ANTI-GAY BULLYING IN SCHOOLS—ARE ANTI-BULLYING STATUTES THE SOLUTION?

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In the last decade, anti-bullying legislation has rapidly proliferated, motivated in part by a string of highly publicized suicides by bullying victims—many of whom were targeted because of their sexual orientation. Despite heightened attention to the issue of anti-gay bullying, few statutes extend explicit protection to sexual minorities. In this Note, I argue that statutory proscriptions against bullying speech targeted at LGBT youth are necessary to ensure full protection for this particularly vulnerable group. Such limitations are constitutional under Tinker v. Des Moines Independent Community School District, *the Supreme Court's seminal case on student speech. Just as importantly, explicit prohibitions on anti-gay speech place state authority behind a clear message that LGBT students are just as important as their heterosexual peers. This message helps construct a reality that leaves no room for anti-gay bullying—where full equality for sexual minorities is the norm, rather than the exception.*

INTRODUCTION

Fifteen-year-old Billy Lucas,[1] thirteen-year-old Asher Brown,[2] and thirteen-year-old Seth Walsh[3] all committed suicide in the same three-week span in September 2010. Although the boys lived in different states—Indiana, California, and Texas—and led very different lives, they shared at least one trait: Each was relentlessly harassed by his classmates because they believed he was gay.

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[1] Richard Essex, *Bullying May Have Pushed 15-Year-Old to Suicide*, 13 WTHR INDIANAPOLIS NEWS (Sept. 13, 2010, 11:15 PM), http://wthr.com/story/13147899/bullying-may-have-pushed-15-year-old-to-suicide.

[2] Peggy O'Hare, *Parents Say Bullies Drove Their Son To Take His Life*, HOUS. CHRON., Sept. 28, 2010, at B1.

[3] Edecio Martinez, *Seth Walsh: Gay 13-Year-Old Hangs Self After Reported Bullying*, CBS NEWS (Sept. 30, 2010, 8:17 AM), http://www.cbsnews.com/8301-504083_162-20018111-504083.html.

News coverage of these and other suicides by allegedly homosexual teenage boys[4] has drawn national attention to the insidious peer harassment that lesbian, gay, bisexual, and transgender (LGBT)[5] youth face on a daily basis. As families and communities mourn these tragic deaths, legislators have rushed to sign increasingly stringent anti-bullying bills into law. Their efforts have been fruitful: In the past decade, a remarkable forty-eight states have enacted some form of anti-bullying legislation[6] aimed at strengthening school district policies to address and ameliorate bullying behavior. Yet, despite the heightened public attention to anti-gay bullying, only a minority of statutes specifically identify sexual orientation as an impermissible target of bullying behavior. Instead, they have opted for broader and less controversial prohibitions.[7]

Statutory prohibitions on targeted, derogatory anti-gay speech raise First Amendment concerns, specifically with regard to content and viewpoint discrimination. Lower courts have reached different outcomes, but their decisions uniformly affirm the state's interest in protecting student safety and welfare.[8] Because of the uniquely damaging nature of verbal attacks based on sexual orientation, the state's interest in protecting vulnerable youth should be dispositive in this context, allowing reasonable proscriptions on homophobic speech.

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[4] There were at least ten suicides by gay teenagers in response to gay bullying in September and October of 2010. *See* David Badash, *UPDATED: September's Anti-Gay Bullying Suicides—There Were a Lot More Than 5*, THE NEW CIVIL RIGHTS MOVEMENT (Oct. 8, 2010), http://thenewcivilrightsmovement.com/septembers-anti-gay-bullying-suicides-there-were-a-lot-more-than-5/discrimination/2010/10/01/13297 (listing ten suicides by gay teenagers in September 2010).

[5] In using the terms "LGBT" and "anti-gay bullying," I do not intend to minimize the unique challenges facing students who are bullied because of their gender identity. Rather, I use these terms in recognition of the fact that bullying based on perceived or actual sexual orientation can also affect bisexual and transgender individuals, or otherwise gender nonconforming individuals who do not identify with the word "gay." While beyond the scope of this Note, preliminary statistics indicate that transgender bullying in particular warrants further examination. *See New Study Findings Show Pervasive Bullying of and Violence Toward Transgender and Gender Non-conforming People, Alarmingly High Rates of Suicide Attempts*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Oct. 7, 2010), http://transequality.org/news10.html (describing survey findings that 41% of transgender respondents had attempted suicide, a rate over twenty-five times higher than the national average of 1.6%).

[6] *See State School Healthy Policy Database: Bullying, Harassment and Hazing*, NAT'L ASS'N OF STATE BD. OF EDUCATORS, http://nasbe.org/healthy_schools/hs/bytopics.php?topicid=3131&catExpand=acdnbtm_catC (last visited Mar. 1, 2012) (describing some form of anti-bullying legislation in every state except South Dakota and Montana, the latter of which has two administrative rules addressing bullying in schools).

[7] *See infra* notes 69–70 and accompanying text (discussing state statutes).

[8] See *infra* Part II.C for a discussion of the lower court cases.

By listing sexual orientation as an impermissible target for bullying behavior and speech, the state enunciates a clear norm of parity for LGBT students, helping to effectuate a shift in social attitudes that is already underway. While various academic writers have criticized anti-bullying statutes for failing to provide a private right of action—an omission that is particularly problematic for LGBT youth, whom Title VI and Title IX do not protect[9]—this Note approaches anti-bullying statutes from a different angle. Drawing from legal scholarship on expressive harm, I argue that state anti-bullying legislation can be valuable precisely for the normative message it sends, even without a private enforcement mechanism.

In Part I of this Note, I summarize the substantial body of empirical research on bullying in order to highlight the uniquely damaging nature of verbal and physical attacks based on sexual orientation. I use anti-bullying legislation enacted in 2010 as a starting point to discuss how statutes can address the problem of anti-gay bullying. In Part II, I argue that statutory prohibitions on purely verbal bullying are consistent with the Supreme Court's jurisprudence on the regulation of student speech in schools. I explain why the traditional rationales for freedom of speech are less applicable in the school context, examining how the Court has limited speech that causes "substantial disruption" under *Tinker v. Des Moines Independent Community School District*, and how lower courts have interpreted this pronouncement. In Part III, I explain why statutes should explicitly identify anti-gay speech as an impermissible target for bullying behavior. The proven threat to LGBT youth from bullying speech is sufficient to warrant a presumption that such speech is harmful. Moreover, even absent a private enforcement mechanism, these statutes send the unambiguous, norm-enunciative message to children, parents, and society that anti-gay bullying is unacceptable.

I
Anti-Gay Bullying

A. Bullying in Schools: An Introduction

Interest in the psychology of school bullying first arose in Europe in the late 1960s and early 1970s, when Norwegian researcher Dan Olweus became the first scholar to operationalize the term "bullying" for in-depth study.[10] His definition of bullying, which the American

[9] For a more detailed discussion of the arguments for a private right of action and the limitations of Titles VI and IX, see *infra* notes 192–203 and accompanying text.

[10] Bullying was originally operationalized as "mobbning," or "mobbing," a term that in ethology describes a group's collective attack on an animal of another species. Dan

research community later adopted, has remained substantially unchanged over time: "A student is being bullied or victimized when he or she is exposed, repeatedly and over time, to negative actions on the part of one or more other students."[11] Negative actions are those that inflict injury or discomfort upon other individuals.[12] Additionally, bullying requires an imbalance of power or strength such that a student victim has difficulty defending himself.[13] To differentiate bullying from more general forms of aggressive behavior, researchers use three criteria: intention, repetitiveness, and an asymmetric power relationship.[14] Researchers also typically distinguish between physical, verbal, and relational bullying (which involves purposefully excluding a child from activities).[15] More recently, cyber-bullying has emerged as a distinct subset of bullying behavior.[16]

Empirical data has painted a consistently stark picture of bullying in American schools. A recent study found that over half of all surveyed students in grades six through ten had been involved in some form of bullying in the past two months.[17] Previous reports have consistently placed the prevalence of children and teens involved in bullying at upwards of thirty percent, depending on how bullying is measured.[18] These statistics reveal that relational and verbal abuse are

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Olweus, *Understanding and Researching Bullying*, *in* HANDBOOK OF BULLYING IN SCHOOLS: AN INTERNATIONAL PERSPECTIVE 9, 9 (Shane R. Jimerson et al. eds., 2010). In his seminal study, Olweus collected data over a period of two and a half years from approximately 2500 boys and girls in grades four through seven, varying in age from ten to fifteen years. DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO 13 (1993).

11 Olweus, *supra* note 10, at 11. Although studies typically conceptualize children as either bullies or victims, a third group of studies includes children who both bully and are bullied by others. Clayton R. Cook et al., *Predictors of Bullying and Victimization in Childhood and Adolescence*, 25 SCH. PSYCHOL. Q. 65, 65 (2010).

12 *See* OLWEUS, *supra* note 10, at 9 (defining negative actions).

13 Olweus, *supra* note 10, at 11.

14 *Id.*

15 *See, e.g.*, Jorge C. Srabstein et al., *Antibullying Legislation: A Public Health Perspective*, 42 J. ADOLESCENT HEALTH 11, 11 (2008) (identifying these three types of bullying).

16 *See* Jing Wang et al., *School Bullying Among Adolescents in the United States: Physical, Verbal, Relational, and Cyber*, 45 J. ADOLESCENT HEALTH 368, 373 (2009) (describing cyber-bullying as "distinct . . . compared with traditional forms of bullying").

17 *Id.* at 369–70.

