT. L.J. 275, 276 n.1 (2012) (“[Clementi] was outed as gay by his roommate on the Internet.”).

<sup>43</sup> See, e.g., Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357, 358 (2011) (“Darun [sic] Ravi used a webcam to covertly record a video of his roommate Tyler Clementi having sex with another student.”); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 392 (2012) (“[H]is roommate surreptitiously videotaped Tyler in a sexual encounter with another boy . . . .”); Dan Savage, *Who Killed Tyler Clementi?*, THE STRANGER (Oct. 2, 2010, 10:39 AM), <http://slog.thestranger.com/slog/archives/2010/10/02/before-we-crucify-those-two-teenagers-who-streamed-tyler-clementi-having-sex-over-the-internet> (“The other boy hasn’t committed suicide.”).

<sup>44</sup> See, e.g., *Facebook’s Network of Support*, FACEBOOK (Oct. 19, 2010, 6:24 PM), [http://www.facebook.com/note.php?note\\_id=161164070571050&id=125459124158601](http://www.facebook.com/note.php?note_id=161164070571050&id=125459124158601); BORN THIS WAY FOUND., <http://bornthiswayfoundation.org/> (last visited Feb. 23, 2013). Other programs, such as MTV’s “A Thin Line,” had been created as early as late 2009. See *MTV Launches ‘A Thin Line’ to Stop Digital Abuse*, MTV NEWS (Dec. 3, 2009, 9:17 AM), <http://www.mtv.com/news/articles/1627487/mtv-launches-thin-line-stop-digital-abuse.jhtml>.

<sup>45</sup> See *supra* note 3.

Secretary of State Hillary Clinton,<sup>47</sup> to television personality Kim Kardashian.<sup>48</sup> Savage has stated that he started the project because he was rattled by the suicides of Clementi and several other gay teens and thought, “I wish I could’ve talked to him for five minutes; I wish I could’ve told him that it gets better.”<sup>49</sup> As others have noted, the campaign is laudable for bringing attention and resources to gay teen struggles, but its approach also presupposes a passive teen unable to take a more proactive role in reaching out for support, education, and relationships.<sup>50</sup>

On the legal front, cyberbullying laws and regulations emerged at both the federal and state levels to provide better protection for gay teens. In response to the emerging national concern about antigay bullying, numerous bills were introduced in Congress to criminalize cyberbullying expressly, to require schools to implement antibullying policies, and to prohibit sexual orientation discrimination in schools.<sup>51</sup> The FCC amended its E-Rate program to require schools receiving federal educational funds to certify that as part of their mandatory “Internet safety policy,” they are “educating minors about appropriate online behavior,” including “cyberbullying awareness and response.”<sup>52</sup> The Department of Education also notified educators that their failure to take actions to address the bullying of gay students could amount to sex discrimination under Title IX.<sup>53</sup> In Clementi’s home state of New Jersey, lawmakers introduced a comprehensive “Anti-Bullying Bill of

<sup>46</sup> See *id.*

<sup>47</sup> U.S. Dep’t of State, *Secretary Clinton: “Tomorrow Will Be Better,”* YouTube (Oct. 19, 2010), <http://www.youtube.com/watch?v=zXBpW8GCDtY>.

<sup>48</sup> See *supra* note 3.

<sup>49</sup> Ivor Tossell, *Trust the Web: It Gets Better*, GLOBE & MAIL (Oct. 26, 2010, 8:07 AM), <http://www.theglobeandmail.com/news/technology/personal-tech/ivor-tossell/trust-the-web-it-gets-better/article1772920/>.

<sup>50</sup> See, e.g., danah boyd, *Four Difficult Questions Regarding Bullying and Youth Suicide*, DANAH BOYD | APOPHENIA (Dec. 12, 2011), [www.zephorio.org/thoughts/archives/2011/12/12/questions-bullying-suicide.html](http://www.zephorio.org/thoughts/archives/2011/12/12/questions-bullying-suicide.html) (“You felt like you were part of a movement but no one reached out to you, no one helped you make it better. No community was made, no support group was developed. You’re still alone.”). In response to the It Gets Better Project, the GSA Network launched the Make It Better Project “to let students, parents, teachers, school administrators, and adult allies know that there are concrete actions they can take right now to make schools safer for all students.” *About, MAKE IT BETTER PROJECT*, <http://www.makeitbetterproject.org/about> (last visited Mar. 11, 2013).

<sup>51</sup> Student Non-Discrimination Act of 2011, H.R. 988, 112th Cong. § 2(a)(2) (2011) (“While discrimination, including harassment, bullying, intimidation and violence, of any kind is harmful to students and to our education system, actions that target students based on sexual orientation or gender identity represent a distinct and especially severe problem.”); Tyler Clementi Higher Education Anti-Harassment Act of 2011, S. 540, 112th Cong. § 2 (2011); Anti-Bullying and Harassment Act of 2011, H.R. 975, 112th Cong. § 2 (2011); Safe Schools Improvement Act of 2011, H.R. 1648, 112th Cong. § 2(5) (2011) (“Students have been particularly singled out for bullying and harassment on the basis of their actual or perceived race, color, national origin, sex, disability status, sexual orientation or gender identity, among other categories.”); Bullying Prevention and Intervention Act of 2011, H.R. 83, 112th Cong. § 2 (2011).

<sup>52</sup> *In re Sch. & Libraries Universal Serv. Support Mechanism*, 26 FCC Rcd. 11819, 11822 (2011).

<sup>53</sup> Letter from Russlynn Ali, *supra* note 6, at 7–8.

Rights,”<sup>54</sup> and numerous states were similarly spurred to action to fight bullying.<sup>55</sup>

With respect to Clementi’s own particular case, several prominent LGBT organizations as well as thousands of individuals called for murder or manslaughter charges against Ravi and Wei.<sup>56</sup> Because Ravi “had to know that outing a reclusive 18-year-old on the web would be emotionally explosive,” the executive director of Equality Forum, an LGBT civil rights group, declared that it “is of national importance that the prosecutor should file the most severe charges that the law allows.”<sup>57</sup> Although prosecutors chose not to pursue murder or manslaughter charges, Ravi was indicted on multiple counts of invasion of privacy, bias intimidation, evidence tampering, and hindering apprehension.<sup>58</sup>

### B. *The Trial of Dharun Ravi*

Dharun Ravi’s trial commenced on February 21, 2010, and his ultimate conviction grew out of both the prosecution’s and the defense’s attempts to deploy an effective innocence narrative. As shown below, the lawyers’ competing theories of the case turned the trial into a question of which eighteen-year-old — Clementi or Ravi — was really the nervous kid in the dorm room, scared of the sexual encounters being captured on camera. Within the context of the Ravi trial, childhood innocence proves to be a “functional,” “malleable” conceit,<sup>59</sup> and the dynamic that ensued gives support to Joseph Fischel’s observation that “adolescents are incapable children when they have sex, but deliberative, intentional adults when they commit crimes.”<sup>60</sup>

<sup>54</sup> Richard Pérez-Peña, *Christie Signs Tougher Law on Bullying in Schools*, N.Y. TIMES (Jan. 6, 2011), <http://www.nytimes.com/2011/01/07/nyregion/07bully.html> (reporting that Clementi’s death and similar suicides gave New Jersey’s antibullying bill “momentum” to get passed).

<sup>55</sup> See, e.g., Alcindor, *supra* note 2.

<sup>56</sup> *Campus Pride Offers Support to Rutgers University Queering the Air, Reiterates Call for Rutgers Action Toward Safer Campus Policies, Practices*, CAMPUS PRIDE BLOG (Oct. 21, 2010), <http://www.campusprideblog.org/blog/campus-pride-offers-support-rutgers-university-queering-air-reiterates-call-rutgers-action-towa> (“Within days of Clementi’s death, Garden State Equality, a statewide New Jersey LGBT advocacy group, demanded they be prosecuted for hate crimes, and given ‘the maximum possible sentence.’”); Marci Stone, *Thousands Demand Manslaughter Charges for Tyler Clementi’s Death*, EXAMINER (Oct. 1, 2010), <http://www.examiner.com/us-headlines-in-national/thousands-demand-manslaughter-charges-for-tyler-clementi-s-death-video>.

<sup>57</sup> *Equality Forum Calls on Prosecutor to File Murder by Manslaughter Charges in Death of Rutgers Freshman Tyler Clementi*, ERIE GAY NEWS (Oct. 1, 2010), <http://www.eriegaynews.com/news/article.php?recordid=201010equalityforumrutgers>.

<sup>58</sup> See Jesse Solomon, *Roommate Indicted in Rutgers University Suicide Case*, CNN (Apr. 21, 2011, 12:49 PM), <http://www.cnn.com/2011/CRIME/04/20/new.jersey.rutgers.indictment/index.html>.

<sup>59</sup> See KINCAID, *supra* note 25, at 19 (“For instance, thinking of an eighteen-year-old molestation victim as a child allows us to create a composite image that gives us innocence as well as sexual capacity.”).

<sup>60</sup> Fischel, *supra* note 24, at 301.

In her opening statements, prosecutor Julia McClure told the jury regarding Ravi's behavior: "He's seeking to brand Tyler as different from everybody else. He's branding Tyler as gay to set him up for contempt . . . ."61 "[His acts] were mean spirited, malicious and criminal; and meant to cross one of the most sacred boundaries of human activity — engaging in sexual activity with another person."<sup>62</sup>

McClure's closing arguments similarly projected onto Clementi feelings of shame and embarrassment surrounding his sexual orientation and sexual activity:

Three weeks into the semester and [he] finds out that his sexual orientation has been broadcast to the defendant's twitter [sic] followers . . . . His private sexual activities have been exposed. What do you think he's thinking? If Molly saw it, did Cassie see it? Did people in the hall see it? Did people in Davidson C see it? You don't think that he was intimidated by learning that information? Fearful, embarrassed? He'd been exposed.<sup>63</sup>

The prosecution's theory of the case, in other words, was that Clementi was shamed and embarrassed at the prospect of being exposed to his peers as having gay sex, an activity he is presumed to consider as inherently — and "sacredly" — private.<sup>64</sup>

Perhaps acknowledging the resonance of this narrative of sexual innocence, Ravi's counsel both cloaked Ravi in his own innocence narrative and attacked the premises of Clementi's purported innocence. Ravi was not "hateful" or "bigoted" or "criminal"; he was an "18-year-old *boy*" whose actions were "childish and immature."<sup>65</sup> During closing arguments, attorney Steven Altman explained to the jury:

Why we're here is because, on September 19 and September 21 of 2010, an 18-year-old boy, a kid, a college freshman, had an experience, had an encounter and he wasn't ready for, that he didn't expect, that he was surprised by, that he hadn't anticipated . . . and he didn't know how to deal with it because he was a kid . . . .<sup>66</sup>

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<sup>61</sup> Megan DeMarco, *Sides Paint Different Pictures of Dharun Ravi's Intentions During Opening Statements*, NJ.COM (Feb. 24, 2012, 1:02 PM), [http://www.nj.com/news/index.ssf/2012/02/sides\\_paint\\_different\\_pictures.html](http://www.nj.com/news/index.ssf/2012/02/sides_paint_different_pictures.html).

<sup>62</sup> *Dharun Ravi Trial: Opening Arguments in Roommate Webcam Spying Case*, NDTV.COM (Feb. 24, 2012, 9:23 PM), <http://www.ndtv.com/article/india/dharun-ravi-trial-opening-arguments-in-roommate-webcam-spying-case-179567>.

<sup>63</sup> Colleen Curry, *Rutgers Trial Summation Fireworks as Case Heads to Jury*, ABC NEWS (Mar. 13, 2012), <http://abcnews.go.com/US/rutgers-summations-prosecution-calls-innocent-kid-defense-false/story?id=15909241#.T9-LArVv7Sg>.

<sup>64</sup> See *supra* note 62 and accompanying text.

<sup>65</sup> DeMarco, *supra* note 61 (emphasis in original).

<sup>66</sup> Evan Mulvihill, *Defense's Closing Argument: Dharun Ravi Did Not Bully Tyler Clementi for Being Gay*, QUEERTY (Mar. 13, 2012), <http://www.queerty.com/defenses-closing-argument-dharun-ravi-did-not-bully-tyler-clementi-for-being-gay-20120313/#ixzz1yGc7xBRI>.

Although this argument has been labeled by some as a variant of the “gay panic” defense,<sup>67</sup> a more charitable reading is that Altman’s “dumb kid” argument merely sought to invert the innocence narrative used by the prosecution. Ravi was not the preying homophobe who took advantage of the young, innocent Clementi; Ravi was a young, innocent kid exposed to sexual maturity far beyond his eighteen years. In contrast to Ravi’s suspicion, surprise, and nervousness, Altman emphasized that Clementi did not seem particularly fazed by the possibility of being seen on camera. Clementi had read Ravi’s message about setting up the webcam a second time, but he nonetheless proceeded to invite his sexual partner, M.B.,<sup>68</sup> over that evening. “Would anybody who was intimidated, scared, in fear, concerned with their privacy continue with any behavior where he knows . . . his privacy is going to be violated?”<sup>69</sup>

Ultimately, the jury convicted Ravi on all fifteen counts, including invasion of privacy and bias intimidation,<sup>70</sup> and in doing so, seemed to affirm the innocence narratives proffered by each side. Consistent with the “dumb kid” defense, the jury verdict did not find that Ravi acted with homophobic animus by either (1) acting “with a purpose to intimidate” Clementi because of his sexual orientation, or (2) knowing that his conduct “would cause an individual or group of individuals to be intimidated because of . . . sexual orientation.”<sup>71</sup> Instead, consistent with the prosecution’s innocence narrative, the jury found that “under circumstances that caused” Clementi to be intimidated, *Clementi* “reasonably believed” that he “was selected to be the target of the offense because of [his] . . . sexual orientation.”<sup>72</sup> Regardless of Ravi’s *actual* motivations, the jury grafted onto Clementi a “reasonable” feeling of vulnerability and violation surrounding his sexual orientation. Ravi’s felony conviction therefore depended on Clementi’s victim-status as a young gay man and the victimization anxieties that attend such identification.

<sup>67</sup> See, e.g., Michelangelo Signorile, *Tyler Clementi and the Dharun Ravi Trial: Why the Verdict Is Just*, HUFFINGTON POST (Mar. 19, 2012, 9:56 AM), [http://www.huffingtonpost.com/michelangelo-signorile/tyler-clementi-dharun-ravi\\_b\\_1362562.html](http://www.huffingtonpost.com/michelangelo-signorile/tyler-clementi-dharun-ravi_b_1362562.html). Under this theory, violent crimes against gay people are mitigated due to the emotional shock of being exposed to a potential homosexual romantic oeuvre.

<sup>68</sup> The name of Clementi’s sexual partner was never revealed. See Friedman et al., *supra* note 13.

<sup>69</sup> Megan DeMarco, *In Closing Statement, Ravi’s Attorney Says Clementi Inviting Guest Back Shows He Was Not Intimidated*, NJ.COM (Mar. 13, 2012, 5:35 PM), [http://www.nj.com/news/index.ssf/2012/03/in\\_closing\\_statement\\_ravis\\_att.html](http://www.nj.com/news/index.ssf/2012/03/in_closing_statement_ravis_att.html).

<sup>70</sup> Kate Zernike, *Jury Finds Spying in Rutgers Dorm Was a Hate Crime*, N.Y. TIMES (Mar. 16, 2012), [http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/03/17/nyregion/defendant-guilty-in-rutgers-case.html?pagewanted=all&_r=0).

<sup>71</sup> N.J. STAT. ANN. § 2C:16-1(a)(1)–(2) (West 2008); Danielle Citron, *Bias Intimidation Verdict in the Ravi Trial*, CONCURRING OPINIONS (Mar. 19, 2012, 6:22 PM), <http://www.concurringopinions.com/archives/2012/03/bias-intimidation-verdict-in-the-ravi-trial.html>; Lauren Pearle, *Dharun Ravi Trial: The Breakdown*, ABC NEWS (Mar. 16, 2012), <http://abcnews.go.com/US/rutgers-trial-legal-explaineer/story?id=15939011#T-IEpLVv7Si>.

<sup>72</sup> § 2C:16-1(a)(1)–(2); Pearle, *supra* note 71.

### C. *Complicating the Innocence Narrative*

Despite the persistence of the innocence narrative from the initial reporting in September 2010 through Ravi's conviction in March 2012, Clementi's own instant messages and Internet postings render the above story of an isolated, closeted, and sexually innocent teenager substantially more tenuous. As the prosecution of Dharun Ravi progressed, and in-depth investigation undermined a number of initial assumptions about what transpired,<sup>73</sup> Clementi's evidentiary trail complicated at least six aspects of the innocence narrative and the related bully/victim binary:<sup>74</sup>

#### 1. *Clementi Was Not Closeted.*

Despite the persistent assumption that Clementi was not open with family and friends about his sexuality, he had in fact come out to his brothers (one of whom is also gay) and his parents before beginning at Rutgers.<sup>75</sup> His father was "very accepting," and although Clementi stated that his mother "completely rejected" him, the two remained in civil communications afterwards.<sup>76</sup> Moreover, his discussions with friends indicate that Clementi was not particularly concerned by his peers knowing about his sexual orientation, was fully aware that Ravi knew he was gay, and did not feel particularly sheepish about his being caught with another guy.<sup>77</sup>

For example, while discussing the logistics of meeting up with M.B., Clementi told his friend:

lol [laughing out loud] . . . I wouldn't mind if [Ravi] found me w/  
a guy . . . maybe he would want to join! . . . that would be so  
awk[ward] tho lol . . . him walking in while I'm getting fucked

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<sup>73</sup> Most prominently, Ian Parker's lengthy piece in *The New Yorker* revealed that a number of issues relevant to the charges against Ravi were considerably different from those that had been initially reported. Ian Parker, *The Story of a Suicide*, NEW YORKER (Feb. 6, 2012), [http://www.newyorker.com/reporting/2012/02/06/120206fa\\_fact\\_parker#ixzz1xt1fJO2p](http://www.newyorker.com/reporting/2012/02/06/120206fa_fact_parker#ixzz1xt1fJO2p). Parker observes, "[i]t became widely understood that a closeted student at Rutgers had committed suicide after video of him having sex with a man was secretly shot and posted online. In fact, there was no posting, no observed sex, and no closet." *Id.* Clementi was observed by only a handful of students, for only a few seconds, kissing M.B., briefly with their shirts off. *Id.*

<sup>74</sup> The information herein is compiled from video recordings of the trial, press accounts, my own investigation of Clementi's online postings, and materials obtained from the attorneys in the case.

<sup>75</sup> See Parker, *supra* note 73; see also Appendix on Behalf of Defendant Dharun Ravi in Support of Notice of Motion for an Order Dismissing the Indictment and Compelling the State to Produce Discovery at DA 23–25, State v. Ravi, No. 11-04-00596 (N.J. Super. Ct. Law Div. Aug. 10, 2011) [hereinafter Appendix to Motion to Dismiss] (on file with author); James Clementi, *Letters to My Brother*, OUT (Feb. 1, 2012), <http://www.out.com/news-commentary/2012/02/01/tyler-clementi-james-letters-my-brother?page=0,3>.

<sup>76</sup> Kate Zernike, *After Gay Son's Suicide, Mother Finds Blame in Herself and in Her Church*, N.Y. TIMES (Aug. 24, 2012), [http://www.nytimes.com/2012/08/25/nyregion/after-tyler-clementis-suicide-his-parents-make-painful-changes-in-the-search-for-why.html?page-wanted=all&\\_r=0](http://www.nytimes.com/2012/08/25/nyregion/after-tyler-clementis-suicide-his-parents-make-painful-changes-in-the-search-for-why.html?page-wanted=all&_r=0).

<sup>77</sup> Appendix to Motion to Dismiss, *supra* note 75, at DA 25, 30.

haha . . . but at the same time I think I would just be like “screw it” and just have him keep plowing my ass lol and not care.<sup>78</sup>

When his friend mentioned the possibility of getting a “reputation” if found having sex, Clementi responded that “everybody is hooking up, straight/gay doesn’t matter . . . why should I be getting a reputation for taking it up my butt when everyone else is doing the same thing (sorta) . . . .”<sup>79</sup>

## 2. *M.B. Was Not “Another Boy.”*

The person with whom Clementi was sharing an “intimate” moment was not another “boy” or even another student, as numerous commentators presumed. Instead, he was a thirty-year-old man Clementi had met on the website adam4adam.com, which hosts sexually explicit personal ads for men seeking sex with other men.<sup>80</sup> Even though the man was not a minor, the presiding judge in the Ravi trial ordered that “M.B.’s” identity remain confidential, and the press were ordered not to videotape M.B.’s face during the trial.<sup>81</sup>

## 3. *The Relationship Was Not Particularly “Romantic.”*

In addition to M.B. being significantly older than Clementi, their relationship appears not to have been particularly “romantic,” at least in conventional terms. They never had coffee, watched a movie, or met anywhere outside of Clementi’s dorm room.<sup>82</sup> The two met and had sex on September 16th, 19th, and 21st, and although they had exchanged text messages with each other regularly during that time period, M.B. did not know Clementi’s last name until it was reported in newspapers.<sup>83</sup>

## 4. *Clementi Did Have People to Talk to.*

Clementi was not entirely isolated as he dealt with Ravi’s actions, and he discussed his feelings about the webcam incident with several people. First, he talked over Google instant message with his friend Hannah Yang about what happened. Although he told her that he “felt violated” and re-

<sup>78</sup> *Id.* at DA 30–31 (grammar and syntax in original). He clarified, however, that Ravi “just doesn’t do it for me.” *Id.* at DA 30.

<sup>79</sup> *Id.* at DA 31 (grammar and syntax in original).

<sup>80</sup> Alexi Friedman & Kevin Manahan, *Ravi Webcam Spying Trial: In Dramatic Testimony, M.B. Says Clementi Was Happy, Pair Had ‘Good Relationship,’* NJ.COM (Mar. 4, 2012, 3:26 PM), [http://www.nj.com/news/index.ssf/2012/03/ravi\\_trial\\_mbs\\_testimony\\_provi.html](http://www.nj.com/news/index.ssf/2012/03/ravi_trial_mbs_testimony_provi.html).

<sup>81</sup> Kate Zernike, *Veiled Witness in Rutgers Case Tells of Noticing Webcam*, N.Y. TIMES (Mar. 2, 2012), [http://www.nytimes.com/2012/03/03/nyregion/in-rutgers-case-mystery-man-testifies-about-noticing-a-webcam.html?pagewanted=1&\\_r=1&src=tp](http://www.nytimes.com/2012/03/03/nyregion/in-rutgers-case-mystery-man-testifies-about-noticing-a-webcam.html?pagewanted=1&_r=1&src=tp) (“In a rare exception, the man was identified in court only as M.B., and the judge warned journalists that they could not record or photograph him.”).

<sup>82</sup> See Friedman et al., *supra* note 13.

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

ferred to Ravi as a “perv,” he also said he thought the incident was “soo [sic] funny” and repeatedly joked about how to deal with Ravi going forward.<sup>84</sup> After Clementi read Ravi’s second “It’s happening again” message, Clementi approached his Residential Advisor, who offered Clementi a spare bed if he did not feel comfortable returning to his room. Nonetheless, Clementi turned down the offer, “saying it should be fine.”<sup>85</sup>

Additionally, Clementi discussed the incident extensively on the community forum of the website JustUsBoys.com. Clementi had been a member of the website since July 2007, when he was fifteen years old, and he had participated in discussions on a wide range of issues (safe sex, cellular phones, fountain pens, etc.) before seeking advice on how to address the webcam incident.<sup>86</sup> Although the discussions about the incident certainly reveal that Clementi was upset about what had happened, they also demonstrate a level-headed and often light-hearted approach to his roommate’s actions. Several reports on Clementi’s death have mentioned his “community board” postings, but few have dwelled on them, I suspect, because JustUsBoys.com is a website that hosts a wide range of pornographic content in addition to both sexual and general interest discussion forums. Nonetheless, nestled within a thicket of videos, pictorials, and sex show advertisements is a surprisingly dynamic, diverse, and supportive community that meaningfully engaged with Clementi as he wrestled with Ravi’s actions.

At 7:22 A.M. on September 21, 2010, Clementi started the thread “college roommate spying. . .” under the handle “cit2mo.” He posted the following message:

so the other night i had a guy over. I had talked to my roommate that afternoon and he had said it would be fine w/him. I checked his twitter today. he tweeted that I was using the room (which is obnoxious enough), AND that he went into somebody else’s room and remotely turned on his webcam and saw me making out with a guy. given the angle of the webcam I can be confident that that was all he could have seen.

so my question is what next?

I could just be more careful next time . . . make sure to turn the cam away . . .

buttt . . .

I’m kinda pissed at him (rightfully so I think, no?)

and idk . . . if I could . . . it would be nice to get him in trouble

<sup>84</sup> Appendix to Motion to Dismiss, *supra* note 75, at DA 191–92.

<sup>85</sup> *Id.* at DA 273, 275.

<sup>86</sup> *Those Loose Ends: On Magic Keys and Fig Leaves*, TEXT2CLOUD (Jan. 6, 2011), <http://text2cloud.com/2011/01/those-loose-ends-on-magic-keys-and-fig-leaves/>.

but idk if I have enough to get him in trouble, i mean . . . he never saw anything pornographic . . . he never recorded anything . . .

I feel like the only thing the school might do is find me another roommate, probably with me moving out . . . and i'd probably just end up with somebody worse than him . . . I mean aside from being an asshole from time to time, he's a pretty decent roommate . . .

the other thing is I that don't wanna report him and then end up with nothing happening except him getting pissed at me . . .<sup>87</sup>

Multiple JustUsBoys.com members responded with a range of different reactions and advice, including suggesting that he stand up for himself and report the incident, expressing their sympathy, tossing out a few jokes,<sup>88</sup> informing Clementi that his roommate's actions might be illegal, and recommending that he get support from the LGBT center. Clementi expressed his anger over his roommate's Twitter post, saying that it made him feel like his roommate was saying, "look at what a fag my roommate is," and telling the forum that he had requested a roommate change.<sup>89</sup> Early in the morning of September 22nd, Clementi told the forum that he had invited "the guy" over another time and yet again Ravi had set up the webcam.<sup>90</sup> He immediately told his Residential Advisor, and "meanwhile I turned off and unplugged his computer, went crazy looking for other hidden cams . . . and then had a great time."<sup>91</sup> Clementi's final post at 6:17 A.M. indicated that the Residential Advisor "seemed to take [his complaint] seriously."<sup>92</sup>

Although Clementi took his own life later that day, the discussion on JustUsBoys.com continued regarding the best approach for handling the webcam incident.<sup>93</sup> When a few days had passed without any further word from Clementi, members started prompting him for an update,<sup>94</sup> and when

<sup>87</sup> Kashmir Hill, *Tyler Clementi Turned to a Gay Message Forum for Help Before His Suicide*, FORBES (Sept. 30, 2010, 10:03 AM), <http://www.forbes.com/sites/kashmirhill/2010/09/30/tyler-clementi-turned-to-a-gay-message-forum-for-help-before-his-suicide/> (grammar and syntax in original).

<sup>88</sup> *Virtual Communities and Embodied Realities: "he was SPYING ON ME . . . do they see nothing wrong with this?,"* TEXT2CLOUD (Dec. 21, 2010), <http://text2cloud.com/2010/12/virtual-communities-and-embodied-realities-he-was-spying-on-me-do-they-see-nothing-wrong-with-this/>.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> cit2mo, *Re: College Roommate Spying . . .*, TEXT2CLOUD (Sept. 22, 2010, 4:38 AM), <http://text2cloud.com/wp-content/uploads/2011/01/2-cit2mo-4.jpg>.

<sup>92</sup> *duy, Tyler Clementi Suicide Confirmed: Freshman's Roommate Accused of Watching, Broadcasting Gay Private Life [video]*, METRO WEEKLY (Oct. 10, 2010, 12:02 AM), [http://www.metroweekly.com/news/last\\_word/2010/10/tyler-clementi-suicide-confirm.html](http://www.metroweekly.com/news/last_word/2010/10/tyler-clementi-suicide-confirm.html).

<sup>93</sup> *A Gay Teen Kills Himself After Being Outed on the Internet!*, JUSTUSBOYS (Sept. 29, 2010), <http://www.justusboys.com/forum/threads/321264-A-Gay-Teen-kills-himself-after-being-outed-on-the-internet!>

<sup>94</sup> *Now Things Get Complicated: The Calculus of Desire*, TEXT2CLOUD (Jan. 2, 2011), <http://text2cloud.com/2011/01/now-things-get-complicated-the-calculus-of-desire/>.

news reports emerged about Clementi's suicide, forum members immediately expressed shock, hurt, and sorrow:

This is still hitting me pretty hard. Besides being so very tragic, I guess it has to do with the fact that I'm one of the people who responded to his thread. I now realize that my posting was too late for him to see and I wish I had responded earlier.<sup>95</sup>

In the days and weeks following Clementi's death, JustUsBoys.com members talked extensively about how they might have done more to prevent his suicide, and how generally to make JustUsBoys.com an even more supportive community.<sup>96</sup>

Clementi may indeed have been shy and without a large network of friends in high school and college, but at the same time, he was able to sift through layers of sexually explicit content to reach a community he felt could provide meaningful support during a difficult time. Ultimately, the community was unable to prevent Clementi's suicide (indeed, there is little in *any* publicly accessible document to suggest he was anywhere near that point), but it is important to acknowledge Clementi's affirmative efforts to navigate the resources available to him.

##### 5. *Clementi Did Not Necessarily Feel "Shame."*

Despite the repeated insistence that Clementi felt "shame" for his "most intimate of acts" and for being "brand[ed]" as gay,<sup>97</sup> there is little in the factual record to suggest that Clementi's discomfort revolved specifically around his sexual orientation or even the sexuality of the images captured by Ravi's webcam. The above conversations indicate that Clementi was not

<sup>95</sup> backpacker, *Re: A Gay Teen Kills Himself After Being Outed on the Internet!*, JustUsBoys (Sept. 30, 2010, 8:24 PM), <http://www.justusboys.com/forum/showthread.php?t=321264&page=5>.

<sup>96</sup> See, e.g., the posting of David808:

Many times in the past, I've offered online advice that was sincere, but ultimately unhelpful. I have had to keep reminding myself that I don't really know what's going on in the head of the person writing about his problems in a cyberspace environment, especially where identities are generally concealed.

Again, nobody here wrote anything that is "wrong"! Nobody could have known how this was going to turn out for cit2mo.

What I urge people reading this to do is to is: If you sense that somebody posting in a forum may be having a rough time with something, take a cautious approach when offering advice. And say things like, "How are you doing?" "How can I help?" "I'm thinking about you." "I'm here for you." None of that may make any difference. But you never know . . . .

David808, *Re: A Gay Teen Kills Himself After Being Outed on the Internet!*, JustUsBoys (Oct. 2, 2010, 7:39 PM), <http://www.justusboys.com/forum/archive/index.php/t-321264-p-2.html>.

<sup>97</sup> See *supra* notes 38–41, 61–63 and accompanying text.

particularly concerned (or at least professed not to be concerned) about having a reputation for being sexually active or about Ravi walking in on him having sex. Moreover, Clementi maintained a (since-removed) sexually explicit profile on the adult website cam4.com,<sup>98</sup> which allows users to broadcast live video of themselves, suggesting that at least in certain contexts of his own choosing, he was comfortable with and/or excited about being viewed in a sexual manner. Clementi's conversations certainly indicate that he felt violated by Ravi's actions, but, as explored more fully below, they also complicate the presumed equation of such feelings with "shame" about his sexuality or his sexual orientation.