18 *See, e.g.*, Karin S. Frey et al., *School Bullying: A Crisis or an Opportunity?*, *in* HANDBOOK OF BULLYING IN SCHOOLS: AN INTERNATIONAL PERSPECTIVE, *supra* note 10, at 403, 403 (noting that "[o]bservations of third to sixth-grade children on school playgrounds revealed that 77% were observed to bully or encourage bullying," while 80% of a middle school sample admitted bullying someone in the previous month); James E. Gruber & Susan Fineran, *Comparing the Impact of Bullying and Sexual Harassment Victimization on the Mental and Physical Health of Adolescents*, 59 SEX ROLES 1, 6 (2008) (finding that 52.3% of the research sample were bullied, 35.3% were sexually harassed, and that "both experiences were common to a number of students"); Anat Brunstein Klomek et al., *Bul-*

the most common forms of bullying among American youth[19] and that boys bully more frequently than girls.[20]

Studies have robustly documented the negative impact of bullying behavior on young people—both bullies and victims.[21] Bullying affects academic performance, leading to increased school absenteeism and higher drop-out rates, with ninety percent of victims experiencing a drop in grades.[22] Bullied children and adolescents are more prone to illness than their classmates[23] and experience a range of lasting psychological harms.[24] A study of thirteen- to nineteen-year-olds enrolled in New York high schools revealed that those who were frequently bullied were seven times more likely to be depressed than nonvictim students.[25] Other researchers have roughly substantiated this finding.[26]

Finally, and most disturbingly, empirical data has repeatedly linked bullying victimization with an increased risk of suicidal ideation and action in elementary, middle, and high school students.[27] This has

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lying, Depression, and Suicidality in Adolescents, 46 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 40, 40 (2007) (reporting that among sixth through tenth graders in the United States, 13% report moderate or frequent involvement as a bully, 10.6% as a victim, and 6.3% as both).

19 *See* Wang et al., *supra* note 16, at 370 (finding that over the course of two months, the prevalence rates of victimization were 12.8% for physical, 36.5% for verbal, 41% for relational, and 9.8% for cyber forms of bullying).

20 *Id.* at 370–71.

21 *See id.* at 368 (noting bullying's effects on "school achievement, prosocial skills, and psychological well-being for both victims and perpetrators"). Although I focus on bullying victims in the following discussion, bullies themselves are at increased risk for a number of negative outcomes. *See* Cook et al., *supra* note 11, at 66 (noting bullies' heightened risk for psychiatric problems, difficulties in romantic relationships, and substance abuse problems); J. David Smith et al., *Antibullying Programs: A Survey of Evaluation Activities in Public Schools*, 33 STUD. EDUC. EVALUATION 120, 121 (2007) (describing similar negative outcomes).

22 Gruber & Fineran, *supra* note 18, at 4.

23 Srabstein et al., *supra* note 15, at 11–12.

24 *See* Gruber & Fineran, *supra* note 18, at 4 (pointing to other studies and listing psychological harms); *see also* Cook et al., *supra* note 11, at 66 (describing studies showing a higher prevalence of "long-term psychological problems, including loneliness, diminishing self-esteem, psychosomatic complaints, and depression").

25 Klomek et al., *supra* note 18, at 43.

26 *See* Gruber & Fineran, *supra* note 18, at 4 (citing a study showing that bullied youths were five times more likely to be depressed than nonbullied youths).

27 *See* Anat B. Klomek et al., *The Association of Suicide and Bullying in Childhood to Young Adulthood: A Review of Cross-Sectional and Longitudinal Research Findings*, 55 CANADIAN J. PSYCHIATRY 282 (2010) (reviewing studies examining the relationship between bullying and suicidal behavior); *see also* Rina A. Bonanno & Shelley Hymel, *Beyond Hurt Feelings: Investigating Why Some Victims of Bullying Are at Greater Risk for Suicidal Ideation*, 56 MERRILL-PALMER Q. 420, 421–22 (2010) (describing recent research demonstrating a positive relationship between bullying victimization, suicide ideation, and suicide attempts).

led researchers to label bullying as a risk factor for suicidality—one that remains even after controlling for other risk factors such as depression, sex, socioeconomic status, and family structure.[28] Given that approximately one million adolescents attempt suicide each year, making it the third leading cause of death among ten- to nineteen-year-olds in the United States,[29] the link between bullying and suicide cannot be ignored.

As the above statistics reveal, bullying is a serious problem in our nation's schools. The problem is significantly magnified for students who stand out from their peers because of one particular characteristic: sexual orientation.

B. The Dangers of Anti-Gay Bullying

Seth Walsh, a thirteen-year-old boy in Tehachapi, California, was taunted with obscenities and jostled in school, and students threatened "to get him" on his way home—all because they thought he was gay.[30] After switching schools, then finally opting for home-schooling, he found himself unable to escape the taunting of his peers, one of whom asked, "Why don't you hang yourself?"[31]

In September 2010, Seth became the third gay teenage boy in a span of less than three weeks to commit suicide after enduring severe bullying because of his sexual orientation.[32] His grandmother addressed the motivation behind the bullying: "[T]he more I thought about it, the more the world needs to know why Seth was harassed . . . . He was harassed because he was gay."[33]

In this respect, Seth's story is not unique. LGBT youth regularly face insidious verbal and physical abuse. A recent nationally representative survey of LGBT teens by the Gay, Lesbian and Straight Education Network (GLSEN) found that 84.6% of those surveyed had been verbally harassed, 40.1% had been physically harassed (pushed or shoved), and 18.8% had been physically assaulted

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[28] Klomek et al., *supra* note 27, at 283.

[29] Robert L. Kitts, *Gay Adolescents and Suicide: Understanding the Association*, 40 ADOLESCENCE 621, 622 (2005).

[30] Thomas Curwen, *A Gay Teenager's Daily Gauntlet*, L.A. TIMES, Oct. 8, 2010, at A1; Martinez, *supra* note 3.

[31] Curwen, *supra* note 30.

[32] *See supra* notes 1–3 and accompanying text (discussing the suicides of three gay teenage boys). I do not discuss Tyler Clementi, a gay teen who drew national headlines for committing suicide in the same period, because at the time of his death he was at an age and in a university setting that raise different analytical issues. *See* Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1 (reporting on Clementi's suicide).

[33] Curwen, *supra* note 30.

(punched, kicked, or injured with a weapon) because of his or her sexual orientation in the past year.[34] The same GLSEN survey found that almost two-thirds of LGBT students felt unsafe at school because of their sexual orientation, and that 30% compared to 6.7% of heterosexual youth had missed a day of school in the past month for that reason.[35] In light of such troubling statistics, at least one commentator has labeled high school "one of the most intensely and often violently anti-gay sites in our culture."[36]

The detrimental impact of this climate is apparent in the host of negative outcomes that attend gay youth: LGBT children and teenagers report dramatically higher levels of depression and anxiety, as well as decreased levels of self-esteem relative to their heterosexual peers.[37] Of course, gay students are not inherently more likely to experience mental and physical harm; rather, it is "a direct result of the hatred and prejudice that surround[s] them."[38] Gay slurs—both by students and adults[39]—are an exceedingly common part of the everyday vernacular, contributing to a climate of homophobia that has

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[34] JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY, at xvi (2009) (internal quotation marks omitted).

[35] *Id.* Those who faced more frequent harassment because of their sexual orientation or gender expression had grade point averages almost half a grade lower than students who were less often harassed (2.7 compared to 3.1). *Id.* Of course, correlative survey data does not necessarily indicate causation, but the starkly disparate numbers make it difficult to deny the strong relationship between bullying and sexual orientation.

[36] Michal J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 219 (2008).

[37] *See, e.g.*, Gruber & Fineran, *supra* note 18, at 7 ("Except for substance abuse, GLBQ students have poorer health outcomes [poorer self esteem, mental and physical health, more trauma symptoms] than their heterosexual peers."); Ann P. Haas et al., *Suicide and Suicide Risk in Lesbian, Gay, Bisexual, and Transgender Populations*, 58 J. HOMOSEXUALITY 10, 20 (2011) (finding that LGBT status was associated with significantly higher rates of depression, generalized anxiety disorder, and conduct disorder than were observed among heterosexual youth, and finding that LGBT youth were six times more likely to have multiple disorders).

[38] *Bullying and Gay Youth*, MENTAL HEALTH AM., http://www.nmha.org/go/information/get-info/children-s-mental-health/bullying-and-gay-youth (last visited Feb. 21, 2012) (citation omitted) (internal quotation marks omitted); *see also* Kitts, *supra* note 29, at 624 ("Being gay in-and-of itself is not the cause of the increase in suicide. The increased risk comes from the psychosocial distress associated with being gay.").

[39] *See* Michelle Birkett et al., *LGB and Questioning Students in Schools: The Moderating Effects of Homophobic Bullying and School Climate on Negative Outcomes*, 38 J. YOUTH & ADOLESCENCE 989, 990 (2009) ("Approximately 91.4% of a [2006] LGB middle school and high school student sample reported that they *sometimes* or *frequently* heard homophobic remarks in school such as 'faggot,' 'dyke,' or 'queer.' Of these students, 99.4% said they heard remarks from students and 39.2% heard remarks from faculty or school staff." (citation omitted)).

become endemic to many American schools.[40] Victims of hate speech experience fear and anxiety, as well as physiological symptoms such as rapid pulse rate, difficulty breathing, post-traumatic stress disorder, and hypertension.[41] Male students in particular, regardless of sexual orientation, report greater anxiety and depression as a result of anti-gay slurs than from any other type of bullying.[42]

The impact of an unwelcoming school climate is aggravated for students who lack a protective buffer of social support.[43] Studies show that positive parental practices protect adolescents from involvement in both bullying perpetration and victimization,[44] but sexual minority youth are less likely to receive this support at home. Approximately one third of gay and lesbian teens have suffered verbal abuse or physical violence from a family member as a consequence of coming out, and one half have experienced some form of parental rejection.[45] Although some theorists argue that being an "anonymous and dif-

[40] *See* KOSCIW ET AL., *supra* note 34, at xvi (reporting that 72.4% of respondents had heard homophobic remarks such as "faggot" or "dyke" frequently or often at school); Elise D. Berlan et al., *Sexual Orientation and Bullying Among Adolescents in the Growing Up Today Study*, 46 J. ADOLESCENT HEALTH 366, 370 (2010) ("Lesbian, gay, and bisexual adults who report being bullied as youths recall experiencing frequent name-calling, being ridiculed in front of others, and physical violence. The names and labels used by bullying perpetrators were derogatory and frequently referred to gender nonconformity and minority sexual orientation." (citation omitted)).

[41] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, *in* WORDS THAT WOUND 17, 24 (Mari J. Matsuda et al. eds., 1993).

[42] *See* Gruber & Fineran, *supra* note 18, at 9 (noting that boys cite anti-gay slurs as the most upsetting of bullying experiences, whereas girls identify other experiences as worse). One study of ninth, tenth, and eleventh grade students in a private, all-male college prep school in an urban Midwestern city reports:

> Boys who were bullied because others called them gay reported more negative perceptions of school climate, higher anxiety, higher depression, and an external locus of control . . . . Boys who were bullied for reasons other than being called gay endorsed more positive perceptions of school climate, lower anxiety, lower depression, and a more internal locus of control.

Susan M. Swearer, *"You're So Gay!": Do Different Forms of Bullying Matter for Adolescent Males?*, 37 SCH. PSYCH. REV. 160, 169 (2008).

[43] The power of social attitudes to affect mental health is not limited to youth. *See* Haas et al., *supra* note 37, at 23–24 (describing 2009 survey data finding that LGBT adults living in one of the nineteen states that lack specific protections against sexual orientation–based hate crimes or employment discrimination were almost five times more likely than LGBT respondents in other states to have two or more mental disorders).

[44] *See* Wang et al., *supra* note 16, at 372 (finding negative correlation between parental involvement and bullying); *see also* Bonanno & Hymel, *supra* note 27, at 433 ("[V]ictimized students who reported low levels of perceived social support from family were at greatest risk for suicide ideation.").

[45] Kitts, *supra* note 29, at 625. The impact of parental and familial rejection is suggested by the alarmingly high number of LGBT adolescents and young adults who are homeless, estimated to constitute twenty to forty percent of the almost two million homeless youth in the United States. Haas et al., *supra* note 37, at 22.

fuse" minority is beneficial to sexual minorities, it can also make it more difficult for LGBT youth to identify similar individuals, particularly within their own age group.[46]

Facing rejection at home and school because of their sexual orientation, LGBT youth may experience a "narrow view of the options available to deal with recurrent family discord, rejection, or failure [that] contributes to a decision to commit suicide."[47] Studies estimate that suicide rates for gay adolescents are at least twice as high as for their heterosexual peers,[48] and some surveys place this rate at a shocking seven times higher than that of non–LGBT youth[49]—with sexual orientation serving as a stronger predictor of suicide attempts in males than in females.[50] A nationally representative U.S. survey and a number of nonrandom studies in the United States and abroad have specifically linked suicidal behavior in LGBT adolescents to school-based harassment, bullying, or violence based on sexual orientation.[51] Against this stark backdrop, many state legislators have decided to act.

C. Anti-Bullying Statutes: Overview and Enumeration

In the last thirteen years, a total of forty-eight states have passed some form of anti-bullying legislation.[52] Concerns about youth suicide have propelled the latest wave of legislative efforts: Each highly publicized suicide by a bullying victim seems to be followed by increasingly vocal demands for more stringent anti-bullying laws.[53]

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[46] *Compare* Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537, 1541 (2008) (arguing that the United States has "undergone an unimaginable transformation" in the past twenty-five years, such that "the anonymity and diffuseness of gays seem a net political benefit"), *with* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724 (1985) (arguing that "anonymous and diffuse" minority groups are most warranting of the Court's protection). This is a rich debate beyond the scope of this Note.

[47] Kitts, *supra* note 29, at 622 (internal quotation marks omitted).

[48] *Id.* at 624.

[49] *See* Haas et al., *supra* note 37, at 17 ("Since the early 1990s, population-based surveys of U.S. adolescents that have included questions about sexual orientation have consistently found rates of reported suicide attempts to be two to seven times higher in high school students who identify as LGB, compared to those who describe themselves as heterosexual . . . ." (citations omitted)).

[50] *See id.* (summarizing studies).

[51] *Id.* at 22–23.

[52] *See supra* note 6 (citing up-to-date compilations of all state legislation); Deborah Simmons, *D.C. Mulls Anti-Bullying Law*, WASH. TIMES, Oct. 29, 2010, at B5 (noting that Georgia adopted its anti-bullying legislation in 1999 and was the first state to pass such legislation).

[53] *See, e.g.*, Isolde Raftery, *Antibullying Bill Goes to the Governor*, N.Y. TIMES, June 24, 2010, at A28 (quoting New York anti-bullying bill sponsor's statement that "the notion that bullying was part of growing up and that 'kids will be kids' was archaic. 'That leads to suicide and it leads to death'").

In 2010, seven states—Georgia, Illinois, Massachusetts, Mississippi, New Hampshire, New York, and Washington—enacted new statutes or modified existing ones.[54] For analytical clarity, and because of the rapidly evolving nature of anti-bullying laws, I will confine the following discussion to these seven statutes. Unless otherwise stated, they are representative of laws in other states. My sample is large enough to highlight both the general structural similarities and the substantive differences within the body of anti-bullying laws as a whole.[55]

At the most fundamental level, each statute requires school districts to implement policies prohibiting bullying behavior. Georgia's recently amended statute epitomizes the type of requirements at the heart of most legislation. It states that "[e]ach local board of education shall adopt a policy that prohibits bullying of a student by another student and shall require such prohibition to be included in the student code of conduct for schools in that school system."[56] It further mandates that "the Department of Education shall develop a model policy regarding bullying . . . and shall post such policy on its website in order to assist local school systems."[57] Every recent legislative enactment provides a baseline definition—if not a comprehensive model policy—for the proscribed behavior, setting a floor above which school districts can build in drafting their policies.[58]

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to be enacted directly on the heels of a high profile youth suicide. *See* Sandra Constantine, *Phoebe Prince Apparent Suicide Prompts Fast Track for Anti-Bullying Bill in Massachusetts Legislature*, MASSLIVE.COM (Jan. 30, 2010, 3:36 P.M.), http://www.masslive.com/news/index.ssf/2010/01/phoebe_prince_suicide_prompts.html. Florida's Jeffrey Johnston Stand Up for All Students Act is named after a victim of bullying. FLA. STAT. ANN. § 1006.147 (West 2008).

54 GA. CODE ANN. § 20-2-751.4 (Supp. 2011); 105 ILL. COMP. STAT. ANN. 5/27-23.7 (West Supp. 2011); MASS. GEN. LAWS ANN. ch. 71, § 37O (West Supp. 2011); MISS. CODE ANN. § 37-11-67 (West Supp. 2010); N.H. REV. STAT. ANN. § 193-F (LexisNexis 2011); N.Y. EDUC. LAW § 801-a (Consol. 2011); WASH. REV. CODE ANN. § 28A.300.285 (West 2011).

55 For more information on basic recurrent statutory features, *see* Adam J. Speraw, Note, *No Bullying Allowed: A Call for a National Anti-Bullying Statute To Promote a Safer Learning Environment in American Public Schools*, 44 VAL. U. L. REV. 1151, 1172 (2010) (identifying three elements common to almost all of the statutes: (1) a definition of bullying or an identification of who will determine its definition; (2) ways to report bullying; and (3) the consequences of bullying).

56 GA. CODE ANN. § 20-2-751.4(b)(1).

57 *Id.* § 20-2-751.4(c).

58 Half of the states entrust a statewide entity with promulgating model policies based on the statutory definition. Section 13 of New York's statute, the Dignity for All Students Act, N.Y. EDUC. LAW §§ 10–18, 108-a, 2801 (Consol. 2011 & Supp. 2011), is hortatory, while Washington's says the "superintendent of public instruction . . . shall provide . . . a revised and updated model harassment, intimidation, and bullying prevention policy," WASH. REV. CODE ANN. § 28A.300.285(4)(a). New Hampshire's directs each school board

The specific definition of proscribed bullying behavior varies from state to state, but importantly, all states define bullying to include written, verbal, and physical acts that cause physical harm or substantially interfere with a student's education.[59] This latter phrase, employed in six of the seven 2010 statutes, reflects language from the Supreme Court's seminal Title IX case, *Davis ex rel. LaShonda D. v. Monroe County Board of Education*.[60] Additionally, some of the statutes prohibit to varying degrees acts which cause emotional distress;[61] which create a "hostile," "intimidating," or "threatening" environment;[62] and those which "substantially disrupt[ ] the orderly operation

to adopt a written policy within six months of the statute's effective date. N.H. REV. STAT. ANN. § 193-F:4.

[59] Indeed, the variation even extends to choice of label for the proscribed behavior. Washington employs the phrase "harassment, intimidation, and bullying," WASH. REV. CODE ANN. § 28A.300.285(4)(a), while Mississippi's statute applies to "bullying or harassing behavior," MISS. CODE ANN. § 37-11-67. Of the current sample, only New York does not employ the term "bullying" in the operative text, opting instead for "harassment." N.Y. EDUC. LAW §§ 11–13, 801-a. The definitional fluctuation is evident in the larger body of statutes. For further discussion of the implication of selecting between these varying labels, see Nan Stein, *Bullying or Sexual Harassment? The Missing Discourse of Rights in an Era of Zero Tolerance*, 45 ARIZ. L. REV. 783, 787–90 (2003). Stein argues that "bullying" obscures the severe nature of "harassment" that is often at issue. *Id.*

[60] 526 U.S. 629, 633 (1999) (holding that a private damages action against the school board for peer harassment "will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit"); *see, e.g.*, GA. CODE ANN. § 20-2-751.4(a)(3)(B) (prohibiting behavior "substantially interfering with a student's education"); 105 ILL. COMP. STAT. ANN. 5/27-23.7(b)(3) (West Supp. 2011) (prohibiting behavior "substantially interfering with [a] student's . . . academic performance"). New Hampshire, the only state not included in this count, prohibits behavior that "interferes with . . . educational opportunities." N.H. REV. STAT. ANN. § 193-F:3(I)(a)(3), :4(I)(b).