#### 6. *More Was Going on than Bullying.*

Ultimately, we do not know exactly why Clementi chose to take his own life, but it is important not to reduce Clementi's suicide solely to bullying. His family has admitted in subsequent interviews that Clementi was dealing with underlying depression,<sup>99</sup> and the names of undisclosed files on his computer created before the webcam incident — for example, "Why is everything so painful.docx," "sorry.docx," and "Gah.docx"<sup>100</sup> — seem to reinforce further such a mental state. Although his family maintains that the webcam incident "was [the] straw that broke the camel's back,"<sup>101</sup> policy-makers, advocates, and scholars should be careful not to jump to the conclusion that the specific trigger was the revelation of Clementi's sexual orientation or sexual activity instead of a confluence of factors, including some degree of mental illness.

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<sup>98</sup> See, e.g., William Saletan, *Bugged Naked: Webcams, Sex and the Death of Privacy*, SLATE (Oct. 1, 2010, 8:19 AM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2010/10/bugged\\_naked.html](http://www.slate.com/articles/health_and_science/human_nature/2010/10/bugged_naked.html) ("Clementi knew all about webcams. His Facebook photo is an obvious webcam product, and a highly ['not safe for work'] webcam page at cam4.com apparently shows lots more of him.").

<sup>99</sup> Marianne O'Donnell, *Parents of Rutgers Student Who Committed Suicide Change View of Homosexuality*, NBC NEWS (June 27, 2012, 4:12 PM), [http://rockcenter.msnbc.msn.com/\\_news/2012/06/27/12437202-parents-of-rutgers-student-who-committed-suicide-change-view-of-homosexuality?lite](http://rockcenter.msnbc.msn.com/_news/2012/06/27/12437202-parents-of-rutgers-student-who-committed-suicide-change-view-of-homosexuality?lite). Emily Bazelon has similarly warned against overlooking mental illness in discussions of teen bullying and suicide. In the documentary film *Bully*, the director prominently featured the family of teenager Tyler Long, who had committed suicide, purportedly due to frequent bullying and non-responsive school administrators. See *BULLY* (Weinstein Co. 2011). To the "horror" of the teen suicide expert Bazelon interviewed, the movie entirely omitted Long's significant mental illnesses, creating the potential for a suicide contagion effect and normalizing an exaggerated correlation between bullying and suicide. See Bazelon, *The Problem with Bully*, *supra* note 15.

<sup>100</sup> See Motion to Dismiss Indictment and Compel Discovery at 72, *State v. Ravi*, No. 11-04-00596 (N.J. Super. Ct. Law Div. Aug. 10, 2011) [hereinafter Motion to Dismiss] (on file with author) ("Why is everything so painful.docx," created June 20, 2010; "sorry.docx," created July 28, 2010; "Gah.docx," created September 2, 2010).

<sup>101</sup> See O'Donnell, *supra* note 99.

#### D. *What Is Left Out?*

Comparing Tyler Clementi's actual communications and experiences to their portrayal in the Ravi trial and the broader media coverage reveals both a whitewashing and black-boxing of Clementi's story. Where Clementi's own voice reveals a sexual appetite and an interest in older men, he is portrayed as timidly craving intimacy and romance with other boys. Where he actually reached out and engaged with other people about his troubles, he is presented as having no one to speak to at all. Although the desire to put a rosy gloss on the last few weeks of Clementi's life is understandable, it is nonetheless problematic that such selective representation has been "leveraged against others"<sup>102</sup> and has underwritten legal and cultural initiatives meant to improve the lives of same-sex attracted teenagers across the nation. Even in Clementi's very sad circumstances, there are nonetheless opportunities to tell "[new] stories" about gay teens "not fueled by fear" of the choices they might make.<sup>103</sup> Exposing the role of the innocence narrative in Clementi's case suggests at least four potential lessons about teenage sexual agency and its relationship to community and technology that should inform ongoing cyberbullying research and policy debates.

##### 1. *The Internet as a Valuable Resource for Gay Teens.*

The Internet is not just a source of torment and affliction for gay teens. Although legal scholarship has largely emphasized the Internet's potential for bullying, intimidation, and harassment,<sup>104</sup> the medium nonetheless provides new opportunities for social, political, and sexual engagements by teenagers.<sup>105</sup> Despite the persistent legislative and cultural focus on the monsters of the Internet — the child pornographers, the online predators, and now the cyberbullies — actual teenagers largely do not experience the In-

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<sup>102</sup> See LANCASTER, *supra* note 21, at 205 (noting that within an innocence narrative, "the victim is the undisputed hero of his or her story. Victims' suffering bestows a sort of awe, an aura, a halo. This narrative, this nimbus, can be leveraged against others.").

<sup>103</sup> STOCKTON, *supra* note 24, at 12 (brackets in original).

<sup>104</sup> See generally THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION (Saul Levmore & Martha Nussbaum eds., 2010); Danielle Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009); Mary Ann Franks, *Unwilling Avatars, Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224 (2011); Nancy S. Kim, *Web Site Proprietorship and Online Harassment*, 2009 UTAH L. REV. 993 (2009). A notable exception is Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 185 (2003) ("For homosexual teenagers with computer access, the Internet has, quite simply, revolutionized the experience of growing up gay." (quoting Jennifer Egan, *Lonely Gay Teen Seeking Same*, N.Y. TIMES MAG. (Dec. 10, 2000), <http://www.nytimes.com/2000/12/10/magazine/lonely-gay-teen-seeking-same.html?pagewanted=all&src=pm>)).

<sup>105</sup> Samantha Biegler & danah boyd, Berkman Ctr. for Internet & Soc'y, *Risky Behaviors and Online Safety: A 2010 Literature Review 3* (2010) (unpublished manuscript), available at <http://www.zephoria.org/files/2010SafetyLitReview.pdf> ("Much popular discourse suggests that the Internet has made life for children radically more dangerous without accounting for the youth who have overcome risks through their engagement.").

ternet like Hansel and Gretel in the woods, perpetually dodging and disentangling themselves from dangerous online encounters.<sup>106</sup> Reported rates of cyberbullying vary widely from 4–46% of teenagers,<sup>107</sup> and to the extent that teenagers are sexually victimized, “most youth are not deceived about the abuser’s age, do discuss sex online before meeting up offline, and are aware of the abuser’s sexual intentions when they decide to meet them.”<sup>108</sup> Moreover, “[d]ire predictions about the threat of Internet-initiated sex crimes committed by strangers appear to be exaggerated . . . .”<sup>109</sup> In one study, 53% of adults agreed that online predators were a threat to children in their households, but “[t]he reality is that few online solicitations lead to offline encounters . . . and physical abductions of children following from online meetings are nearly nonexistent.”<sup>110</sup> Although there are certainly positive and negative aspects of online explorations, at its best, “the Internet is a tool that can help youth to overcome their shyness, to learn to talk about sex, find a romantic partner, or learn about sexuality and sexual health.”<sup>111</sup>

Although empirical research focusing specifically on sexual minority youth and the Internet is in its infancy, “the very same features and characteristics that allow heterosexual youth to use the Internet for sexual exploration can be even more important for sexual minorities.”<sup>112</sup> “The Internet . . . has been recognized as an important socializing force for youth seeking to learn about gay culture . . . [as it] provides gay youth with a way to form their own communities, explore their identities, and create social change as they connect with one another.”<sup>113</sup> Chat rooms, for example, “may be particularly valuable as a context for coming out and reducing anxieties about gay life, as well as to receive social support, enter local gay communities,

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<sup>106</sup> See YOUTH & MEDIA POLICY WORKING GRP. INITIATIVE, BERKMAN CTR. FOR INTERNET & SOC’Y, SPECIAL REPORT: KIDS, DATA, AND INTERNET SAFETY 3 (2010), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Kids\\_Data\\_Internet\\_Safety\\_BCIS\\_Youth\\_Policy\\_03-30-10.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Kids_Data_Internet_Safety_BCIS_Youth_Policy_03-30-10.pdf). For example, public health researcher Michele Ybarra has observed that “many popular myths about youth and the Internet — ‘everyone’ is affected by Internet harassment, harassment is increasing over time, harassment is getting nastier and more upsetting, and all young victims of online harassment are hapless innocents — are simply not supported by the data.” *Id.*

<sup>107</sup> Andrew Schrock & danah boyd, *Problematic Youth Interactions Online: Solicitation, Harassment, and Cyberbullying*, in COMPUTER-MEDIATED COMMUNICATION IN PERSONAL RELATIONSHIPS 368, 374 (Kevin B. Wright & Lynn M. Webb eds., 2011), available at <http://www.danah.org/papers/2011/CMCPR-ProblematicYouthInteraction.pdf>.

<sup>108</sup> Biegler & boyd, *supra* note 105, at 3.

<sup>109</sup> Schrock & boyd, *supra* note 107, at 370. See also *id.* at 372 (“In the second Youth and Internet Safety Survey (YISS-2), administered in 2005, 0.03% (4 in 1,500) of youths reported physical sexual contact with an adult they met online, and all were 17-year-olds engaging in sexual acts with adults.”).

<sup>110</sup> *Id.* at 370.

<sup>111</sup> KAVERI SUBRAHMANYAM & DAVID SMAHEL, DIGITAL YOUTH: THE ROLE OF MEDIA IN DEVELOPMENT 54 (2011) (compiling research on teen online sexual explorations).

<sup>112</sup> *Id.* at 53.

<sup>113</sup> Gary W. Harper et al., *The Role of the Internet in the Sexual Identity Development of Gay and Bisexual Male Adolescents*, in THE STORY OF SEXUAL IDENTITY, *supra* note 18, at 297, 302.

and search for sexual and romantic partners.”<sup>114</sup> For example, Mary L. Gray’s ethnographic work with queer youth in rural Kentucky illustrates the embeddedness of the Internet in both identity practices and community formation.<sup>115</sup> She documents several young people’s processes of self-discovery through Internet explorations and chatter,<sup>116</sup> and she shows how rural youth expand their experience of social belonging by “sutur[ing] the queer social worlds they find in their hometowns, on television, and online.”<sup>117</sup> The Internet provides opportunities for youth to name their desires, and through such naming, situate themselves within social and sexual communities online and off.<sup>118</sup> She cautions that “youth engage media in far more complicated ways than we assume,” and echoing social media scholar danah boyd’s concerns, urges scholars and policymakers to move beyond the negative effects of media consumption and engage with the role of new media in the everyday lives of queer youth.<sup>119</sup>

Despite being the subject of a “high-profile” case of cyberbullying and harassment, Clementi appears to have benefitted from the Internet at least in some ways. Through JustUsBoys.com, he shared his views on a wide range of sexual and non-sexual issues,<sup>120</sup> provided information and advice to other members,<sup>121</sup> and ultimately had an active online forum to discuss his troubles regarding his roommate. Additionally, he used websites such as adam4adam

<sup>114</sup> *Id.*

<sup>115</sup> GRAY, *supra* note 29, at 126–27.

<sup>116</sup> *E.g., id.* at 121–22 (recounting teenage girl’s use of Internet chat rooms as a means of “making sense of her love for *Baywatch*” and attraction to the women portrayed on the television show); *id.* at 127 (relating gay-identifying seventeen-year-old’s view of the commercial portal PlanetOut.com as “a place to feel at least somewhat at home”); *id.* at 130 (“Since I live in a small town, where I know very few gay people, it gives me a sense that the gay community is small, but when you get on the Internet, you realize the gay community is everywhere and it’s huge!”).

<sup>117</sup> *Id.* at 15.

<sup>118</sup> *Id.* at 136–37 (recounting nineteen-year-old John W.’s use of websites to situate himself within/in relation to gay identity and S&M communities). She does note, however, a fairly pervasive urban bias encountered by rural gay teens. Gary Harper and his coauthors also emphasize the importance of the Internet for teens living in towns that lack gay communities:

Yeah there’s gay communities I feel on the Internet. It’s, it’s a way for people who don’t have that um, who don’t have that external connection in their town, in their, wherever they live that being on the Internet it’s easy to find people that are similar to yourself and, and bond through, through similarities.

Harper et al., *supra* note 113, at 314.

<sup>119</sup> GRAY, *supra* note 29, at 14, 170.

<sup>120</sup> *Those Loose Ends, supra* note 86.

<sup>121</sup> For example, after user “boysmile” asked whether “bareback sex [is] safe for a 100% top,” numerous members responded angrily about the user’s ignorance, prompting Clementi to post:

If someone is ignorant, they need to be informed, not hollered at. Too [sic] many it may seem like a question which has been asked to death, but to him it does not, and he deserves a valid courteous answer since he asked a valid question in a courteous manner.

cit2mo, *Re: Is Bareback Sex Safe for a 100% Top?*, JustUsBoys (Apr. 4, 2008, 3:19 PM), <http://www.justusboys.com/forum/threads/208522-is-bareback-sex-safe-for-a-100-top>. He

and cam4 to find sexual partners online and off. Although an active sex life is by no means incompatible with sadness or depression, there is nothing in the record to indicate that Clementi *ever* experienced harassment or was in any way sexually victimized in online environments before living with Dharun Ravi. Clementi did not appear to have a large number of friends — gay, straight, or otherwise — and he used the Internet as an outlet for conversation, humor, and his sexual desires. It is true that digital media facilitated Ravi's actions to Clementi's detriment, but Clementi's relationship to the Internet was more complicated than the story of pure victimization would have us assume.

## 2. Teenagers Can Be Sexual Agents.

It is generally off-limits to claim affirmatively that children and teenagers of any sexual orientation “can have sexual pleasure and be safe too,”<sup>122</sup> and our educational and legal systems routinely root out and punish those who potentially challenge the desired asexuality of minors.<sup>123</sup> For example, in 2007 alone, nearly 250 Virginia elementary school children were suspended for “offensive sexual touching” or “improper physical contact against a student,” and 165 Maryland schoolchildren were suspended for “sexual harassment” including three preschoolers, sixteen kindergartners, and twenty-two first graders.<sup>124</sup> Law enforcement officers routinely pose as minors and actively seek out adult sexual partners who might be drawn to a seductive, sexually assertive teenager, and they then pursue criminal charges at least in part because such young sexual agents are supposedly mere figments of the pedophilic imagination.<sup>125</sup> A deep thicket of criminal laws and expansive sex offender registries punish sexual conduct with *and between*

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then proceeded to explain that “yeh, STI’s as well as other infectious diseases can be absorbed through any mucous membranes . . . .” *Id.* (grammar and syntax in original).

<sup>122</sup> *Harmful to Minors: The Perils of Protecting Children from Sex*, PUBLISHERS WEEKLY (Apr. 2, 2002), <http://www.publishersweekly.com/978-0-8166-4006-5> (reviewing JUDITH LEVINE, *HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX* (2002)).

<sup>123</sup> LANCASTER, *supra* note 21, at 63 (quoting Judith Levine, *A Question of Abuse*, MOTHER JONES (July–Aug. 1996) (“Today, teachers and social workers . . . tend to see sexual pathology and criminal exploitation in any situation that looks even remotely sexual.”). See also Fischel, *supra* note 24, at 306 (“Thus, child sexuality is often read as child sexual abuse, without nuance for age, age difference, sexual practices, the relationship of the persons involved, and any other factors relevant to the encounter or relationship.”).

<sup>124</sup> LANCASTER, *supra* note 21, at 64 (“Children-who-molest, children-who-harass, children-who-abuse are mostly children who fail to validate adult fantasies of childhood innocence.”).

<sup>125</sup> STOCKTON, *supra* note 24, at 38 (“This child voice that police send out to ‘pedophiles’ in order to ‘catch’ them is the voice of childhood that the law denies — yet must believe the public, especially parents, feels increasingly endangered by. Adult accusations of adult pedophilia are a way to disbelieve the voice of this child.”); Adler, *supra* note 23, at 147 (“[To Catch a Predator] continually stages the spectacle of the sexual child that it disavows.”).

minors,<sup>126</sup> thereby treating sexual desire and sexual action as antithetical to the innocence of childhood.

Tyler Clementi's online engagements and relative comfort discussing his sexuality suggest that gay teens can be more active, mature, and self-aware sexual agents than our society and our legal system typically credit.<sup>127</sup> "Perhaps surprising to researchers who emphasize the suicidality, depression, victimization, prostitution, and substance abuse of gay youth, gay teenagers generally feel good about their same-sex sexuality."<sup>128</sup> Clementi met a thirty-year-old man online, asked his roommate to give him exclusive use of their dorm room, and had apparently enjoyable sex with M.B. on three occasions. There is nothing in Clementi's communications or in M.B.'s trial testimony to indicate that the relationship was coercive, entered into under false pretenses, or kept secret in any way. Even when Clementi learned that Ravi was attempting to spy on him a second time, he still managed to unplug Ravi's computer and have a "great time" with his guest.

This is not to say that everything is rosy in the exercise of sexual agency. Sexual pleasure is not necessarily all about love and intimacy, as initially presumed in the romanticized accounts of Clementi's relationship with M.B., nor is it all pure, liberated hedonism. Although a full account of gay male sexual subjectivity is beyond the scope of this Article, it is nonetheless important to recognize that sexual pleasure can simultaneously or alternatively manifest one's stigma, shame, and even ambivalence towards

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<sup>126</sup> For example, the North Carolina Supreme Court affirmed the adjudication of delinquency under the state's "crimes against nature" statute of a fourteen-year-old boy who had consensual oral sex with his twelve-year-old girlfriend. *In re R.L.C.*, 643 S.E.2d 920, 921 (N.C. 2007). To support the constitutionality of the statute as applied to the juvenile, the court explained: "One plausible legitimate purpose for penalizing the activity of R.L.C. and O.P.M. at issue is the government's interest in preventing sexual conduct between minors." *Id.* at 925. See also Adler, *supra* note 23, at 133–34.

<sup>127</sup> I acknowledge, though, the need to draw some lines between the sexual agency of children and young adults. I generally do accept that children (under the age of thirteen) should be very strongly presumed unable to exercise sexual autonomy responsibly, Fischel, *supra* note 24, at 304–05, but among older teenagers, Clementi's story suggests that one's eighteenth year is not a magical pivot point between youth and adulthood. On the one hand, Clementi and Ravi were both eighteen at the time of the webcam incident, yet their case has propelled forward antibullying reforms largely aimed at high school students. See, e.g., *supra* notes 51–55 and accompanying text. On the other hand, Clementi was able to interact maturely and eloquently on an "adult" community forum starting at the age of fifteen. See *supra* Part I(C)(4); cf. *supra* notes 120–21 and accompanying text.

<sup>128</sup> SAVIN-WILLIAMS, *supra* note 1, at 166; accord MCCORMACK, *supra* note 29, at xxix ("[T]he experiences of LGBT students . . . demonstrate that the discourses of sexuality and gender in these high schools are markedly different from what the academic literature has traditionally shown."); Hammack & Cohler, *supra* note 18, at 176–77. See also Deborah L. Tolman & Sara I. McClelland, *Normative Sexuality Development in Adolescence: A Decade in Review, 2000–2009*, 21 J. RES. ADOLESCENCE 242, 242 (2011) ("While risks associated with adolescent sexuality are essential to understand, this first decade of the 21st Century witnessed the emergence of a critical mass of empirical studies reflecting an assumption that adolescent sexuality is a normal and expected aspect of adolescent development.").

one's very survival.<sup>129</sup> None of these complexities though — the freedom, the agency, or the pain — are captured by the innocence narrative and its accompanying sexual pastoralism. In whitewashing Clementi's experiences, the innocence narrative brackets both the agency *and* the abjection potentially at issue in teenage sexual encounters and subverts both to a more palatable, sympathetic, and empirically suspect story of two boys sharing a romantic moment.

### 3. *The Sexual Internet Supports Sexual Communities.*

To the extent that online sexual content appears in legal debates, the question is almost always how to limit minors' access to pornography and other "adult" materials, yielding a string of legislation prohibiting or limiting minors' access to "indecent" materials online.<sup>130</sup> Clementi's postings on JustUsBoys.com, the concerned responses to those postings, and the discussions that followed Clementi's death complicate this equation of "sexual content" with material that is "harmful to minors."<sup>131</sup>

After learning of Clementi's death, several members shared their own "coming out" stories and emphasized how JustUsBoys.com was crucial to helping them get through the difficult process of coming to terms with their own sexuality. For example, one JustUsBoys.com user posted:

It's been my observational experience in my time here since May of '03 that the degree of support offered to MANY young AND old gay men here has, I personally believe, benefited AND saved more than one life.

There's a lot of silliness and just plain old nonsense that takes place on many of the forums here, but there has been DEFINITE aid,

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<sup>129</sup> See, e.g., DAVID HALPERIN, WHAT DO GAY MEN WANT? 45 (2007) (discussing gay men's "ambivalence about survival" in context of sexual risk-taking); *id.* at 69 ("Gay subjectivity is divided against itself, formed in stigma, in rejection by others — especially by those whom one desires — and by oneself."); Leo Bersani, *Is the Rectum a Grave?*, 43 AIDS: CULTURAL ANALYSIS/CULTURAL ACTIVISM 197, 211–13 (1987); Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL'Y 7, 50 (2004) ("[Q]ueer theoretic work is curious about, involved in and indeed often positively affirmative with respect to shame and abjection . . . it ends up affirming sex 'dark side and all.'").

<sup>130</sup> See, e.g., Children's Internet Protection Act, Pub. L. No. 106-554, §§ 1701–41, 114 Stat. 2763 (2000) (conditioning educational funds on the installation of filtering technologies); Child Online Protection Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (requiring commercial distributors of "material harmful to minors" to restrict access to minors); Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (criminalizing transmission of indecent materials to minors).

<sup>131</sup> At least one study of the role of the Internet in gay and bisexual male development has similarly observed that searching out and viewing pornographic websites has "set the stage for further exploration of their sexual identity." Harper et al., *supra* note 113, at 311 ("So I start getting curious and I started searching. That's how I discovered there's some like areas for gay people. And like you're chatting there. And all that stuff . . . that's kind of when I started to be more into the community.").

assistance, direction, comfort, help and emotional support that has had a HUGE impact on people's lives here.<sup>132</sup>

Clementi's death therefore provided a moment for members of JustUsBoys.com to come together, not just to mourn Clementi's death or to condemn his cyberbullies, but also to discuss constructive ways of forging an even more productive, supportive community.

The JustUsBoys community forum provides a supportive, engaged community, and the fact that it is embedded within a variety of gay pornography (from which the website derives the revenue that supports it) does not automatically discount its ultimate social value.<sup>133</sup> Moreover, as recounted by a number of influential scholars, the present-day LGBT political movement has its roots in undeniably *sexual* communities and subcultures,<sup>134</sup> and the contemporary shift towards issues of relationship equality should not foreclose the potential for the more "unseemly" corners of queer culture to provide a valuable resource for gay teens.

#### 4. Harm from Disrupted "Boundary Management."

Embedded in both the innocence narrative used against Ravi and the invasion of privacy statute under which he was convicted is the idea that the exposure of Clementi's "intimate parts" or "sexual contacts" is inherently

<sup>132</sup> Pianist, *Re: A Gay Teen Kills Himself After Being Outed on the Internet!*, JUSTUSBOYS (Sept. 30, 2010, 7:22 PM), <http://www.justusboys.com/forum/showthread.php?t=321264&page=5> (grammar and syntax in original); see also ChickenGuy, *Re: A Gay Teen Kills Himself After Being Outed on the Internet!*, JUSTUSBOYS (Sept. 30, 2010, 7:20 PM), <http://www.justusboys.com/forum/showthread.php?t=321264&page=5> ("I hope that JUB will continue to promote these forums even more . . . I am one of those who found such comfort there, and found seemingly impossible obstacles and challenges to be overcome in a very short period of time.").

<sup>133</sup> For example, the administrators of JustUsBoys.com launched a separate nonprofit website, EmptyClosets.com, aimed at providing a resource for gay teens who had been kicked out of the over-eighteen community forums. See *JustUsBoys*, WIKIPEDIA, <http://en.wikipedia.org/wiki/JustUsBoys> (last visited Nov. 20, 2012, 8:51 PM); Paul UK and EC staff, *A Brief History of EmptyClosets*, EMPTY CLOSETS, <http://emptyclosets.com/home/pages/welcome/history-of-emptyclosets.php> (last visited Feb. 13, 2013) ("One of the owners of the media company has said that he never had a resource such as [EmptyClosets.com] when growing up, and that his life would have been much easier had such a resource been available . . .").

<sup>134</sup> See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES* (2d ed. 1998); JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS* 96–98 (1985); Lauren Berlant & Michael Warner, *Sex in Public*, 24 *CRITICAL INQUIRY* 547 (1998). Pat Califia, for example, notes that the gay bathhouses of the 1970s and 1980s, largely maligned for the sexual license they promoted, facilitated the coming out process, funded early gay rights efforts, created employment opportunities for openly gay men, and arguably "became the heart and soul of 80's [sic] gay activism." PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* 33 (1994). Conversely, opponents of gay liberation have historically appealed to concepts of obscenity and indecency to halt LGBT publication, equating homosexuality with censurable sexual immorality. See D'EMILIO, *supra*, at 114–15, 130–31; see also *One, Inc. v. Olesen*, 241 F.2d 772, 777 (9th Cir. 1957) (describing as "nothing more than cheap pornography" a story in which a "young girl gives up her chance for a normal married life to live with the lesbian"), *rev'd*, 355 U.S. 371 (1958).

intrusive.<sup>135</sup> Clementi's online explorations, however, raise doubts about whether the harms here included the denial of his dignity through the "exposure" of his sexual orientation and through the transgression of the "sacred boundaries" of his sexual activity.<sup>136</sup> Clementi was certainly upset that he had been spied upon and mocked by Ravi, but, at least in certain "public" contexts, Clementi did not see his body or his sexuality as hidden behind an impermeable wall of privacy.

Clementi's experience appears not to fall easily within the dignitary privacy concerns cited by the prosecution.<sup>137</sup> Instead, the harm suffered by Clementi arguably falls more neatly within what Julie Cohen refers to as "boundary management."<sup>138</sup> "Intimate relationships, community relationships, and more casual relationships all derive from the ability to control the presentation of self in different ways and to differing extents."<sup>139</sup> In certain contexts (e.g., gay-themed websites), Clementi desired to share certain aspects of his "intimate" life (e.g., details about his sexual desires) and not others (e.g., his last name), while in other contexts (e.g., the Rutgers community) his preferences were starkly different.<sup>140</sup> Ravi's behavior may have ul-

<sup>135</sup> Such conduct is criminalized under the New Jersey Code of Criminal Justice:

An actor commits a crime of the third degree if, knowing that he is not licensed or privileged to do so, he photographs, films, videotapes, records, or otherwise reproduces in any manner, the image of another person whose intimate parts are exposed or who is engaged in an act of sexual penetration or sexual contact, without that person's consent and under circumstances in which a reasonable person would not expect to be observed.

N.J. STAT. ANN. § 2C:14-9 (West 2013).

<sup>136</sup> Compare *supra* notes 62–63 and accompanying text, with *supra* notes 128–29 and accompanying text.

<sup>137</sup> Within Daniel Solove's taxonomy of privacy interests, this asserted interest would most closely align with "exposure" of private information, which works by "stripping people of their dignity." Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 536–37 (2006) ("Exposure involves the exposing to others of certain physical and emotional attributes about a person. These are attributes that people view as deeply primordial, and their exposure often creates embarrassment and humiliation."). Ryan Calo has questioned whether "denying women or homosexuals the right to exercise control over their own bodies is best understood as a privacy harm" instead of an equality concern. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1137 (2011).

<sup>138</sup> JULIE COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 148 (2012) ("The interest in privacy, which operates at the interface between evolving subjectivity and surveillance, should be understood as an interest in preserving room for socially situated processes of boundary management to operate."); see also IRWIN ALTMAN, THE ENVIRONMENT AND SOCIAL BEHAVIOR 10 (1975) ("Privacy is an interpersonal boundary-control process . . ."); David J. Phillips, *Negotiating the Digital Closet: Online Pseudonymity and the Politics of Sexual Identity*, 5 INFO. COMM. & SOC'Y 406, 410 (2002) ("Being 'out' or closeted is not a binary condition, it is a negotiated and fluid identity status. It is not privacy *per se* that is essential in these political contexts . . ."). Anita Allen has proposed a similar concept of "selective disclosure" of sexual orientation or identity — the disclosure "in some context to some persons but not others." Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1716 (2010). Allen refers to the Clementi/Ravi incident in the last footnote of her piece. *Id.* at 1764 n.464.

<sup>139</sup> COHEN, *supra* note 138, at 146.

<sup>140</sup> See David J. Phillips, *From Privacy to Visibility: Context, Identity, and Power in Ubiquitous Computing Environments*, 23 SOC. TEXT 83, 98 (2005) ("[O]ur identities are always

timately broken down Clementi's perceived boundaries between these online/sexual and offline/academic contexts and the sharply different set of norms governing each.<sup>141</sup> To the extent that Ravi's actions served to fracture Clementi's delicate navigation of various social spaces and the identity practices each offered, the concept of an "invasion of privacy" may be apt.<sup>142</sup> Looking at the case through the lens of childhood innocence, however, elides privacy as boundary management with privacy as sexual dignity, again obscuring Clementi's efforts to negotiate various facets of his social and sexual life differently in different contexts.<sup>143</sup>

## II. REIFYING THE INNOCENCE NARRATIVE

The innocence narrative surrounding Tyler Clementi's death has served as the foundation not only for the prosecution of Dharun Ravi, but also for a broader set of antibullying legal reforms. Although the plight of Clementi and other gay teens has quickly and effectively mobilized bipartisan legal initiatives at both the state and the federal level, basing legal reforms on the assumed innocence and vulnerability of gay teens risks the long-term codification and legal entrenchment of such weaknesses. The innocence narrative produces a certain knowledge of gay teens that denies their capacity to chart their own social and sexual courses, and "[s]uch ignorance effects"<sup>144</sup> can accordingly be "harnessed, licensed, and regulated" to their detriment. Ostensibly designed to protect gay teens (and other vulnerable youth) from bullying and harassment, there is a considerable risk that by turning to the state to oversee and protect the social development of gay teens, such protectionism will morph into a paternalism that overlooks, doubts, and renders invisible the social and sexual agency of gay teens.

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multiple. We stand in different social relationships, we perform different roles, vis-à-vis our clients, our coworkers, our neighbors, our families. Successful social life involves not only the appropriate performance of a particular identity in a particular situation, but the graceful passage between roles and situations." Helen Nissenbaum also notes:

Observing the texture of people's lives, we find them not only crossing dichotomies, but moving about, into, and out of a plurality of distinct realms . . . . Each of these spheres, realms or contexts involves, indeed may even be defined by, a distinct set of norms, which governs its various aspects such as roles, expectations, actions, and practices.

Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 137 (2004).

<sup>141</sup> See Nissenbaum, *supra* note 140, at 141 ("What matters is not only whether information is appropriate or inappropriate for a given context, but whether its distribution, or *flow*, respects contextual norms of information flow.").

<sup>142</sup> See ALTMAN, *supra* note 138, at 50 ("[P]rivacy mechanisms define the limits and boundaries of the self. When the permeability of those boundaries is under the control of a person, a sense of individuality develops."); Phillips, *supra* note 140, at 98 ("The ability to segregate these contexts is a measure of social power.").

<sup>143</sup> Cf. Calo, *supra* note 137, at 1137 ("Protecting the right to use contraception or choose sexual partners merely because they happen to take place in private . . . operates to obscure and perhaps demean the important harms taking place.").