[61] Massachusetts, New Hampshire, and New York's statutes include similar language. *See* MASS. GEN. LAWS ANN. ch. 71, § 37O (West Supp. 2011) (defining bullying to cause "emotional harm"); N.H. REV. STAT. ANN. § 193-F:3(I)(a)(2) (defining bullying to cause "emotional distress"); N.Y. EDUC. LAW § 11(7) (Consol. Supp. 2011) (defining harassment as harm to a student's "emotional or physical well-being").

[62] *See* GA. CODE ANN. § 20-2-751.4(a)(3)(C) (prohibiting behavior that creates an "intimidating or threatening educational environment"); MASS. GEN. LAWS ANN. ch. 71, § 37O(a) (stating that "'[b]ullying' . . . creates a hostile environment" and defining "hostile environment" as a school environment "permeated with intimidation, ridicule or insult"); N.H. REV. STAT. ANN. § 193-F:2(III), :3(I)(a)(4) (seeking to prevent a "hostile educational environment"); N.Y. EDUC. LAW § 11(7) ("'Harassment' shall mean the creation of a hostile environment by conduct or by verbal threats, intimidation or abuse . . . ."); WASH. REV. CODE ANN. § 28A.300.285(4)(a) (prohibiting "intimidation"). Cases interpreting both Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (2006), and Title IX, 20 U.S.C. §§ 1681–1688 (2006), employ the phrase "hostile environment." *See* Wills v. Brown Univ., 184 F.3d 20, 26 (1st Cir. 1999) ("Broadly speaking, a hostile environment claim requires the victim to have been subjected to harassment severe enough to compromise the victim's employment or educational opportunities."); 106 AM. JUR. PROOF OF FACTS 3D 437, § 4 (2009) (discussing the possibility of school district liability for "hostile environment sexual harassment" under Title IX).

of the school."[63] Each statute makes clear that school district policy must prohibit the defined behaviors but otherwise defers to school districts and their boards to delineate the exact contours of the policies themselves.[64]

More specific provisions for enforcement and compliance are relatively uncommon. Statutes generally do not identify an actor or entity responsible for oversight, and only a "handful of states" condition funding on policy adoption and implementation.[65] Of those states that enacted statutes in 2010, Georgia is the only one to directly address the consequences of noncompliance, providing that "[a]ny school system which is not in compliance . . . shall be ineligible to receive state funding."[66] A number of statutes further include provisions prohibiting suits for civil damages against school boards or the state for statutory noncompliance,[67] and courts have construed statutes without express provisions to do the same.[68] Part III.B of this Note discusses this void in anti-bullying legislation in greater depth.

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[63] Such language appears in the statutes of Georgia, GA. CODE ANN. § 20-2-751.4(a)(3)(D), Massachusetts, MASS. GEN. LAWS ANN. ch. 71, § 37O(a)(v), New Hampshire, N.H. REV. STAT. ANN. § 193-F:3(1)(a)(5), and Washington, WASH. REV. CODE ANN. § 28A.300.285(2)(d). This language originates in *Tinker v. Des Moines Independent Community School District*. *See* 393 U.S 503, 513 (1969) (holding that regulation of student speech is permissible only where there is "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school"); *see also infra* Part II (discussing the *Tinker* standard as applied to anti-bullying statutes).

[64] *See, e.g.*, GA. CODE ANN. § 20-2-751.4(b) (listing broad guidelines for local board of education policies).

[65] Fred Hartmeister & Vickie Fix-Turkowski, Commentary, *Getting Even with Schoolyard Bullies: Legislative Responses to Campus Provocateurs*, 195 EDUC. L. REP. 1, 16 (2005). Colorado's statute, for instance, requires administrators to "file annual reports with state education departments . . . . Willful failure to comply with the reporting requirement may result in the forfeiture of the state's share of financial support until compliance is attained." *Id.*

[66] GA. CODE ANN. § 20-2-751.4(g). New York's statute empowers the Commissioner of Education to "[p]rovide grants . . . to local school districts to assist them in implementing the guidelines," but it does not explicitly preclude funding if guidelines are not implemented. N.Y. EDUC. LAW § 14(2).

[67] *See* Hartmeister & Fix-Turkowski, *supra* note 65, at 16 (describing language in Oklahoma, Oregon, Rhode Island, West Virginia, and Vermont statutes that likely forecloses a private right of action). New Hampshire's statute, for instance, states that "[n]othing in this chapter shall supersede or replace existing rights or remedies under any other general or special law, including criminal law, nor shall this chapter create a private right of action for enforcement of this chapter against any school district or chartered public school, or the state." N.H. REV. STAT. ANN. § 193-F:9.

[68] *See, e.g.*, Dornfried v. Berlin Bd. of Educ., No. CV064011497S, 2008 WL 5220639, at *9 (Conn. Super. Ct. Sept. 26, 2008) (holding that the legislative history of Connecticut's statute does not support an implied private right of action for a school official's alleged failure to abide by statutory mandates); Santoro v. Town of Hamden, No. CV040488583, 2006 WL 2536595, at *2 (Conn. Super. Ct. Aug. 18, 2006) (declining to read a private cause of action into Connecticut's anti-bullying statute). *But see* L.W. *ex rel.* L.G. v. Toms River

Over the years, a small number of states have chosen to extend explicit protection to victims who are bullied based on enumerated personal characteristics. Although enumeration remains a minority position, the most recent spate of anti-bullying statutes offers a promising indication that this may be shifting. Illinois, New Hampshire, New York, and Washington—over half of the states enacting statutes in 2010—provide a list of prohibited bases for bullying behavior, including sexual orientation.[69] These lists are uniformly nonexclusive, to highlight for teachers and school officials certain types of bullying as absolutely prohibited while still reaching bullying based on unlisted characteristics. New York's statute, for instance, encompasses but is not limited to "conduct, verbal threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex."[70]

Gay rights organizations strongly support enumeration,[71] and research indicates that statutes that specifically identify sexual orientation as an impermissible target for bullying lead to a greater

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Reg'l Sch. Bd. of Educ., 915 A.2d 535, 547 (N.J. 2007) ("Because of the [New Jersey Law Against Discrimination (LAD)]'s plain language, its broad remedial goal, and the prevalent nature of peer sexual harassment, we conclude that the LAD permits a cause of action against a school district for student-on-student harassment based on an individual's perceived sexual orientation . . . .").

69 *See* 105 ILL. COMP. STAT. ANN. 5/27-23.7(a) (West Supp. 2011) (prohibiting bullying based on "race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, [or] unfavorable discharge from military service"); N.H. REV. STAT. ANN. § 193-F:s(II) ("Bullying in schools has historically included actions shown to be motivated by a pupil's actual or perceived race, color, religion, national origin, ancestry or ethnicity, sexual orientation, socioeconomic status, age, physical, mental, emotional, or learning disability, gender, gender identity and expression, obesity, or other distinguishing characteristics . . . ."); N.Y. EDUC. LAW § 12(1) (prohibiting harassment or discrimination based on "race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex"); WASH. REV. CODE ANN. § 28A.300.285(2) (West 2011) (protecting by reference characteristics enumerated in the "[m]alicious harassment" provision of Washington's criminal code, WASH. REV. CODE ANN. § 9A.36.080(3) (West Supp. 2011)).

70 N.Y. EDUC. LAW § 11(7).

71 *See, e.g.*, *Strengthening School Safety Through Prevention of Bullying: Joint Hearing Before the Subcomm. on Healthy Families & Cmtys. and the Subcomm. on Early Childhood, Elementary, and Secondary Educ. of the H. Comm. on Educ. & Labor*, 111th Cong. 78–79 (2009) (statement of the National Gay and Lesbian Task Force Action Fund) (advocating for the passage of federal enumerated anti-bullying legislation); *id.* at 100–01 (statement of Jody Huckaby, Executive Director, Parents, Families and Friends of Lesbians and Gays National) (same); ANTI-DEFAMATION LEAGUE, BULLYING/CYBERBULLYING PREVENTION LAW: MODEL STATUTE AND ADVOCACY TOOLKIT 4–5 (2009), *available at* http://www.adl.org/civil_rights/Anti-Bullying%20Law%20Toolkit_2009.pdf (including enumeration as an essential element of an effective anti-bullying law or policy).

decrease in LGBT bullying than those statutes that do not.[72] The Supreme Court, too, has stated that statutory "[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply."[73] Similar numbers of students report hearing homophobic remarks frequently in schools with non-enumerated anti-bullying laws (74.3% of students) as in those with no laws at all (75% of students).[74] However, those enrolled in schools with enumerated policies experience less bullying, feel safer overall, and report that teachers are significantly more likely to intervene in instances of anti-gay bullying.[75] These statistics underscore the tremendous potential for enumerated anti-gay bullying legislation to positively impact the lives of LGBT youth.

States lacking anti-bullying statutes, or those whose statutes currently do not include enumeration, should adopt legislation pursuant to this model.[76] Enumerated legislation directly acknowledges the particularly insidious threat of anti-gay bullying and sends an unambiguous message that homophobic behavior is intolerable on school grounds. The expressive power of this message stems from its ability to challenge and displace current norms of inequality—a power recognized by both gay rights advocates and their opponents.[77]

If the proliferation of lawsuits challenging school anti-bullying policies is any indication, anti-bullying statutes will soon face a wave

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[72] *See* GAY, LESBIAN & STRAIGHT EDUC. NETWORK, MODEL STATE ANTI-BULLYING & HARASSMENT LEGISLATION 4–5 (2010) [hereinafter GLSEN MODEL LEGISLATION], *available at* http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1577-2.pdf (citing studies that find students at schools with enumerated policies are fifty percent more likely to feel safe at school).