<sup>144</sup> SEDGWICK, *supra* note 18, at 5.

By asking the state to recognize and protect against certain forms of injury, the constituency seeking such recognition risks codifying within the law “the very powerlessness it aims to redress.”<sup>145</sup> The law deals with a particular phenomenon only through the traits it can observe, and around such observable traits, it creates an analytical frame that treats those traits as factual rather than discursive, “ensuring that persons describable according to them will now become regulated through them.”<sup>146</sup> Through the production of such injury-identity, the law may denounce those who would prey upon a group’s weaknesses, but it also crystallizes an understanding that may stymie the group’s attempts at more thorough empowerment.<sup>147</sup> For example, Wendy Brown argues that although feminist-backed anti-pornography and anti-prostitution laws enlist the state to protect women from externally imposed sexual injury, such protection comes at the price of desexualizing and subordinating women.<sup>148</sup> Jeannie Suk similarly has explored how a focus in feminist legal theory on the vulnerability of women has been turned on its head in order to justify restrictions on women’s abortion rights.<sup>149</sup> A focus on vulnerability and victimization can be used to protect women and minority groups from social, economic, and physical abuse, but it can also be used to question their ability to make meaningful, well-informed decisions.<sup>150</sup>

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<sup>145</sup> WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 21 (1995).

<sup>146</sup> *Id.* at 66; see also Laura Grenfell, *Embracing Law’s Categories: Anti-Discrimination Laws and Transgenderism*, 15 *YALE J.L. & FEMINISM* 51, 94 (2003).

<sup>147</sup> BROWN, *supra* note 145, at 7. (“Ideals of freedom ordinarily emerge to vanquish their imagined immediate enemies, but in this move they frequently recycle and reinstate rather than transform the terms of domination that generated them.”) For example, Amy Adler has shown that child pornography laws purport to protect children from sexual exploitation, yet enforcement of such laws requires seeing children from “the perspective of the pedophile.” Adler, *supra* note 22, at 256, 270 (“As the law seeks to liberate children from sexual oppression, it also reinscribes children as sexually violable.”).

<sup>148</sup> BROWN, *supra* note 145, at 169; see also JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 346 (2006) (arguing that “governance feminism” refuses to see women as “powerful actors”). As Renee Romkens points out:

The representation of the battered woman . . . regularly shifts from a group category of “deserving victims” during the stage of lawmaking, to a category of potentially flawed, unreliable, irresponsible, exaggerating, and undeserving individuals in its day-to-day legal implementation of laws that were originally intended to protect and support women.

Renee Romkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 *YALE J.L. & FEMINISM* 265, 286 (2001).

<sup>149</sup> See generally Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Disclosure*, 110 *COLUM. L. REV.* 1193 (2010) (demonstrating how in *Gonzales v. Carhart*, 550 U.S. 124 (2007), the trauma women might experience from regretting an abortion justified the so-called partial-birth abortion ban).

<sup>150</sup> A similar dynamic has arguably also been seen in the exercise of the federal government’s “plenary power” over Native American tribes:

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States, — [sic] dependent largely for their daily food; dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the

Although the remainder of this Part will focus on cyberbullying initiatives and specifically the figuring of gay teens within them, it is important to note that this slippage from benevolent protection to doubting paternalism is already evident in our broader legal treatment of minors' decisionmaking. The Supreme Court, for example, has repeatedly emphasized that juveniles' "lack of maturity and . . . underdeveloped sense of responsibility," "vulnerab[ility] . . . to negative influences and outside pressures," and less "well formed" character require greater scrutiny of minors' criminal sentencing.<sup>151</sup> On the other hand, this same immaturity has been used by the Court to uphold the ability of parents to commit their minor children to mental health institutions against their will:

Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments . . . . The fact that a child may balk at hospitalization . . . does not diminish the parents' authority to decide what is best for the child.<sup>152</sup>

The legal immaturity and vulnerability of children may grant them special status with regard to criminal punishments, yet the same characteristics can be used to subordinate a young person's legitimate decisions to the prerogative of the parent. Particularly where LGBT youth are at issue — and parental authority can be used to force therapeutic intervention into gender and sexual identities<sup>153</sup> — the codified weakness, vulnerability, and dependence of minors is, at the very least, a double-edged sword.

The following sections will explore how bullying initiatives built upon the vulnerability of gay teens risk both reifying the weakness and vulnerability of gay teens and imperiling resources that might facilitate proactive social exploration and identity management. Section (A) will look at scholarly proposals to require greater oversight of cyberbullying and online harassment and suggest some particular consequences for sexual minority youth. Section (B) will look at New Jersey's comprehensive Anti-Bullying Bill of

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course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

United States v. Kagama, 118 U.S. 375, 383–84 (1886).

<sup>151</sup> Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005)); see also *id.* at 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences.").

<sup>152</sup> Parham v. J.R., 442 U.S. 584, 603–04 (1979).

<sup>153</sup> Patience Crozier, *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth*, 21 B.C. THIRD WORLD L.J. 123, 135–36 (2001); Andrew Gildea, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 133–34 (2008); see also James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decisionmaking About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 986 (2003).

Rights and explore the discursive consequences of its mandatory system of monitoring, investigation, data collection, and statistical reporting.

### A. *Anti-Cyberbullying Proposals*

The recent focus on antigay bullying is a subset of a larger effort to illuminate and eliminate cyberbullying and online harassment. Underlying nearly every proposed and enacted initiative towards this end is an intuition that greater oversight of teenagers' use of the Internet by schools, parents, and website operators will lessen the incidences of bullying and better the lives of bullying victims. For example, in the recent essay collection *The Offensive Internet*, several authors criticize Internet communities as lacking the supervision and visibility that were so effective in constraining neighborhood misbehavior in offline "villages."<sup>154</sup> As mentioned in Part I(A), the FCC and the Department of Education have similarly stressed the need for schools to combat cyberbullying, and both legal and lay commentators have similarly pushed schools and parents to take more proactive roles in eliminating this type of online harassment.<sup>155</sup> Such appeals appear to have been successful, as parents are increasingly using a complex array of smartphone and social media technologies to track and monitor the movements and communications of their children.<sup>156</sup>

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<sup>154</sup> See Saul Levmore & Martha Nussbaum, *Introduction*, in *THE OFFENSIVE INTERNET*, *supra* note 104, at 1, 1–2, 5; Daniel Solove, *Speech, Privacy, and Reputation on the Internet*, in *THE OFFENSIVE INTERNET*, *supra* note 104, at 15, 16–17 ("In the village of yesteryear, people had to live under the ever-present judgmental eye of their fellow villagers . . . . In the small village, people knew each other well, and disreputable information would be judged within the context of a person's entire life.").

<sup>155</sup> Joshua A.T. Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215, 1233 (2009) ("Instead of segregating children from adults, legislators wishing to protect children should foster and promote the development of tools that parents and teachers can use to protect children in virtual worlds." (citing JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* 110 (2008) ("Parents and teachers need to become a much bigger part of the solution, and soon.")); Waldman, *supra* note 43, at 438 (advocating that schools employ "soft-power" approaches to combat antigay bullying). For example, in response to the Ravi trial verdict, the executive director of the LGBT advocacy group Campus Pride observed that "this trial's conclusion will not end the daily torment and harassment of LGBT students on college and university campuses across the nation. College and university professionals have an obligation to recognize the crucial role and responsibility they have in creating safer environments for LGBT students . . ." *Verdict in Rutgers Webcam Spying Case Ends Trial but Will Not End Daily Harassment of LGBT College Students*, CAMPUS PRIDE BLOG (Mar. 16, 2012), <http://www.campusprideblog.org/blog/verdict-rutgers-webcam-spying-case-ends-trial-will-not-end-daily-harassment-lgbt-college-students/>.

<sup>156</sup> See Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1238–39 (2011); see also Ahrens, *supra* note 4, at 36; Somini Sengupta, 'Big Brother'? No, It's Parents, N.Y. TIMES (June 25, 2012), [http://www.nytimes.com/2012/06/26/technology/software-helps-parents-monitor-their-children-online.html?\\_r=3&pagewanted=1&hp&\\_perpage=2](http://www.nytimes.com/2012/06/26/technology/software-helps-parents-monitor-their-children-online.html?_r=3&pagewanted=1&hp&_perpage=2). Perhaps ironically, though, legislation had been introduced in Congress to limit the third-party collection of geolocation data from minors. See Do Not Track Kids Act of 2011, H.R. 1895, 112th Cong. § 6 (2011).

Numerous legal scholars have similarly pressed Internet intermediaries to take a more proactive role in combating bullying and harassment, and these scholars are critical of the service providers' complicity in the availability of content that is particularly harmful to children, women, and racial and sexual minorities.<sup>157</sup> Danielle Citron, for example, has proposed a heightened standard of care for Internet service providers ("ISPs") and website operators, which would include (1) configuring websites to provide "traceable anonymity" in the form of logging user Internet protocol ("IP") addresses; (2) employing screening software, as the technology becomes available, "to limit the amount and kinds of harmful materials on their sites"; and (3) some duty to monitor user behavior, tied to the size and nature of the intermediary in question.<sup>158</sup> Citron and many other scholars<sup>159</sup> have also advocated clawing back the service provider immunities under Section 230(c)(1) of the Communications Decency Act ("CDA"),<sup>160</sup> which have insulated website operators from their enablement of rather serious harassment and victimization.<sup>161</sup>

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<sup>157</sup> Patricia Sanchez Abril, *Repu-taint Sites and the Limits of § 230 Immunity*, 12 J. INTERNET L. 3, 3–5 (2009) (but noting that some courts are interpreting the broad immunity granted to service providers under § 230 of the Communications Decency Act, *infra* notes 160–61, narrowly "in response to evolving methods of ISP information solicitation"); Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 389–90 (2009); Stacy M. Chaffin, *The New Playground Bullies of Cyberspace: Online Peer Sexual Harassment*, 51 HOW. L.J. 773, 812–14 (2008); Danielle Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 83–85 (2009); Franks, *supra* note 104, at 245–49; Kim, *supra* note 104, at 1010–12; Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1131–33 (2011); David A. Myers, *Defamation and the Quiescent Anarchy of the Internet: A Case Study of Cyber Targeting*, 110 PENN ST. L. REV. 667, 670–71 (2006); Dawn C. Nunziato, *Romeo and Juliet Online and in Trouble: Criminalizing Depictions of Teen Sexuality (c u l8r: g2g 2 jail)*, 10 NW. J. TECH. & INTELL. PROP. 57, 87–89 (2012); Cara J. Ottenweller, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1286–88 (2007).

<sup>158</sup> Citron, *supra* note 157, at 123–24.

<sup>159</sup> See, e.g., *Cyberbullying and Other Online Safety Issues for Children: Hearing on H.R. 1966 and H.R. 3630 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 133 (2009) (statement of John Palfrey, Professor of Law, Harvard Law School) (suggesting three ways to amend Section 230 to provide a safer environment for young users: (1) requiring intermediaries to retain user log files to aid law enforcement's identification of anonymous offenders, (2) implementing a notice-and-takedown regime for defamatory content akin to Section 512 of the Digital Millennium Copyright Act ("DMCA"), or (3) exempting Section 230 immunities for intermediaries altogether when there has been harm to young people); DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR AND PRIVACY ON THE INTERNET* 154–55 (2007) (suggesting narrowing Section 230 immunities at least in situations where the service provider is aware of harmful activities, such as the posting of nude photos, and fails to remove the pertinent content); Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. POCKET PART 41, 43 (2007) ("The government should implement a notice and take-down regulatory scheme, similar to that under the DMCA, to curtail ISP immunity for certain forms of tortious cyberbullying.").

<sup>160</sup> Under Section 230(c)(1), "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2006).

<sup>161</sup> See, e.g., *Barnes v. Yahoo, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (dismissing negligence suit against Yahoo! for failure to take down nude pictures of plaintiff); *Doe v. MySpace*,

Although enlisting parents, schools, and website intermediaries to police bullying and harassing materials might be an effective way of choking off avenues for potential harassment, there is a serious risk that these efforts will further limit avenues for gay teen identity development. The more parents and educators actively insert themselves into teenagers' Internet usage, text messages, and social media communications, the fewer opportunities remain for adolescents to manage their boundaries and develop their sexual identities without fear of disclosing perhaps-only-provisional views on such matters. Identity development requires space for self-education, exploration, and equivocation,<sup>162</sup> and although finding such space can be a challenge for many young people, it is often both particularly important and difficult for gay teens facing the potential disapproval of family, friends, and educators.<sup>163</sup> Gay teens have been shown to be remarkably good at safely navigating their "coming out" process in a way that gradually builds a system of support,<sup>164</sup> but this becomes increasingly difficult when the adults in their lives are being repeatedly implored to look over their shoulders and track their physical and digital movements. There may be some appeal in making the Internet more like the offline "village," where one's physical comings and goings and related gossip are subjected to the regulatory power of the neighbor's gaze, but the village can often be a particularly difficult place for those whose beliefs and practices are at odds with its prevailing norms.

While increased parental oversight over teenagers' Internet use yields diminished opportunities for exploration and self-discovery online, financially incentivizing service providers to police their networks risks further limiting the resources available for such explorations. First, to the extent that chat rooms, community forums, and social networks involve the off-limits juxtaposition of minors with sexual desire and/or activity, Section 230 of the CDA already expressly encourages intermediaries to prevent access to "objectionable or inappropriate online material":

(b) Policy

It is the policy of the United States —

. . .

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, fam-

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Inc., 528 F.3d 413, 415 (5th Cir. 2008) (barring a lawsuit against MySpace by a thirteen-year-old girl who was sexually assaulted by a nineteen-year-old man she met on the network); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (dismissing suit by America Online member whose telephone number was falsely posted in connection with sale of T-shirts making light of Oklahoma City bombing).

<sup>162</sup> See COHEN, *supra* note 138, at 133–35 (exploring the "play of subjectivity"); Bernstein & Triger, *supra* note 156, at 1275 ("Intensive Parenting does not allow children to develop a sense of independence, self-sufficiency, and coping skills to address life's challenges.").

<sup>163</sup> See Stein, *supra* note 104, at 184–85 (noting this difficulty for gay men and lesbians across all age groups).

<sup>164</sup> See generally SAVIN-WILLIAMS, *supra* note 1.

ilies, and schools who use the Internet and other interactive computer services;  
 (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate on-line material[.]<sup>165</sup>

Although the Supreme Court invalidated the CDA's express prohibition on distributing indecent materials to minors,<sup>166</sup> Section 230(c)(2) nonetheless immunizes service providers for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."<sup>167</sup> In other words, to the extent that a service provider limits a user's access to "objectionable" material, the CDA insulates the service provider from legal action, even if the material is subject to constitutional free speech or due process guarantees. Although Sections 230(c)(1) and (c)(2) currently work in tandem to immunize service providers from their decision either to let stand or affirmatively to police the content posted by users, restrictions solely on Section (c)(1) immunities shift incentives even further towards affirmative policing of "objectionable" content, notwithstanding its potential value to gay teens.<sup>168</sup> As mentioned in Part I, Clementi began participating in "adult" community forum discussions at least as early as the age of fifteen, and increased policing of these forums (e.g., to ensure that no minors are present) might have interfered with his ability to seek advice and support from the JustUsBoys community.

Second, this shift in financial incentives towards policing objectionable content is disproportionately likely to impact resources devoted to same-sex sexuality. Elizabeth Glazer's work on obscenity law, for example, demonstrates that facially neutral screening of sexual content by entities such as Google and the Motion Picture Association of America has disproportionately impacted materials involving homosexuality.<sup>169</sup> Facebook's "abusive

<sup>165</sup> 47 U.S.C. § 230(b).

<sup>166</sup> *Reno v. ACLU*, 521 U.S. 844, 874 (1997) ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

<sup>167</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>168</sup> *See, e.g.,* Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 916 (2002) ("[I]mposing strict liability on ISPs would result in overdeterrence in the form of excessive monitoring by ISPs and overzealous censorship policies."); *id.* at 917 (arguing that third-party ISPs "do not always capture the full value of the conduct they are obliged to monitor"); Seth F. Kreimer, *Censorship by Proxy: First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 28 (2006) ("[I]f it is costly to distinguish protected from unprotected speech, the proxy censor is likely to abandon the effort to avoid errors and adopt a conscious policy of prophylactic self-censorship that blocks any content that could precipitate the threat of sanctions.").

<sup>169</sup> *See* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1383 (2008) ("Seemingly neutral and objective bodies that routinely filter content have

material” screening also has led to the deletion of a depiction of two fully clothed men kissing,<sup>170</sup> and Apple’s App Store policy against adult content censored an illustrated adaptation of Oscar Wilde’s *The Importance of Being Earnest*.<sup>171</sup> School districts have similarly used their obligation to filter materials “harmful to minors” under the FCC’s E-Rate program to block websites for LGBT advocacy groups such as the Gay, Lesbian & Straight Education Network and the Human Rights Campaign.<sup>172</sup>

Third, even under current law’s facial agnosticism towards service providers’ filtering decisions, the past decade has seen the disproportionate elimination of materials of potentially great value to gay teens. In the late 1990s, for example, chat rooms devoted specifically to gay teens were prevalent on major networks such as Gay.com and America Online.<sup>173</sup> In response to the uproar against online sexual predators, however, these youth-focused chat rooms, for the most part, did not survive long into the twenty-first century. The New York Attorney General filed a lawsuit against Yahoo!, alleging that user-generated chat rooms appeared to promote sexual contact between adults and minors, and even though it likely could have rested on its Section 230 immunities, Yahoo! decided to ban any user under eighteen from its public chat rooms.<sup>174</sup> Although Gay.com used to provide chat rooms for thirteen- to seventeen-year-olds, they are no longer available.<sup>175</sup> Given such willingness to eliminate interactive platforms for gay teens notwithstanding

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demonstrated a systematic bias against the expression of homosexuality.”); see also Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 405 (2009) (“Although the putative focus of Singapore’s filtering is pornography, the government has employed these elastic guidelines to block popular gay and lesbian sites.”); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 194 (1997) (noting that some pornography filtering software “ban[s] access to newsgroups discussing gay and lesbian issues or topics such as feminism”); Kreimer, *supra* note 168, at 39 (“The class of gay liberation sites is more likely to cross the boundary into ‘obscenity’ than the class of Colonial American recipe sites . . . [I]nsurgent speakers . . . are likely to face the harshest premiums.”).

<sup>170</sup> Xenii Jardin, *Richard Metzger: How I, a Married, Middle-Aged Man, Became an Accidental Spokesperson for Gay Rights Overnight*, BOINGBOING.NET (Apr. 19, 2011, 6:37 AM), <http://boingboing.net/2011/04/19/richard-metzger-how.html>.

<sup>171</sup> Brian Barrett, *The Latest Examples of Apple’s Editorial Censorship*, GIZMODO (June 14, 2010, 10:40 AM), <http://gizmodo.com/5562802/the-latest-examples-of-apples-stupid-editorial-censorship>.

<sup>172</sup> Complaint at 8, *Franks v. Metro. Bd. of Pub. Educ.*, No. 3:09-00446 (M.D. Tenn. May 19, 2009); see also *Tennessee Schools End Censorship of Gay Educational Web Site After ACLU Lawsuit*, ACLU (June 4, 2009) [http://www.aclu.org/lgbt-rights\\_hiv-aids/tennessee-schools-end-censorship-gay-educational-web-sites-after-aclu-lawsuit](http://www.aclu.org/lgbt-rights_hiv-aids/tennessee-schools-end-censorship-gay-educational-web-sites-after-aclu-lawsuit).

<sup>173</sup> See Egan, *supra* note 104. As one fifteen-year-old boy related: “The Internet is the thing that has kept me sane . . . I live constantly in fear. I can’t be my true self. My mom complains: ‘I can see you becoming more detached from us. You’re always spending time on the computer.’ But the Internet is my refuge.” *Id.*

<sup>174</sup> Lucy Sherriff, *Yahoo! Clamps Down on Predatory Chat*, THE REGISTER (Oct. 13, 2005, 12:10 PM), [http://www.theregister.co.uk/2005/10/13/yahoo\\_clamps\\_down/](http://www.theregister.co.uk/2005/10/13/yahoo_clamps_down/).

<sup>175</sup> See Egan, *supra* note 104; *Frequently Asked Questions*, GAY.COM, <http://www.gay.com/faq> (last visited Mar. 8, 2013); Anonymous, *Reopen Gay Com Youth Floor*, IPETITIONS.COM (Jan. 14, 2009), <http://www.ipetitions.com/petition/gayyouth/signatures> (“We monitored [gay.com] and our sons [sic] activities on it and believe that you should re-open the youth floor.”).

strong, existing legal immunities, it is highly questionable whether service providers would choose to host such platforms if they faced monetary damages for the harms that might occur to teenage users.

There are undeniably a wide range of harms experienced online, and numerous scholars have convincingly documented the potential for Internet bullying and harassment to interfere with professional, educational, and social relationships both online and off.<sup>176</sup> But these stories are only one side of the coin. As suggested above by Tyler Clementi's online experiences — and buttressed by empirical research on youth media use<sup>177</sup> — the Internet also provides opportunities to forge social networks often unavailable in the immediate physical locality, and to situate oneself within a wider web of identities and desires than one's parents, school, or college roommates generally envision. The antigay bullying movement may have generated a deep catalogue of It Gets Better videos and brought greater attention to LGBT support services like The Trevor Project, but what seems ultimately to be fostered is a walled-in cyberspace for gay youth marked by passivity and constant adult supervision.<sup>178</sup> The conception of the Internet introduced by the online predator<sup>179</sup> and further ushered in by the cyberbully is one which increasingly cuts off youth from online “darknets” and “counterpublics”<sup>180</sup> — spaces in which participants can form communities potentially at odds with the normative evolution of youth sexual innocence. A cleaner, safer, gay-friendly Internet may be a more pleasant environment where children

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<sup>176</sup> See generally Citron, *supra* note 104; Franks, *supra* note 104.

<sup>177</sup> See generally GRAY, *supra* note 29; YOUTH & MEDIA POLICY WORKING GRP. INITIATIVE, *supra* note 106; Biegler & boyd, *supra* note 105.

<sup>178</sup> See boyd, *supra* note 50 (“Countless adults (and youth) have celebrated ‘It Gets Better’ as a powerful message filled with hope. But ‘It Gets Better’ isn’t the same as ‘I can make it better.’ Abstraction and patience don’t help when you’re in pain Right Now.”).

<sup>179</sup> See *id.* As danah boyd describes:

As the sexual predator moral panic kicked in in 2005, youth started telling me about how all internet strangers were dangerous. They swallowed the message they’d been told, hook, line, and sinker. What really startled me were all of the LGBT youth I met who told me that they had no one to talk with. . . I’d ask them if they connected with other LGBT folks online and they’d look at me with horror before talking about how scary/sketchy/bad strangers were.

*Id.* (ellipsis in original).

<sup>180</sup> See COHEN, *supra* note 138, at 175 (describing the concept of “darknet”); MICHAEL WARNER, PUBLICS AND COUNTERPUBLICS 56 (2002) (describing “counterpublics”). As Nancy Fraser explains:

This history records that members of subordinated social groups — women, workers, peoples of colors, and gays and lesbians — have repeatedly found it advantageous to constitute alternative publics. I propose to call these *subaltern counterpublics* in order to signal that they are parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interest and needs.

Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 67 (1990).

can sit on their hands and wait for adolescence to run its course, but it is not one that appreciates their desires and capacities to make things better now.

### B. *Bullying Surveillance*

The previous section demonstrated how cyberbullying initiatives grounded solely in the vulnerabilities of gay teens risk diminishing valuable resources for social and sexual identity development. This section will further show that the administrative processes put in place to root out and punish bullying converge with the paternalisms explored above to entrench more deeply the one-dimensional account of the innocent, vulnerable gay teen.

Soon after Tyler Clementi's suicide, New Jersey passed the "[t]oughest bullying law in the country."<sup>181</sup> The Anti-Bullying Bill of Rights mandates that all New Jersey public schools implement a comprehensive regime to investigate, punish, and collect data on bullying practices throughout the state.<sup>182</sup> On its face, such a system would seem both to empower schools to punish a fuller range of behavior harming their students, and to provide a clearer, more nuanced understanding of the dynamics of school bullying. Instead, the law is a model of "disciplinary surveillance."<sup>183</sup> Through its multiple layers of hierarchy, simplistic categorization and subcategorization of students, and selective disclosures and concealments, the New Jersey bullying law installs a framework for seeing gay teens only in relation to the norm of victimhood.<sup>184</sup> To the extent that what is actually occurring on the

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<sup>181</sup> Marion Herbert, *Toughest Bullying Law in the Country to Take Effect this Fall*, DIST. ADMIN. (July 1, 2011, 12:00 AM), <http://www.districtadministration.com/article/toughest-bullying-law-country-take-effect-fall>. In recent years, numerous other states have enacted or updated their bullying laws to cover cyberbullying and to mandate antibullying policies similar to New Jersey's. For a regularly updated overview of state and federal bullying laws, see HINDUJA & PATCHIN, *supra* note 2.

<sup>182</sup> Anti-Bullying Bill of Rights Act, N.J. STAT. ANN. § 18A:37-13.2 (West 2011). On January 27, 2012, the law was declared unconstitutional under state law as an "unfunded mandate." Leslie Brody, *Anti-Bullying Law Imposes Unfunded Mandate on N.J. School Districts, State Body Rules*, NORTHJERSEY.COM (Jan. 28, 2012, 11:06 AM), [http://www.northjersey.com/news/state/Anti-bullying\\_law\\_imposes\\_unfunded\\_mandate\\_on\\_NJ\\_school\\_districts\\_state\\_body\\_rules.html?page=all](http://www.northjersey.com/news/state/Anti-bullying_law_imposes_unfunded_mandate_on_NJ_school_districts_state_body_rules.html?page=all). The legislature quickly responded by amending the law to ease some of the financial burdens on school districts and to allocate \$1 million to funding the law. See S.B. 1789, 215th Leg., 1st Ann. Sess. (N.J. 2012). The grants sought by school districts, however, neared \$5 million, leading to large disparities and shortages in funding for the programs mandated by the law. *N.J. Schools Get Fraction of Anti-Bullying Funds*, ASSOCIATED PRESS (July 4, 2012, 6:22 AM), [http://www.lehighvalleylive.com/breaking-news/index.ssf/2012/07/nj\\_schools\\_get\\_fraction\\_of\\_ant.html](http://www.lehighvalleylive.com/breaking-news/index.ssf/2012/07/nj_schools_get_fraction_of_ant.html).

<sup>183</sup> See MICHEL FOUCAULT, *DISCIPLINE & PUNISH 170* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (tracing the evolution of the modern penal system and showing how a complex system of surveillance and punishment structures, regulates, and normalizes institutional practices within prisons, schools, factories, and the military); see generally JOHN GILLIOM, *OVERSEERS OF THE POOR* (2001) (examining the surveillance systems put in place through welfare programs in Appalachia).

<sup>184</sup> See FOUCAULT, *supra* note 183, at 170 ("The success of disciplinary power derives no doubt from the use of simple instruments; hierarchical observation, normalizing judgment, and

ground can be neither easily folded into a bully/victim binary<sup>185</sup> nor neatly attributed to sexual orientation, the complications to the gay teen innocence narrative are either channeled into a simplified account of antigay bullying or entirely excluded from bullying statistics. As a result, the law produces a very specific — and skewed — body of knowledge about the students it observes.

The bullying law mandates a hierarchy of oversight by educators, administrators, and a new cadre of bullying experts.<sup>186</sup> Every school employee must verbally report to the school principal all incidents of “harassment, intimidation or bullying” — defined expansively to cover actual or perceived sexual orientation<sup>187</sup> — on the same day that she witnesses or receives reliable information about the incident, followed up by a written

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their combination in a procedure that is specific to it, the examination.”); *id.* at 198 (describing the management of the “plague-stricken town” as “traversed throughout with hierarchy, surveillance, observation, [and] writing”); *id.* at 220, 223 (“[W]hereas the juridical systems define juridical subjects according to universal norms, the disciplines characterize, classify, specialize; they distribute along a scale, around a norm, hierarchize individuals in relation to one another and, if necessary, disqualify and invalidate.”); JAMES SCOTT, *SEEING LIKE A STATE* 11 (1998) (arguing that to be manageable in the context of modern bureaucracy, individuals must be “legible” according to certain categories and characteristics); David Phillips, *Identity and Surveillance Play in Hybrid Space*, in *ONLINE TERRITORIES: GLOBALIZATION, MEDIATED PRACTICE AND SOCIAL SPACE* 171, 174 (Miyase Christensen et al. eds., 2011) (“In its idealized form, actuarial surveillance individualizes each member of the population, and permits the observation and recording of each individuals’ actions, then collates these individual observations across the population. From these conglomerated observations, statistical norms are produced. These norms are then applied back to the subjected individual . . .”).

<sup>185</sup> See FOUCAULT, *supra* note 183, at 180 (noting that in discipline, “we have a distribution between a positive pole and a negative pole; all behavior falls in the field between good and bad marks, good and bad points . . .”); *id.* at 199 (“Generally speaking, all the authorities exercising individual control function according to a double mode; that of binary division and branding (mad/sane; dangerous/harmless; normal/abnormal) . . .”); Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 97, 100 n.7 (Robert Wintemute & Mads Andenaes eds., 2001) (explaining that normalization is the “ever-shifting, provisional ordering of a social, conceptual, and ethical field around a distinction — say, married/unmarried; or a range of distinctions — say, wife/mistress/girlfriend; or a standard — say ‘room temperature’ or ‘illness’ or ‘reasonableness’”).

<sup>186</sup> § 18A:37-15(b)(5)–(6); § 18A:37-20. See also FOUCAULT, *supra* note 183, at 170–71 (“The exercise of discipline presupposes a mechanism that coerces by means of observation; an apparatus in which the techniques that make it possible to see induce effects of power, and in which, conversely, the means of coercion make those on whom they are applied clearly visible.”); GILLIOM, *supra* note 183, at 3 (“The very idea of ‘surveillance’ — roughly translated as *watching from above* — implies the observer is in a position of dominance over the observed.”).

<sup>187</sup> The statute defines “[h]arassment, intimidation or bullying” as:

[A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

report within two days.<sup>188</sup> For promptly reporting a bullying incident, the law immunizes the employee from monetary damages.<sup>189</sup> Upon receipt of the initial bullying report, an investigation is initiated by the principal and conducted by a newly appointed “school antibullying specialist,” who is tasked with issuing a written report on the incident within ten school days.<sup>190</sup> The results of *each* investigation are reported to the superintendent of schools within two days of its completion and must be reported to the Board of Education at its next meeting.<sup>191</sup> Parents of the students involved in the investigation are entitled to receive information about the “nature of the investigation,” “whether the school district found evidence of harassment, intimidation or bullying,” and “whether discipline was imposed.”<sup>192</sup>

Parents who disagree with the outcome of the investigation may request a hearing before the school board, but “the board shall meet in executive session for the hearing to protect the confidentiality of the students.”<sup>193</sup> In other words, if a student objects to being labeled a bully, wishes to show that the situation was more complex than the school presumed, or contests the presence of sexual orientation bias, such counter-stories are entirely closed off from the public eye. The bullying law mandates a multi-level investigation and “specialist” input,<sup>194</sup> but the various assumptions, complications, and inferential leaps involved in the multi-step process of labeling a victim and punishing the bully remain obscured to everyone but the specific student

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- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student’s property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
  - b. has the effect of insulting or demeaning any student or group of students; or
  - c. creates a hostile educational environment for the student by interfering with a student’s education or by severely or pervasively causing physical or emotional harm to the student.