[73] Romer v. Evans, 517 U.S. 620, 628 (1996).

[74] GLSEN MODEL LEGISLATION, *supra* note 72, at 5.

[75] *See id.* Students in schools with policies expressly including sexual orientation and gender identity or expression are less likely to report a serious harassment problem at school (33% compared to 44%), have teachers that are more likely to intervene "always or most of the time" (25.3% compared to 15.9% at schools with a non-enumerated policy and 12.3% at schools without any policy), and are almost twice as likely to feel "very safe" at school (54% compared to 36%). Students at a school without an enumerated policy are three times more likely to skip class because they feel uncomfortable or unsafe (16% compared to 5%). *Id.*

[76] Some states have already chosen to do this. *See NJ Lawmakers Unveil Bipartisan 'Anti-Bullying Bill of Rights*,' NJTODAY.NET (Oct. 25, 2010, 12:33 P.M.), http://njtoday.net/2010/10/25/nj-lawmakers-unveil-bipartisan-'anti-bullying-bill-of-rights'/ (describing New Jersey's "Anti-Bullying Bill of Rights," introduced weeks after Tyler Clementi's suicide).

[77] *See* John Wright, *Senate OKs 2 Equality Texas–Backed Bills Targeting Bullying, Suicide in Same Day*, DALLASVOICE.COM (May 23, 2011, 8:35 P.M.), http://www.dallasvoice.com/senate-oks-2-equality-texasbacked-bills-targeting-bullying-suicide-day-1077582.html (arguing that Texas's recently passed anti-bullying and youth suicide prevention laws, the latter of which was originally named after Asher Brown, *see supra* note 2 and accompanying text, would not have succeeded had they included express protections for LGBT youth).

of constitutional challenges.[78] Perhaps unsurprisingly, some of the most important provisions in these statutes—those specifically prohibiting anti-gay speech—are also the most contentious. I turn to the constitutionality of these provisions in the following Part.

II
Verbal Bullying and First Amendment Freedoms

While the portions of state anti-bullying statutes that regulate physical acts of violence against minority groups are indisputably constitutional, restrictions on bullying *speech*—particularly restrictions singling out specific categories of speech—are seemingly in tension with the First Amendment.[79] In the following Part, I argue for a statutory prohibition on targeted, derogatory "verbal communications,"[80] motivated by "any actual or perceived differentiating characteristic"[81]—including those set forth in an explicitly enumerated list—which "substantially disrupt the orderly operation of the school"[82] or "substantially interfere with a student's academic performance."[83] In combination, these statutory components create sufficiently narrow boundaries to balance protection for LGBT students with protection for other students' freedom of speech. Thus, they are constitutional under *Tinker v. Des Moines Independent Community School District*,

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[78] *See, e.g.*, Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 676 (7th Cir. 2008) (granting plaintiff a preliminary injunction against school policy prohibiting him from wearing a "Be Happy, Not Gay" t-shirt, but conceding that the policy could survive if restricted to derogatory comments that would interfere with the school's educational purpose); C.H. *ex rel.* Hudak v. Bridgeton Bd. of Educ., No. 09-5815 (RBK/JS), 2010 WL 1644612, at *8, 10–11 (D.N.J. Apr. 22, 2010) (dismissing student's facial challenge to school's dress code, literature distribution, harassment/anti-bullying, and equal education policies after upholding her as-applied challenge under *Tinker*); *see also infra* Part II.C (discussing cases in the Third and Seventh Circuits).

[79] U.S. Const. amend. I; *see, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 206 (3d Cir. 2001) ("There is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause."). In this way, portions of state anti-bullying statutes that regulate physical violence are analogous to hate crime legislation that has been upheld as constitutionally permissible outside of the school context. *See* Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993) (approving a Wisconsin enhanced-penalty hate crime statute as one aimed at conduct, not expression).

[80] *See supra* text accompanying note 59 (noting that all 2010 statutes limit verbal bullying).

[81] *See supra* note 69 and accompanying text (describing enumeration in Illinois, New Hampshire, New York, and Washington statutes).

[82] *See supra* note 63 and accompanying text (identifying statutes that employ the phrase).

[83] *See supra* note 60 and accompanying text (identifying 2010 statutes that employ the phrase or a variation).

the Supreme Court's seminal precedent on freedom of speech in schools.[84]

A. The Basic Conflict

The principal constitutional question is whether statutes that prohibit anti-gay bullying speech imperissibly abridge students' speech rights. The Supreme Court has strictly guarded freedom of speech as among the "fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action."[85] However, while strict free speech adherents have argued that any regulation on the spread of destructive messages unconstitutionally intrudes into speakers' rights, the majority of the Court has never adopted such an unyielding position.[86] Moreover, lower courts have refused to endorse the opposite perspective, holding that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause."[87]

Content-based restrictions on speech—particularly viewpoint-based restrictions—are subject to the most stringent level of scrutiny.[88] The state may engage in content discrimination only under extremely limited circumstances.[89] Even in these exceptional cases,

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[84] In *Tinker*, the Court held that a school cannot regulate student expression unless the speech creates a substantial disruption in the orderly operation of the school or interferes with the rights of others. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (1969); *see infra* Part II.C (discussing *Tinker*).

[85] Lovell v. City of Griffin, 303 U.S. 444, 450 (1938). See generally ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE (2007), for a helpful overview of the evolution of First Amendment jurisprudence.

[86] According to Alexander Tsesis, Justice Hugo Black was the most prominent judicial advocate of the absolutist position. He maintained that laws directly limiting speech were outside the bounds of "congressional or judicial balancing . . . . [T]he men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 393–94 (2004).

[87] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

[88] John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 581 (2009). The Supreme Court first announced the principle that content-based restrictions generally draw strict scrutiny review in *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101–02 (1972). Strict scrutiny requires the state to prove that its regulations serve a compelling governmental interest achieved through narrowly tailored means. *Id.*; *see* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 915 (describing the formulation of the Court's jurisprudence in *Mosley*).

[89] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358–59 (2003) (upholding a criminal prohibition on cross burning conducted with the intent to intimidate against a First Amendment challenge). But the Court explicitly grounded its reasoning in the fact that "[i]t does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's 'political affiliation, union membership, or homosexuality.'" *Id.* at 362 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)).

the Supreme Court has adhered to the bedrock First Amendment principle that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[90] Accordingly, viewpoint-discriminatory statutes, which regulate speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction," are presumptively unconstitutional.[91] Outside school walls, even restrictions on disfavored classes of expression—including obscenity,[92] defamation,[93] fighting words,[94] and true threats[95]—cannot be based on viewpoint.[96] Anti-bullying statutes that prohibit disparaging speech against gays and other minority groups ostensibly restrict both content and viewpoint.

Nonetheless, arguments supporting enumerated bullying speech regulation are uniquely persuasive in the primary educational setting, where courts justify deference to school decision making based on students' age and maturity and based on the need to maintain discipline.[97] Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[98] but the Supreme Court has repeatedly affirmed schools' power to limit these rights in accordance with the *in loco parentis* role that schools play in incul-

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[90] Texas v. Johnson, 491 U.S. 397, 414 (1989); *see* R.A.V. v. City of St. Paul, 505 U.S. 377, 414 (White, J., concurring) ("The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.").

[91] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[92] *See* Roth v. United States, 354 U.S. 476 (1957) (upholding a federal criminal statute punishing the use of the mails for distribution of obscene material).

[93] *See* Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding a state criminal defamation statute).

[94] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572–74 (1942) (upholding a statute as fitting within the exception to the First Amendment known as "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

[95] *See* Virginia v. Black, 538 U.S. 343 (2003) (upholding a state cross-burning statute as valid under the true threats exception to the First Amendment).

[96] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (striking down a city ordinance banning fighting words on only "one side of the debate" as unconstitutionally viewpoint discriminatory); Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 874–75 (1993) (discussing the *R.A.V.* opinion and viewpoint discrimination).

[97] *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 339–40 (1985) (discussing, in the context of a high school student's Fourth Amendment rights, the substantial interest of teachers and administrators in maintaining discipline on school grounds); McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 242–44 (3d Cir. 2010) (limiting the university speech policy but articulating reasons why regulation of speech can be more stringent in the primary school context).

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

cating students with fundamental values.[99] Accordingly, the First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings,"[100] and they must be "applied in light of the special characteristics of the school environment."[101]

Despite debate about whether the Supreme Court's school speech decisions incorporate jurisprudence from First Amendment viewpoint discrimination doctrine in other contexts,[102] scholars and courts agree that schools may enact facially viewpoint-discriminatory rules in order to prevent substantial disruption.[103] In *Sypniewski v. Warren Hills Regional Board of Education*, the Third Circuit relied on this rule to affirm a school's racial harassment policy—one that was "indisputably a content-based restriction on expression [that], in other contexts, may well be found unconstitutional."[104] Acknowledging the viewpoint restriction at issue, the court argued that "the public school setting is fundamentally different from other contexts . . . . When due respect is paid to the needs of school authority, it becomes clear the focus on racial expression in this case is justifiable."[105]

The traditional rationales for an unyielding prohibition on viewpoint and content discrimination[106]—promotion of a free marketplace of ideas[107] and avoidance of "the occasional tyrannies of governing majorities"[108]—are less applicable in the school context. Unlike adults or university students, children can make only limited contributions to

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[99] *See* Amanda L. Houle, *From T-Shirts to Teaching: May Public Schools Constitutionally Regulate Antihomosexual Speech?*, 76 FORDHAM L. REV. 2477, 2488 (2008) (discussing the history of the *in loco parentis* doctrine, which transfers parents' powers and responsibilities over their children to the school).

[100] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986).

[101] *Tinker*, 393 U.S. at 506.

[102] *See* Taylor, *supra* note 88, at 573–74 (discussing the debate among lower courts and academic commentators).

[103] *See id.* at 574 (citing a survey of Supreme Court case law regarding student speech in support of this proposition and noting that "courts regularly approve facially viewpoint-based restrictions on student speech involving the Confederate flag under *Tinker* with barely a word about the First Amendment's general distrust of viewpoint discrimination").

[104] 307 F.3d 243, 267 (3d Cir. 2002).

[105] *Id.* at 267, 268.

[106] *See generally* DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS 19–52 (2010) (discussing justifications for rigid adherence to freedom of speech).

[107] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that critics of American participation in World War I should have freedom of speech because "the ultimate good desired is better reached by free trade in ideas—and . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market").

[108] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

the marketplace of ideas and opinions[109]—particularly in the context of a conversation about sexual orientation.[110] When students attack other students on the basis of such characteristics, it simply cannot be true that "[w]e have no basis for distinguishing good from bad ideas, and the only logical choice is to protect all ideas."[111] Further, because few high school students can vote, the informed self-government rationale for an open marketplace is diminished.[112] Finally, *Tinker* should temper concerns about government censorship because it holds that school speech restrictions must be motivated by a desire to prevent disruption rather than to suppress disagreeable viewpoints.[113]

Thus, the question is not whether statutes prohibiting anti-gay bullying speech are unconstitutional, but how deferential such statutes must be to speech rights in order to achieve constitutionality.

B. Standard of Review

Because the constitutionality of student speech restrictions depends on the type of speech at issue, the first step in assessing statutes regulating bullying communications is to select the appropriate standard of review. My proposed statutory definition incorporates the phrase "substantial disruption" or "substantial interference" in accordance with recent legislative trends,[114] situating the constitutional analysis squarely within the Court's precedent in *Tinker*. However, while *Tinker*'s substantial disruption standard presents the default mode of analysis for student speech regulation, three other Supreme Court cases—*Bethel School District No. 403 v. Fraser*,[115] *Hazelwood School District v. Kuhlmeier*,[116] and *Morse v. Frederick*[117]—delimit

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[109] *See* Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 876 (7th Cir. 2011) (reaffirming that the contribution of students to the marketplace is "modest," particularly for younger students).

[110] *See* Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 673 (7th Cir. 2008) ("Nor, on the benefits side of the First Amendment balance, is uninhibited high-school student hallway debate over sexuality . . . an essential preparation for the exercise of the franchise.").

[111] Matsuda, *supra* note 41, at 32.

[112] *See* FRALEIGH & TUMAN, *supra* note 106, at 8 (arguing that freedom of expression promotes self-government because "[d]emocracy requires that people be informed on all sides of an issue, without government screening of ideas that it deems unwise or dangerous").

[113] *See* Taylor, *supra* note 88, at 576–77 (arguing that *Tinker* does not allow schools to restrict student speech for ideological purposes alone, but that it can restrict speech if doing so would "prevent the substantial disruption of the school's work").

[114] *See supra* notes 60–63 and accompanying text (discussing the statutory language of recently passed anti-bullying legislation).

[115] 478 U.S. 675 (1986).

[116] 484 U.S. 260 (1988).

[117] 551 U.S. 393 (2007).

categories of speech that can be restricted even without the threat of substantial disruption.

In *Fraser*, a public high school suspended a student pursuant to a disciplinary rule prohibiting the use of obscene language after he used a "graphic[ ] and explicit sexual metaphor" in a student assembly speech.[118] Approving the suspension, the Court held that the school could limit students' use of "plainly offensive" language on school grounds when it determined that such language "undermine[d] the school's basic educational mission."[119] The Court was careful to distinguish unprotected "lewd and obscene speech" from expressions of protest or political opinion,[120] and lower courts have subsequently construed *Fraser* narrowly to encompass only slurs and other speech with purely "lewd" content.[121] Anti-bullying statutes have the potential to reach far beyond this scope and thus appear to be outside *Fraser*'s bounds.

Hazelwood, a ruling that followed shortly after *Fraser*, again deferred to school administrators' power to impose reasonable restrictions on speech that is "wholly inconsistent with the 'fundamental values' of public school education."[122] The *Hazelwood* Court affirmed a high school principal's decision to withdraw a student-written article about pregnancy from the school newspaper,[123] reasoning that the First Amendment does not require "a school affirmatively to promote particular student speech."[124] Because bullying speech involves private communications, *Hazelwood* is inapplicable.

Finally, in *Morse*, the Court carved out an exception allowing schools to regulate student speech promoting illegal drug use, similar to *Fraser*'s exception allowing schools to regulate sexually explicit speech.[125] The high school in *Morse* suspended a student speaker for waving a fourteen-foot "BONG HiTS 4 JESUS" banner across the

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118 *Fraser*, 478 U.S. at 677–78.

119 *Id.* at 683, 685.

120 *See id.* at 680 (rejecting the argument that the student's speech fell within the bounds of political expression protected by *Tinker*).

121 *See, e.g.*, R.O. *ex rel.* Ochshorn v. Ithaca City Sch. Dist., 645 F.3d 533, 541 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 422 (2011) (finding student's drawing of stick figures in sexual positions "unquestionably lewd" and accordingly prohibited by *Fraser*); Doninger v. Niehoff, 527 F.3d 41, 49 (2d Cir. 2008) (reading *Fraser*'s "plainly offensive" language "in light of the vulgar, lewd, and sexually explicit language that was at issue in that case"); *see also Hazelwood*, 484 U.S. at 271 n.4 ("The decision in *Fraser* rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of [the student's] speech . . . .").

122 *Hazelwood*, 484 U.S. at 267 (quoting *Fraser*, 478 U.S. at 685–86).

123 *Id.* at 262–66.

124 *Id.* at 270–71.

125 *See* Morse v. Frederick, 551 U.S. 393, 408 (2007) (explaining that schools may restrict student expression promoting illegal drug use in part because the danger is "far more serious and palpable" than the conduct at issue in *Tinker*).

street from the school in an effort to appear on television.[126] Six religious advocacy groups submitted amicus briefs on the student's behalf, requesting that the Court avoid a broad holding that would have the effect of infringing students' rights to engage in religious speech at school.[127] The Court's rationale for upholding the suspension was consistent with this view: It explicitly grounded its decision in the school's compelling interest in deterring drug use by schoolchildren.[128]

Some have argued that the Court's reasoning in *Morse*, which more broadly turned on preventing "severe and permanent damage to the health and well-being of young people,"[129] should be extended to other areas of student safety.[130] Subsequent lower court interpretations of *Morse* provide tentative support for this reading,[131] to the chagrin of constitutional scholars who would prefer to see *Morse* read through Justice Alito's exceedingly narrow concurrence.[132] This debate over *Morse*'s scope is inapposite for our purposes. Relatively low-harm speech does not and should not fall within *Morse*'s boundaries, regardless of how expansively courts interpret its holding. Conversely, legitimately harmful speech—such as the speech anti-bullying statutes proscribe—need not fit into a *Tinker* exception. Anti-bullying statutes satisfy *Tinker*'s more exacting substantial disruption test itself.

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126 *Id.* at 397–98.

127 *See* Emily Gold Waldman, *A Post-*Morse *Framework for Students' Potentially Hurtful Speech (Religious and Otherwise)*, 37 J.L. & EDUC. 463, 484–85 (2008) (describing the amicus briefs in greater depth).

128 *Morse*, 551 U.S. at 407.

129 *Id*.

130 *See* Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a "New" Student Welfare Standard in Student Speech After* Morse v. Frederick, 58 AM. U. L. REV. 1221, 1225–26 (2009) (arguing that the Court's deference to administrators in *Morse* appears to extend beyond the context of drug use to other situations so long as a school's regulation of speech is intended to protect its students from danger); Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1030 (2008) (arguing that the theory employed in *Morse* could logically extend beyond illicit substances); Taylor, *supra* note 88, at 586 n.80 (discussing the possibility that *Morse* provides schools with "broader authority to regulate speech in the interests of student safety quite generally").

131 *See* Negrón, *supra* note 130, at 1236–40 (surveying lower court opinions post-*Morse* and finding that most have extended its application beyond situations in which student speech or expression promotes illegal drug use).

132 *See Morse*, 551 U.S. at 422 (Alito, J., concurring) ("I join the opinion of the Court on the understanding that . . . it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use . . . ."); Erwin Chemerinsky, *How Will* Morse v. Frederick *Be Applied?*, 12 LEWIS & CLARK L. REV. 17, 18, 25–26 (2008) (expressing the hope that Alito's concurrence in *Morse* will be controlling).

C. The Meaning of "Substantial Disruption"

For language outside the bounds of the three cases described above, *Tinker* establishes the "authoritative standard" for determining whether the First Amendment permits student speech regulation.[133] In *Tinker*, public school officials suspended three teenagers who wore black armbands to school and refused to remove them in contravention of school policy.[134] Noting that the school had adopted the policy in anticipation of the students' protest, the Court overturned the suspensions, finding that the school had impermissibly singled out expressive opposition to the Vietnam War for prohibition.[135] In so holding, the Court articulated the now-familiar rule that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[136] First Amendment protection does not extend to expression that materially disrupts classwork or creates a substantial disruption in school activities, or to expression that interferes with the rights of other students.[137] Almost all courts have subsequently hewed to *Tinker*'s substantial disruption standard,[138] under which regulation of student bullying speech is constitutionally permissible if such speech is reasonably predicted to create a substantial disruption in the school setting.

Tinker appears to set a stringent bar for a finding of substantial disruption. The Court overturned the district court's holding in favor of school authorities because of their failure to produce any "reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students."[139] The Court emphasized that, "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot

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[133] Leah M. Ward, *Suspended on Saturday? The Constitutionality of the Cyberbullying Act of 2007*, 62 ARK. L. REV. 783, 790 (2009).

[134] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

[135] *Id*. at 510–11.

[136] *Id.* at 511.

[137] *Id*. at 513.