§ 18A:37-14.

<sup>188</sup> § 18A:37-15(b)(5).

<sup>189</sup> § 18A:37-16(c) (“[A] school employee who promptly reports an incident of harassment, intimidation or bullying . . . is immune from a cause of action for damages arising from any failure to remedy the reported incident.”)

<sup>190</sup> § 18A:37-15(b)(6)(a); § 18A:37-20 (“Appointment of school anti-bullying specialists, coordinator”); *see also* FOUCAULT, *supra* note 183, at 174 (noting that oversight by “specialized personnel” in schools and factories, distinct from teachers and workers, “became indispensable” to their post-industrial reorganization).

<sup>191</sup> § 18A:37-15(b)(6)(b)–(c).

<sup>192</sup> § 18A:37-15(b)(6)(d).

<sup>193</sup> *Id.*

<sup>194</sup> Another potential concern in mandating the appointment of school specialists specifically tasked with investigating bullying is that such experts will have incentives to overstate the magnitude of bullying within their jurisdiction in order to justify and dignify their positions. As explained by Cass Sunstein:

An independent counsel who uncovers nothing is likely to look as if he has more or less wasted his time, or done nothing, whereas an independent counsel who brings a prosecution, or several prosecutions, is likely to look, in at least some circles, like another Archibald Cox, a kind of hero of democratic ideals . . . .

who is labeled a bully.<sup>195</sup> All students are subjected to the gaze of the antibullying apparatus, but that apparatus maintains a “lateral invisibility” among student-subjects, frustrating any concerted challenge to systemic sorting of bullies and victims for purposes of punishment and treatment.<sup>196</sup>

What does get reported to the public and the state is the product of a mandatory system of data aggregation and reporting. Twice a year, the superintendent of each school district, in coordination with a newly appointed “district antibullying coordinator,” must report all acts of bullying, intimidation, and harassment to the district board of education and the New Jersey Department of Education.<sup>197</sup> The superintendent must report to the board the following: the number of reports of bullying, the status of all investigations, the nature of reported acts of bullying based on protected categories (e.g., race, gender, disability, sexual orientation), the names of the investigators, and the type and nature of any disciplinary or other measures imposed.<sup>198</sup> The report to the Department of Education requires a lesser quantum of information: school-level and district-level numbers of reported incidents of bullying, broken down by protected category.<sup>199</sup> This report to the Department of Education is in turn used by the state to grade each school on its efforts to implement its antibullying policies and programs, and both the report and the grade must be posted on school and school district websites.<sup>200</sup>

Despite the apparent goals of gathering better data on school bullying and holding school districts accountable for their efforts in combating it,<sup>201</sup> the data reporting requirements of the bullying law do little to capture the complexities of bullying and instead perpetuate the victim-status of gay teens and other enumerated minorities.<sup>202</sup> There is nothing in the law’s reporting requirements that accounts for the well-documented permeability of

<sup>195</sup> As explained by Scott:

Officials of the modern state are, of necessity, at least one step — and often several steps — removed from the society they are charged with governing. They assess life of their society by a series of typifications that are always some distance from the full reality these abstractions are meant to capture.

SCOTT, *supra* note 184, at 76.

<sup>196</sup> FOUCAULT, *supra* note 183, at 200.

<sup>197</sup> § 18A:17-46; § 18A:37-20(b)(3).

<sup>198</sup> § 18A:17-46.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* The official report cards for the 2011–2012 school year — the first year subject to the bullying law — likely will not be available until the spring of 2013, in line with New Jersey’s historical practice. See, e.g., *Guide to the New Jersey School Report Card 2011*, N.J. DEPT OF EDUC., <http://education.state.nj.us/rc/rc11/guide.htm> (last visited Mar. 29, 2013).

<sup>201</sup> § 18A:37-13.1(f) (“It is the intent of the Legislature in enacting this legislation to strengthen the standards and procedures for preventing, reporting, investigating and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises.”).

<sup>202</sup> See FOUCAULT, *supra* note 183, at 189 (“The examination that places individuals in a field of surveillance also situated them in a network writing; it engages them in a whole mass of documents that capture and fix them.”); GILLIOM, *supra* note 183, at 9 (“Bureaucratic surveillance manifests a way of seeing and knowing the world that excludes much of our true complexity while moving a small cluster of characteristics to the forefront.”).

the bully/victim binary, i.e. that victims are often bullies and vice versa,<sup>203</sup> or the disconnect between what teenagers and adults understand as constituting bullying.<sup>204</sup>

Despite the messiness of classifying bullies and victims, the Department of Education nonetheless requires data reports to adhere to this binary. For example, it has promulgated hypothetical scenarios, including the following, to educate administrators as to what does and does not comprise a reportable instance of Harassment, Intimidation, or Bullying (“HIB”):

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**Scenario 1: “The School Bus”**

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While on the school bus, several students repeatedly called James “homo” and “gay” and directed other comments to him in regard to sexual orientation. Today, when James was getting on the bus, the same students shoved him up the steps. While riding to school, the students openly passed around a derogatory note about him. When James got to school, he told his eighth-grade homeroom teacher about the incident, adding that he was very upset, was tired of the abuse, and did not want to come to school anymore because of it.

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**Analysis of this Scenario**

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Considerations	Reporting Decisions
The students’ actions (verbal and written communications, shoving) caused James to feel insulted and demeaned and caused a substantial disruption on the bus. James was alarmed and harmed emotionally by their behavior.	Report the incident as HIBT.
The students’ behavior was motivated by bias toward what they perceived as James’s sexual orientation.	Check “yes” in the “bias” field of the incident header when entering the information on the Electronic Violence and Vandalism Reporting System (“EVVRS”).

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<sup>203</sup> See Biegler & boyd, *supra* note 105, at 10.

<sup>204</sup> danah boyd and Alice Marwick have noted that many teenagers see their conflicts not as bullying, but instead as a form of “drama.” See danah boyd & Alice Marwick, *Bullying as True Drama*, N.Y. TIMES (Sept. 22, 2011), <http://www.nytimes.com/2011/09/23/opinion/why-cyberbullying-rhetoric-misses-the-mark.html> [hereinafter boyd & Marwick, *Bullying as True Drama*] (“Teenagers want to see themselves as in control of their own lives; their reputations are important. Admitting that they’re being bullied, or worse, that they are bullies, slots them into a narrative that’s disempowering and makes them feel weak and childish.”); *id.* (“Many teenagers who are bullied can’t emotionally afford to identify as victims, and young people who bully others rarely see themselves as perpetrators.”); danah boyd & Alice E. Marwick, *The Drama! Teen Conflict, Gossip, and Bullying in Networked Publics 2* (Sept. 12, 2011) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1926349](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1926349).

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**Scenario 2: “Math Class”**


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Shannon and Tracey were arguing during sixth-grade math class. When the teacher intervened, Shannon called Tracey a name that is considered a racial slur. The teacher reprimanded Shannon, classroom instruction continued, and nothing more happened between the girls. The teacher spoke with Tracey after class and determined that she was not upset about the incident. Tracey told the teacher that she knew that Shannon did not intend to hurt her by making the comment and that they were still friends.

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**Analysis of this Scenario**

Considerations	Reporting Decisions
Tracey indicated that she was not upset by Shannon’s remark.	Do not report the incident because Tracey was neither alarmed nor harmed by Shannon’s remark.

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**How the Situation May Differ**

Considerations	Reporting Decisions
The student told the teacher that she was so upset by a student’s racial slurs (bias) that she wanted to transfer into another class.	Report the incident as HIBT and check “yes” in the “bias” field of the incident header when entering the information.
One student called another student “stupid.” After class, the teacher saw that the student who was called the name was upset. Upon being questioned, the student revealed that the same student regularly taunted her.	Because one student’s pattern of behavior caused another student to be emotionally harmed, report the incident as HIBT. In this case, check “no” in the “bias” field of the incident header when entering the information in the EVVRS.

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These scenarios suggest that when the purported sexual orientation of a student arises in the context of harassment and the student complains about being “demeaned” or “insulted,” a reportable bullying incident may have occurred. On the other hand, if another student uses an outright racial slur and the object of the slur is able to brush it off (as research suggests students are inclined to<sup>206</sup>), the incident remains outside the purview of state record-keeping. The bullying law and the state’s reporting guidance thus simultaneously exclude from “official” reports the resiliency of certain teenagers while failing to account for the reluctance of many other teenagers to see their conflicts through the viewpoint of a bullied victim.<sup>207</sup> Regardless of the derogatory language used by the perpetrator, and notwithstanding the poten-

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<sup>205</sup> N.J. DEP’T OF EDUC., EVVRS INCIDENT SCENARIOS 5 (2009) (internal citations omitted), available at [http://homeroom.state.nj.us/evvrs/Scenarios\\_0311.pdf](http://homeroom.state.nj.us/evvrs/Scenarios_0311.pdf). The EVVRS is an online reporting service set up for New Jersey schools to report to the Department of Education incidents of violence and vandalism. It was updated to accommodate the data collection requirements of the Anti-Bullying Bill of Rights. Letter from Susan B. Martz, Dir., Office of Student Support Servs., N.J. Dep’t. of Educ., to Dist. Superintendents and Charter Sch. Leaders (Sept. 26, 2011), available at <http://homeroom.state.nj.us/evvrs/V&VMemo.pdf> (reporting on updates to the Violence, Vandalism, and Substance Abuse Reporting Form 2011–2012).

<sup>206</sup> See boyd & Marwick, *Bullying as True Drama*, *supra* note 204.

<sup>207</sup> See GILLIOM, *supra* note 183, at 117 (“In short, for these subjects of surveillance, many of the local facets and depictions of their lives are displaced and overrun by a unified

tially legitimate school interest in addressing race/gender/sexual orientation animus, the trigger for a reportable bullying incident is a student's express self-identification as the victim of bullying. Regardless of whether such self-identification comes from an embrace of the innocence narrative or from a more proactive opposition to homophobia, students only "count" for the purpose of the bullying law if they outwardly resemble the "paradigmatic victim" envisioned by the regulatory, normative frame.<sup>208</sup>

Despite the complexities and fluidity of a potential bully/victim incident, all that trickles into the official statistics is the fact of bullying and whether it involved a protected classification.<sup>209</sup> The law provides for bullies and it provides for victims, yet it *only* individuates and categorizes the *victims* according to a particular set of protected identities. The bully is a monolith, but the victim comes in several flavors of discriminatory animus.<sup>210</sup> Gay students, disabled students, and female students, among others, appear in this regime *only* as the victims of bullying, and the "unmarked" bully is silently placed within the regulatory scheme in inaccurately neat opposition to them.<sup>211</sup>

Through this reductive approach, the bullying law propelled to passage by Tyler Clementi's death mandates surveillance by teachers, administrators, and bullying experts, yet only clearly assists a very specific subset of gay teens. By rendering invisible gay teens who are *not* deeply suffering, the bullying law skews resources towards oversight and protection, despite the needs of many gay teens to explore their identities and desires outside the gaze of the adults in their lives. More troublingly, if students *are* suffering from harassment, yet refuse to admit feeling harassed, the New Jersey Department of Education instructs administrators not to treat these students as bullying victims. Only when students are openly willing to vocalize their suffering are they officially deemed victims of antigay bullying. Just as Dharun Ravi's conviction hinged upon grafting feelings of vulnerability and victimization onto Tyler Clementi, the New Jersey regime appears to condition antibullying protections on gay teens' outward embrace of their own

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system of knowledge which can have little room for personal stories, self-understandings, or tribal names.").

<sup>208</sup> Romkens, *supra* note 148, at 284; *cf.* DEAN SPADE, *NORMAL LIFE* 84 (2011) ("Discrimination law primarily conceptualizes the harm of racism through the perpetrator/victim dyad . . . . In this (mis)understanding, structural or systemic racism is rendered invisible.").

<sup>209</sup> See N.J. DEP'T OF EDUC., *HARASSMENT, INTIMIDATION, OR BULLYING (HIB) INFORMATION*, 2011–2012 4 (2011), available at <http://homeroom.state.nj.us/evvts/00317-11-12.pdf>.

<sup>210</sup> Foucault observes that individuals farther and farther away from the established norm are subjected to more and more individuation and categorization. For example, there are myriad categories of disease, but there are very few categories for the healthy. See FOUCAULT, *supra* note 183, at 193 ("In a system of discipline, the child is more individualized than the adult, the patient more than the healthy man, the madman and the delinquent more than the normal and non-delinquent.").

<sup>211</sup> *Cf.* Libby Adler, *The Gay Agenda*, 16 MICH. J. GENDER & L. 147, 166–72 (2009) (critiquing the framing of Lambda Legal's marriage litigation strategy in terms of a sex-family distinction and the resulting opposition between "normal" families and "marginal" sexual practices).

victim-status. Moreover, just as Tyler Clementi's own words and actions complicate the innocence narrative deployed in his name, the experiences and needs of gay teens in New Jersey appear disconnected from the bullying law that purports to protect them.

### III. CONCLUDING THOUGHTS: THE STRATEGIC DEPLOYMENT OF GAY TEENS

The previous sections have demonstrated a disconnect between the nar-ratological frameworks used to combat bullying and the day-to-day exper-iences of the gay teens ostensibly protected by such efforts. This Part will conclude by briefly exploring the role of the innocence narrative in the broader context of LGBT legal activism. It may be relatively unsurprising that parents, educators, and prosecutors would present gay teens in a manner that ultimately extends their jurisdiction over both victims and bullies,<sup>212</sup> but it is perhaps more surprising that LGBT advocates have employed similar narratives. Given the historical commitment of LGBT advocates to empow-ering gay youth,<sup>213</sup> why embrace narratives with the potential to work to the detriment of at least some gay teens? Why push for legal reform built upon an incomplete picture of gay teen experience? What is the strategic value of codifying the vulnerability and weakness of gay teens?

Some clues are provided by recent efforts to overturn California's Pro-position 8<sup>214</sup> and the U.S. military's Don't Ask, Don't Tell policy (the latter mooted by congressional repeal).<sup>215</sup> In both sets of litigation, advocates for same-sex marriage rights and openly gay service members cited the plight of

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<sup>212</sup> See Ahrens, *supra* note 4, at 65 (observing that parents have often been supportive of extensive monitoring and punishment of cyberbullying by school administrators).

<sup>213</sup> For example, the GSA Network has challenged abstinence-only sex education. See Teresa Watanabe, *Clovis Unified District Sued Over Abstinence-Only Sex Education*, L.A. TIMES (Aug. 22, 2012), <http://articles.latimes.com/2012/aug/22/local/la-me-sex-ed-20120822>. Also, LGBT organizations have been actively involved in challenging mandatory Internet filtering and content regulations. See Stein, *supra* note 104, at 161–62; see also Complaint at 1, *Franks v. Metro. Bd. of Pub. Educ.*, No. 3:09-0446 (M.D. Tenn. May 19, 2009) (challenging the Internet filtering policy of a Tennessee school district). Where Internet governance debates have shifted, however, away from pornography and indecency and towards sexual predators and cyberbullying, these constituencies have become far less vocal critics of the resulting legislation, notwithstanding the disproportionate use of sex offender laws against gay men. See, e.g., LANCASTER, *supra* note 21, at 14–16. Joseph Fischel observes:

Because attempts to explore differences of straight and gay sexuality in terms of age are heard as defensive rationalizations or apologia for pedophiles, it is exceedingly difficult to assert that the discourse on sex predators — often homophobic and hys-terical — undermines critically interrogating family, home, heterosexuality, and other typical, unceremonious sites of abuse and coercion. Rightfully, gay people hate talking about this.

Fischel, *supra* note 24, at 338.

<sup>214</sup> Proposition 8 was a California ballot initiative that amended the state constitution to eliminate the right of same-sex couples to marry. See *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012).