[138] *See* Jerico Lavarias, *A Reexamination of the* Tinker *Standard: Freedom of Speech in Public Schools*, 35 HASTINGS CONST. L.Q. 575, 577 (2008) (noting that "because of the ambiguity of what 'invades the rights of others' actually extends to," courts have generally ignored this prong of the test, and instead "focused on the 'substantial disruption' prong"); Taylor, *supra* note 88, at 586–87 ("In the vast majority of cases, *Tinker* requires courts to apply . . . the 'substantial disruption rule' . . . .").

[139] *Tinker*, 393 U.S. at 509.

be sustained."[140] Instead, "for the State . . . to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[141]

Lower courts applying *Tinker* to prohibitions on bullying speech have arrived at different conclusions. I summarize three of the most important cases below to illuminate how courts delineate the bounds of substantial disruption.

In *Saxe v. State College Area School District*, the Third Circuit sustained a facial challenge to a school district's anti-harassment policy, holding that it was unconstitutionally overbroad in violation of the First Amendment.[142] The policy in *Saxe* bears more than a passing resemblance to my proposal, with a few minor but constitutionally dispositive differences: "Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[143] Striking down the policy, the court noted that "[n]o one would suggest that a school could constitutionally ban 'any unwelcome verbal . . . conduct . . . which offends . . . an individual because of' some enumerated personal characteristics."[144]

The *Saxe* opinion, written by then-Judge Samuel Alito, took issue with two features that it found to conflict with the *Tinker* standard. First, the statutory ban on speech made with merely the "purpose" of causing disruption, which it held could reach "simple acts of teasing and name calling," conflicted with *Tinker*'s requirement that a "school must reasonably believe that speech will cause actual, material disruption before prohibiting it."[145] Second, the court found that the policy's extension to acts "creat[ing] an intimidating, hostile or offensive environment" swept in all "negative or derogatory speech about such contentious issues as racial customs, religious tradition, language, sexual

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[140] *Id.* (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[141] *Id.*

[142] 240 F.3d 200, 202, 217 (3d Cir. 2001).

[143] *Id.* at 215.

[144] *Id*.

[145] *Id*. at 210–11, 216–17 (internal quotation marks omitted).

orientation, and values."[146] Such speech could not be constitutionally proscribed unless it posed a realistic threat of substantial disruption.[147]

One year after *Saxe*, the Third Circuit reached the opposite outcome in *Sypniewski v. Warren Hills Regional Board of Education*, when it held that a school board's anti-harassment policy was constitutionally permissible because the school had a history of racial incidents.[148] The court upheld the school's ban on racial harassment or intimidation by "name calling [and] using racial or derogatory slurs."[149] However, it required the school to excise the provision in its policy that prohibited students from wearing or possessing "any written material . . . that is racially divisive or creates ill will or hatred," finding that this clause would likely restrict speech beyond the bounds set by *Tinker*.[150] The court further invalidated the policy's application to Sypniewski's t-shirt, "Top 10 reasons you might be a Redneck Sports Fan," because there was insufficient evidence to tie the word "redneck" to the school's history of disruptive racial harassment.[151]

Most recently, in *Zamecnik v. Indian Prairie School District No. 204*, the Seventh Circuit upheld a grant of summary judgment in favor of a student's challenge to a school's verbal harassment policy.[152] The student plaintiff in *Zamecnik* wore a t-shirt to school that exhorted its readers to "Be Happy, Not Gay."[153] Although the court expressed support for the proposition that "bullying, intimidation, and provocation . . . can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth," it found that the t-shirt did not contain the kind of speech that would materially and substantially interfere with school activities under *Tinker*.[154] However, the court declined to invalidate the policy, which prohibited "derogatory comments, spoken or written, that refer to

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146 *Id*. at 217 (internal quotation marks omitted).

147 *Id*.

148 307 F.3d 243, 246, 268–69 (3d Cir. 2002). This history of racial incidents included a student in blackface who wore a string around his neck for Halloween; "White Power Wednesdays" held by members of "the Hicks," a group of students that wore Confederate flag attire; and other "racially harassing behavior." *Id.* at 247–48.

149 *Id*. at 249, 265.

150 *Id.* at 264–65.

151 *Id.* at 249, 251, 269.

152 636 F.3d 874, 875, 882 (7th Cir. 2011). *Zamecnik* is a continuation of the litigation in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668 (7th Cir. 2008). *Zamecnik*, 636 F.3d at 875.

153 *Zamecnik*, 636 F.3d at 875.

154 *Id.* at 877, 880 (holding that the anger sparked by the t-shirt "did not give rise to substantial disruption," the test under *Tinker*).

race, ethnicity, religion, gender, sexual orientation, or disability," as a facial matter.[155]

A superficial analysis of the outcomes in *Saxe*, *Sypniewski*, and *Zamecnik* might appear discouraging for anti-bullying legislators, as the court in each of these cases ruled in favor of the student speaker. However, closer examination reveals that the courts' reasoning hews fairly uniformly to a substantial disruption standard that should logically encompass anti-gay bullying speech directed at a specific individual. Indeed, neither *Sypniewski* nor *Zamecnik* are directly applicable to review of anti-bullying statutes drafted according to my formulation, because the messages at issue in those cases were not targeted at any particular student.[156] In this way, and as Professor Emily Waldman has recently argued, there is a constitutional distinction between speech that targets particular students for attack and speech that expresses a general political, social, or religious viewpoint without directly identifying individual students.[157]

Analogizing to Frederick's banner in *Morse*, Waldman posits that states can regulate student speech that personally attacks particular students because of the "clear and direct causal link between verbal bullying and subsequent student harm" and because targeted derogatory comments lack the "real political content" that the framers intended the First Amendment to protect.[158] Moreover, even when such speech does express a deeply held political belief, as in the case of anti-gay religious speech, "the political aspect of the speech and the *ad hominem* aspect can largely be decoupled. . . . [A] student can express his belief that . . . homosexuality is sinful, without singling out . . . gay students and telling them that they are going to Hell or calling them derogatory names."[159] As Professor Eugene Volokh posits with regard to workplace harassment, targeted and offensive speech "can be suppressed with minimum impact on First Amendment interests" because it "is unlikely to convince or edify the listener; in most cases, it is likely only to offend."[160] Derogatory

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155 *Id.* at 875 (internal quotation marks omitted).

156 For more on this class of "t-shirt litigation" cases, including discussion of lower court jurisprudence on anti-gay t-shirt messages, see generally Michael Kent Curtis, *Be Careful What You Wish for: Gays, Dueling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431 (2009).

157 Waldman, *supra* note 127, at 492.

158 *Id.* at 492–95. Although I draw heavily on Waldman's reasoning here, it is important to note that she argues for regulation of student speech outside of the *Tinker* framework. *Id.* at 496 n.170.

159 *Id.* at 494–95.

160 *Id.* at 495 (quoting Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1871–72 (1992)).

homophobic comments directed at specific students would almost certainly fall into this "minimum value" category. Conversely, nontargeted speech would be both less likely to create a substantial disruption and less likely to inflict harm.

Tinker's substantial disruption standard, as understood in light of lower court pronouncements, thus appears to accommodate the type of language my proposed definition proscribes. After removing the portions of the anti-harassment policy the *Saxe* court found objectionable, for instance, the result is a statute that prohibits "verbal or physical conduct based on one's actual or perceived . . . personal characteristics" which "has the purpose or effect of substantially interfering with a student's educational performance."[161] Similarly, part of the *Zamecnik* court's rationale for upholding the student's right to wear a "Be Happy, Not Gay" t-shirt rested on the fact that there was no indication that the student's "tepidly negative" comments targeted an individual or were defamatory—in other words, there was insufficient evidence to justify a finding of substantial disruption.[162]

In the rush to protect First Amendment rights, the rights of the real victims—those whom the noxious speech targets—are at risk of being unfairly disregarded.[163] Legislation must confront the insidious, virulent anti-gay speech that permeates middle and high schools throughout the country. "Students cannot hide behind the First Amendment to protect their 'right' to abuse and intimidate other students at school," the *Sypniewski* court stated.[164] "There is no constitutional right to be a bully."[165]

III

The Value of Prohibitions on Anti-Gay Speech

Just as anti-gay speech conveys an obvious message, legislation prohibiting such speech conveys a message as well. In the following Part, I first turn to the normative arguments in favor of speech regula-

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[161] *Id.* at 498 (citing Saxe v. State Coll. Area Sch. Dist., 240 F.2d 200, 217 (3d Cir. 2001)); *Saxe*, 240 F.2d at 202.

[162] Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 876–77 (3d Cir. 2011) (quoting Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 676 (7th Cir. 2008)); *Nuxoll*, 523 F.3d at 672.

[163] Prominent commentators have repeatedly advanced this argument in support of hate speech regulation. *See* Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the* R.A.V. *Case*, *in* Words That Wound, *supra* note 41, at 133, 134–35 (decrying the Court's opinion in *R.A.V.* as "completely ahistorical and acontextual" for assuming that "we know nothing about the origins of the practice of cross burning or about the meaning that a burning cross carries both for those who use it and those whom it terrorizes").

[164] Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002).

[165] *Id.*

tion. These arguments counsel in favor of an automatic presumption that anti-gay speech is substantially disruptive. I then argue that such regulation, even absent legislative authorization of private enforcement, is valuable precisely for the message it transmits.

A. Protection from Speech

When someone utters the slur "fag," the word—absent any accompanying physical action—reinforces years of subjugation and violence against sexual minorities.[166] It is precisely "the knowledge that they are *not* the isolated unpopular speech of a dissident few that makes [these words] so frightening."[167] In addition to reinforcing a history of violence against LGBT individuals, the slur underscores a contemporary reality in which homophobic slurs and acts of anti-gay hatred are still commonplace.[168]

Within this social reality, derogatory statements create a sharp dichotomy between majority and minority, actively constructing a world in which homosexuality is inferior to heterosexuality. As Professor Nan Hunter argues, "[o]ne's identity . . . is based not on an individual's self-perception of the salience of certain characteristics, but on the centrality of those characteristics to her standing and treatment in society."[169] The process of social construction is even more relevant in the school context, as young students deploying hateful language may not be fully aware of its history and are likely still learning and testing the boundaries of social mores. Because of the prevalence of homophobic remarks in popular culture, children may easily understand "gay" as a proxy for "bad," unwittingly reinforcing our hetero-normative societal structure.