<sup>215</sup> See *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1166–67 (9th Cir. 2011).

gay youth generally — and Tyler Clementi specifically — to place LGBT people squarely within the U.S. Supreme Court’s equal protection framework. In the Proposition 8 litigation, appellees’ brief to the Ninth Circuit concluded with the following:

Last month, in a widely publicized tragedy, a young Rutgers student jumped to his death from the George Washington Bridge after being outed on the Internet as gay. A few days later, across the Hudson River in the Bronx, two 17-year-old young men were beaten and tortured to the brink of death by a gang of nine because they were suspected of being gay. Incidents such as these are all too familiar to our society. And it is too plain for argument that discrimination written into our constitutional charters inexorably leads to shame, humiliation, ostracism, fear, and hostility. The consequences are all too often very, very tragic.<sup>216</sup>

In its amicus brief supporting appellees, the Anti-Defamation League told a similar story:

In addition to suffering discrimination, gays and lesbians are also frequently victimized for their sexual orientation. Indeed, one need not look farther than recent headlines to see evidence that harassment of and violence against gays and lesbians is a current and widespread problem. *See, e.g., . . .* Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 29, 2010 . . . (Rutgers student commits suicide after being outed on the internet [sic]).<sup>217</sup>

In the Don’t Ask, Don’t Tell litigation, Lambda Legal also deployed the vulnerability of gay youth as a narrative device:

The injuries caused by the government’s stigmatization of LGB people through [Don’t Ask, Don’t Tell] are especially acute for youth, who hear the government’s message of discrimination perhaps mostly loudly. . . . LGB youth must contend with a daily message from their government that they are undeserving of equal treatment. The injury from being branded as a second-class citizen can have damaging consequences on the psyche of LGB youth, which can outlast any physical wound.<sup>218</sup>

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<sup>216</sup> Brief of Plaintiff-Appellees at 106–07, *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2011) (No. 10-16696), 2010 WL 4310749 at \*106–07.

<sup>217</sup> Brief for Anti-Defamation League as Amicus Curiae in Support of Plaintiffs-Appellees at 19, *Perry*, 591 F.3d 1147 (No. 10-16696), 2010 WL 4622566 at \*19.

<sup>218</sup> Brief for Lambda Legal Defense and Education Fund, Inc. as Amicus Curiae in Support of Appellees’ Opposition to a Stay Pending Appeal at 8–9, *Log Cabin Republicans*, 658 F.3d 1162 (Nos. 10-56634, 10-56813), 2010 WL 4622637 at \*8–9.

The victimization of gay and lesbian youth is “widespread,” and Tyler Clementi’s experience of “being outed on the Internet” typifies the harassment of and violence to gays and lesbians. As with the Dharun Ravi prosecution, antibullying initiatives, and the legal protection of minority groups more broadly, “shame, humiliation, ostracism, fear and hostility” are harnessed in order to cultivate the sympathies — and with it, the protections — of the legal system. Echoing the concerns raised by Wendy Brown,<sup>219</sup> caring for the lasting “wounds” of being young and gay emerges as a central moral justification for striking down laws that potentially disadvantage LGBT people.

More specifically, the gay teen innocence narrative has been deployed to neutralize and counter some of the arguments that have been so effectively deployed by the conservative activists. In the Proposition 8 campaign, for example, proponents of the measure frequently invoked the specter of exposing children to same-sex sexuality in schools as a basis for overturning same-sex marriage rights in California.<sup>220</sup> The innocence narrative, however, reverses this child protection argument to demonstrate that harm to kids also flows *in the other direction*.<sup>221</sup> In its amicus brief, the California Teachers Association makes this point rather explicitly:

As shown above, the carefully crafted arguments of Protect Marriage and its supporters rely on discriminatory suggestions that same-sex relationships are inferior to heterosexual relationships, and on fears that children exposed to the concept of same-sex marriage may become gay or lesbian. . . . These messages are commonly understood to have adverse consequences on gay and lesbian students. . . . The recent suicides of a number of youths subjected to harassment vividly illustrate the continuing problem of discrimination leveled at gay and lesbian youths and the devastating consequences that can result.<sup>222</sup>

In other words, by restricting LGBT marriage rights, *opponents* of gay rights are harming innocent children.

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<sup>219</sup> See *supra* notes 145–48 and accompanying text.

<sup>220</sup> See, e.g., VoteYesonProp8, *Yes on 8 TV Ad: Everything To Do With Schools*, YouTube (Oct. 20, 2008), <https://www.youtube.com/watch?v=7352ZVMKBQM&feature=related>; yesonprop81025, *Proposition 8 Commercial*, YouTube (Oct. 25, 2008), <https://www.youtube.com/watch?v=75J3TN9Zzck>; yesonprop81025, *Proposition 8 Commercial*, YouTube (Oct. 25, 2008), <https://www.youtube.com/watch?v=U8j2y9WtTPw&feature=relmfu>.

<sup>221</sup> See Tom Waidunas, *Young, Gay, and Suicidal: Dynamic Nominalism and the Process of Defining a Social Problem with Statistics*, 37 *SCI. TECH. & HUM. VALUES* 199, 210 (2012) (“Reconceiving of gay youths as suicide victims due to systemic oppression helped activists counteract claims that gay people victimized minors. Instead, gay activists could be seen as the advocates for oppressed minors.” (citation omitted)).

<sup>222</sup> Brief for California Teachers Association as Amicus Curiae in Support of Plaintiff-Appellees Request to Affirm the District Court’s Ruling at 9–11, *Perry*, 591 F.3d 1147 (No. 10-16696), 2010 WL 4622565 at \*9–11.

The gay teen innocence narrative also reinforces the doctrinal argument that sexual orientation is an immutable trait and thus a suspect classification subject to strict constitutional scrutiny.<sup>223</sup> Sexual orientation under this view is not just a choice made by some adults to forego heterosexual relationships and responsibilities; instead, there are kids out there — good, young, innocent kids — struggling with issues of sexual identity. In Lambda Legal’s amicus brief in the Don’t Ask, Don’t Tell litigation, to support its argument that sexual orientation is a “central, defining trait of personhood that a person should not be required to change to avoid discrimination,” it cites to “the suicides of Seth Walsh, 13, Asher Brown, 13, Billy Lucas, 15, Tyler Clementi, 18, and Raymond Chase, 19”<sup>224</sup>:

It is reckless and irresponsible to continue to repeat the demonstrably false notion that everyone can choose to be heterosexual. Indeed, a disproportionate number of gay youth commit suicide each year — as evidenced by the surge of suicides that have been recently reported — because they are simultaneously unable to cope with harassment they face and unable to change their sexual orientation to escape it.<sup>225</sup>

Sexual orientation becomes an immutable trait because gay teens cannot change it and because they lack the skills to “cope” with the consequences. Notwithstanding research suggesting that most gay teens are actually rather adept at negotiating the coming out process safely,<sup>226</sup> strict scrutiny seems to arise from their purportedly inevitable suffering.

In addition to countering legal arguments from conservatives, the innocence narrative also counters criticism from scholars critical of the normative goals and conceptual framing of the mainstream LGBT rights movement. First, it responds to the unease many scholars have expressed about the prioritization of issues such as marriage equality<sup>227</sup> by configuring the struggles of gay youth teleologically towards marriage, parenthood, mili-

<sup>223</sup> Immutable traits generally are more likely to be subjected to strict scrutiny — i.e., the government cannot subject a person to discriminatory treatment unless that treatment is narrowly tailored to a compelling government interest — because it is thought to be unjust to punish someone for a trait that they cannot control or change. See *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“Sexual orientation and sexual identity . . . are so fundamental to one’s identity that a person should not be required to abandon them.”).

<sup>224</sup> Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae in Support of Plaintiff Appellee/Cross-Appellant for Affirmance in Part and Reversal in Part at 27, 30 n.8, *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011) (Nos. 10-56634, 10-56813), 2011 WL 2443729 at \*27, \*30 n.8.

<sup>225</sup> *Id.* at 29–30.

<sup>226</sup> See SAVIN-WILLIAMS, *supra* note 1, at 183–87.

<sup>227</sup> See generally LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* (2004); JUDITH HALBERSTAM, *IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES* (2005); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236 (2006).

tary service, and other normative markings of adulthood. Within the innocence narrative, the struggle with sexual identity and social acceptance during one's teenage years develops, matures, and evolves over time into normal, respectable gay and lesbian adulthood marked by commitment and cohabitation.<sup>228</sup> The message conveyed by the briefs opposing Proposition 8 and Don't Ask, Don't Tell is that if Tyler Clementi and others knew that they could grow up and get married and/or serve in the military openly, suicide would become a far less appealing option. Missing from this story, however, are both the existence of alternative avenues for happiness and the very real possibility that these teenagers might want nothing to do with either "adult" institution.

Second, the gay teen innocence narrative counters repeated scholarly arguments about the constructedness and performativity of sexual identity — that is, that identity categories are the product of a particular historical context, are produced through a series of culturally coded practices, and therefore are neither innate nor pre-given.<sup>229</sup> The bullying of young gay teens struggling with their sexual identity, however, would seem to provide empirical support for the idea that there really is something innate and essential to gay identity, which can be identified in a thirteen-year-old. Moreover, if we are increasingly willing to acknowledge the existence of gay teens as young as twelve-, thirteen-, and fourteen-years-old,<sup>230</sup> but at the same time continue to insist upon the sexual incompetency of all teenagers, then either (1) we are being entirely hypocritical in our treatment of teenagers (entirely possible), or (2) homosexuality is a fundamental, biological trait that emerges in puberty in a highly volatile, potentially suicidal form that must be carefully managed until adulthood. The equal protection immutability argument may dovetail nicely with such essentialist understandings of sexual identity,<sup>231</sup> but its friction with the broader legal treatment of teenage sexuality boxes gay teens into a rather dismal place.

Although the strategic deployment of gay teens may be an effective litigation tactic, its particular brand of essentialism, buttressed by the narrative of innocence and vulnerability, can do a major disservice to the every-

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<sup>228</sup> See HALBERSTAM, *supra* note 227, at 153 (observing that the "stretched-out adolescence" of queer culture "challenges the conventional binary formulation of a life narrative," which "charts an obvious transition out of childish dependency through marriage and into adult responsibility through reproduction").

<sup>229</sup> See generally JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990) (discussing the performativity of gender); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. 1: AN INTRODUCTION* (Robert Hurley trans., Vintage Books 1990) (1978) (discussing the historical contingency of modern sexual identities).

<sup>230</sup> See, e.g., SAVIN-WILLIAMS, *supra* note 1, at 145; Benoit Denizet-Lewis, *Coming Out in Middle School*, N.Y. TIMES (Sept. 23, 2009), <http://www.nytimes.com/2009/09/27/magazine/27out-t.html?pagewanted=all>.

<sup>231</sup> See Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 563–64 (1994).

day practices of actual gay teens.<sup>232</sup> Despite the invocation of the need to protect gay teens from the harms of bullying and harassment, psychological research has suggested harmful consequences when gay teens internalize the innocence narrative and its related “suicidal script,” and the act of attempting suicide becomes a “rite of passage.”<sup>233</sup> Moreover, as demonstrated throughout this Article, the innocence narrative diverts attention away from the need for resources that would allow teenagers to take a proactive role in developing their sexual identity. The innocence narrative largely overlooks such needs and asks young people instead to wait it out, stay away from sex and the Internet in the meantime, and be content with knowing that it will get better someday. Advocates declare that discrimination, harassment, and bullying send a message of inferiority to gay youth, yet youth sexuality has been expressly excluded from previous LGBT rights victories,<sup>234</sup> and the message conveyed by current legal initiatives does not seem much more empowering.

This is not to say that discussions of gay teens should be off limits to advocates or that advocates should not seek to address the mistreatment of gay teens through the legal system. When doing so, however, it is crucial that advocates be conscious of the narratives they employ and the extent to which those narratives pull from and perpetuate dominant, disabling accounts of gay teens. The strategic effectiveness of a sympathetic narrative might in some circumstances outweigh its potential empirical or ethical shortcomings,<sup>235</sup> but facilitating gay teens’ agency at the very least requires greater attention to the “background conditions” necessary for exploration, pleasure, and sociopolitical engagement.<sup>236</sup>

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<sup>232</sup> See SEDGWICK, *supra* note 18, at 42 (observing that essentialist theory “reaches deeply . . . protectively” into the experiences and identities of “gay and pro-gay children”).

<sup>233</sup> SAVIN-WILLIAMS, *supra* note 1, at 67–68; *see also* boyd, *supra* note 50 (“By many accounts, the early internet [sic] seems to be correlated with a decline in suicide among LGBT youth . . . . Is it possible that the culture of fear we’ve created has increased suicide rates?”); Waidunas, *supra* note 221, at 203–04 (noting the “looping effects” of risk statistics on gay youth).

<sup>234</sup> *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The present case does not involve minors.”); *In re R.L.C.*, 643 S.E.2d 920, 925 (N.C. 2007) (notwithstanding *Lawrence*, upholding a “crime against nature statute” that criminalized oral sex, but not vaginal intercourse, between minors). *Cf. A.H. v. State*, 949 So.2d 234, 235 (Fla. Dist. Ct. App. 2007) (upholding child pornography conviction of sixteen- and seventeen-year-old couple for exchanging naked, sexual pictures of themselves via email).

<sup>235</sup> For example, in *Lawrence*, the petitioners’ non-intimate, non-sexual relationship contrasted starkly with their romanticized portrayal in Justice Kennedy’s majority opinion. *Compare Lawrence*, 539 U.S. at 562, 567, 578, with DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* 281 (2012) (“[B]y design, the Supreme Court knew little about the facts of the case.”).

<sup>236</sup> *See* Adler, *supra* note 211, at 203. For example, in the aftermath of Tyler Clementi’s suicide, Rutgers instituted a number of policy changes to provide better support to LGBT students, including relaxing the requirements of sex-segregated housing and training 130 staff and faculty “liaisons.” Ariel Kaminer, *Since Suicide, More Resources for Transgender and Gay Students*, N.Y. TIMES (Sept. 21, 2012), <http://www.nytimes.com/2012/09/22/nyregion/after-clementis-suicide-rutgers-embraces-its-gay-and-transgender-students.html?pagewanted=all> (“The result is a university where, some students say, the presence of highly visible gay,

Ultimately, we must acknowledge that each generation produces its own narratives. Pervasive bullying and harassment undeniably reflect the experiences of many gay teens today, as it certainly did for many more teenagers a generation ago. Today's gay teens, however, increasingly depart from the archetypical coming out war stories that grounded much of the struggle and success of gay liberation.<sup>237</sup> It is understandable to want to protect the identities and communities that provide value and coherence to so many lives, but what price must gay teens pay for the struggles of their predecessors? Must the "pain over its unredeemed history" really be the foundation of LGBT legal and political claims?<sup>238</sup> Rather than inherit the legacy of a brutalized youth, today's gay teens might instead inherit a similarly powerful legacy of resilience, activism, and a refusal to follow the path laid out before them.<sup>239</sup>

Each of these legacies is present in the story of Tyler Clementi. He was harassed in novel ways by his peers, felt like an outsider within his surrounding community, and his subsequent suicide evinces the torment, fragility, and despair experienced by countless teenagers in the past, present, and inevitable future. But even within this context, Clementi's digital trail shows a kid (1) reaching out for support, friends, and sex; (2) connecting online with opportunities for each; and (3) eloquently expressing his needs, concerns, and desires. The narrow focus on victimization and sexual innocence shifts attention away from these crucial aspects of his story to the potential detriment of other teenagers similarly striving to figure it all out.

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lesbian, bisexual and transgender students has become just a basic and unexceptional part of campus life.”).

<sup>237</sup> See SAVIN-WILLIAMS, *supra* note 1, at 6–7.

<sup>238</sup> See BROWN, *supra* note 145, at 74.

<sup>239</sup> See HALBERSTAM, *supra* note 227, at 176 (“Queer youth sets up younger gays and lesbians not as the inheritors and benefactors of several decades of queer activism but rather as victims of homophobia who need ‘outreach’ programs and support groups.”).