Victims of anti-gay speech may be in the most difficult position to counter it because their voices have been diminished ex ante by the message that being gay is inferior. Professor Charles Lawrence III provides a more concrete example of this in the experience of a white, gay male student called a "faggot" on the subway:

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166 *See, e.g.*, Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 814–27 (2002) (describing the history of societal attitudes toward homosexuality in the United States).

167 Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, *in* WORDS THAT WOUND, *supra* note 41, at 53, 74 (emphasis in original).

168 For a small sampling of examples of the continuing presence of homophobic slurs and acts of anti-gay hatred in American society, see John Eligon, *Antigay Attacks Reported at Stonewall and in Chelsea*, N.Y. TIMES, Oct. 5, 2010, at A28; Michael Wilson & Al Baker, *Lured into a Trap, Then Tortured for Being Gay*, N.Y. TIMES, Oct. 9, 2010, at A1; Linton Weeks, *The Fa- Word: An Insulting Slur in the Spotlight*, NPR (May 28, 2011), http://www.npr.org/2011/05/28/136722113/the-fa-word-an-insulting-slur-in-the-spotlight.

169 Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 5 (2000).

> [The student] realized that any response was inadequate to counter the hundreds of years of societal defamation that one word—"faggot"—carried with it. . . . [I]t is not sufficient to deny the truth of the word's application, to say, "I am not a faggot." One must deny the truth of the word's meaning, a meaning shouted from the rooftops by the rest of the world a million times a day. The complex response, "Yes, I am a member of the group you despise and the degraded meaning of the word you use is one that I reject" is not effective in a subway encounter.[170]

Courts have recognized the threat posed by comments targeting essential, immutable characteristics like sexual orientation,[171] gender, and race: "[F]or most people these are major components of their personal identity—none more so than a sexual orientation that deviates from the norm. Such comments can strike a person at the core of his being."[172] Professor Jeremy Waldron describes attacks on these characteristics as "assaults upon the *dignity* of the persons affected—*dignity*, in the sense of these persons' basic social standing, of the basis of their recognition as social equals, and of their status as bearers of human rights and constitutional entitlements."[173] The message of inequality creates a "ripple effect"[174] that can reach far beyond the individual level, "frequently savag[ing] the community sharing the traits that caused the victim to be selected."[175] When an individual from a historically persecuted minority group has been victimized, "[t]he entire community is diminished."[176] Yet, despite the monumental

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[170] Lawrence, *supra* note 167, at 70.

[171] Whether sexual orientation is mutable, and whether it is useful for the gay rights movement to treat it as such, is a complex date beyond the scope of this Note. *See generally* Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 LAW & SEX. 1, 7 (2003) (arguing that the immutability argument is unhelpful to the gay rights movement); KENJI YOSHINO, COVERING 46–49 (2006) (arguing that immutability is potentially problematic when applied to sexual orientation, which has long been posited by those who oppose homosexuality to be a matter of choice rather than an innate characteristic).

[172] Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 671 (7th Cir. 2008).

[173] Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1610 (2009).

[174] OFFICE OF PRIMARY & SECONDARY EDUC., DEP'T OF EDUC., PREVENTING YOUTH HATE CRIME: A MANUAL FOR SCHOOLS AND COMMUNITIES 4 (1998).

[175] Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4702(5), 123 Stat. 2835, 2835 (2009).

[176] *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 17 (2009) (statement of Sen. Cardin). Indeed, students who witness bullying and belong to the same out-group as the bullying victim may experience "psychological and physiological stress" equal to that of the victim. Justin Wieland, *Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California's Public Schools: Contemporary Issues in Prevalence, Response and Prevention*, 11 U.C. DAVIS J. JUV. L. & POL'Y 235, 241 n.21 (2007) (citing Press Release, Pennsylvania

harms that anti-gay bullying perpetrates, the debate over rigid adherence to free speech rights in the anti-bullying context persists.

To date, lower courts appear reluctant to find *Tinker*'s substantial disruption prong satisfied in the absence of concrete incidences of bias-motivated violence.[177] The Ninth Circuit, in *Harper v. Poway Unified School District*, is one of few courts that has indicated a willingness to make this leap, upholding a school's policy prohibiting heterosexual students from wearing t-shirts with derogatory remarks about homosexuals during a self-organized "Straight-Pride Day."[178] Judge Reinhardt, writing for the majority, argued persuasively that "from first grade through twelfth—students are discovering what and who they are. Often, they are insecure. Generally, they are vulnerable to cruel, inhuman, and prejudiced treatment by others."[179] He noted that "[a]s long ago as in Brown v. Board of Education, the Supreme Court recognized that '[a] sense of inferiority affects the motivation of a child to learn.'"[180]

The Supreme Court subsequently vacated the *Harper* opinion, decided under *Tinker*'s previously overlooked rights prong, and remanded to the Ninth Circuit to be dismissed as moot. Other circuits have largely ignored *Harper*. Further, the specific message at issue, expressed on a t-shirt reading "homosexuality is shameful,"[181] would likely fall outside of my definition of constitutionally proscribable speech. The *Harper* majority's rationales are nonetheless strongly compelling when invoked to justify more exacting anti-bullying statutory requirements. Contemporary political disagreement regarding homosexuality should not imbue students with the right to "assault[ ] their fellow students with demeaning statements."[182] Instead, "[t]he question is about the direct targets of the abuse. Can their lives be led, can their children be brought up, can their hopes be maintained and

State University, Impact of Repeated Abuse Can Be as Severe for Bystanders as Victims (Dec. 14, 2004), *available at* http://www.psu.edu/ur/2004/bystander.html).

177 *See* Kathleen Hart, Note, *Sticks and Stones and Shotguns at School: The Ineffectiveness of Constitutional Antibullying Legislation as a Response to School Violence*, 39 GA. L. REV. 1109, 1128–34 (2005) (reviewing recent circuit court decisions on expressive student speech). *Compare* West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1361 (10th Cir. 2000) (upholding school district's racial harassment policy adopted after a number of racially influenced incidents on school grounds), *and* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002) (same), *with* Castorina v. Madison Cnty. Sch. Bd., 246 F.3d 536, 538 (6th Cir. 2001) (remanding a student's challenge to the school dress code policy's prohibition on clothing with "racist implications" because of insufficient and conflicting evidence relating to any racial tensions at the school).

178 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated*, 549 U.S. 1262 (2007).

179 *Id.* at 1176.

180 *Id.* at 1180 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).

181 *Id.* at 1170–71.

182 *Id.* at 1181.

their worst fears dispelled, in a social environment polluted by [hateful] materials?"[183]

Given the substantial body of empirical research linking anti-gay bullying to concrete physical and emotional harm,[184] this type of speech should lead to an automatic presumption in favor of finding substantial disruption. Judicial doctrine should not constrain a school to wait until a student experiences physical harm—at his own hands or the hands of his bully—before administrators can intervene. Given the contemporary political climate and the ubiquity of anti-gay language in schools—where 72.4% of survey respondents hear homophobic remarks "frequently or often"[185]—a homophobic environment is the rule rather than the exception. The *Sypniewski* court ruled that, "in a racially charged environment, a school may prevent racially provocative harassment by name calling."[186] Absent indication to the contrary, courts should presume a "charged" environment with regard to sexual orientation.

Five years and countless news stories after *Harper*, Chief Judge Kozinski's harshly worded dissent in that case rings false. Examining the list of academic sources cited by the majority to establish the harmfulness of anti-gay language, he asserts that "none provide[ ] support for the notion that disparaging statements by other students . . . materially interfere with the ability of homosexual students to profit from the school environment."[187] The court has "no business assuming without proof that the educational progress of homosexual students would be stunted by Harper's statement."[188] Statistics, however, have repeatedly confirmed the harm that such speech imparts on vulnerable youth.[189] This harm—which includes "a decline in students' test scores, an upsurge in truancy, [and] other symptoms of a sick school"—is exactly what the *Nuxoll* court indicated would constitute "symptoms . . . of substantial disruption."[190]

Anti-bullying statutes that explicitly enumerate sexual orientation as a protected category can establish a rebuttable presumption that this speech is harmful, while still leaving the ultimate determina-

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183 Jeremy Waldron, *Free Speech & the Menace of Hysteria*, N.Y. REV. BOOKS, May 29, 2008, at 40 (reviewing ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007)).

184 See *supra* Part I.B for an overview of the empirical research.

185 KOSCIW ET AL., *supra* note 34, at xvi.

186 Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 264 (3d Cir. 2002).

187 *Harper*, 445 F.3d at 1199.

188 *Id.*

189 *See supra* notes 34–35 and accompanying text (setting forth statistics).

190 Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674 (7th Cir. 2008).

tion of "when student speech crosses the line between hurt feelings and substantial disruption" to school administrators with "the relevant knowledge of and responsibility for the consequences."[191] This puts the state's authority behind one of its most vulnerable populations while continuing to protect student speech interests.

B. Enforcement and Expressive Value

In the previous sections, I have provided a proposal and counter-argument to advocates of weaker anti-bullying laws based on constitutional grounds. But proponents of stronger laws have their own criticisms: most notably, the legislation's failure to provide for a private enforcement mechanism. Various academic commentators have denounced this gap, arguing that "[a] private right of action with the potential for high damage awards is . . . the most effective mechanism of enforcement as it does a better job of pushing schools to obey the law."[192] Without legally enforceable private oversight, the statutes are "virtually ineffective,"[193] and "the legislative mandate [is] powerless."[194]

Students victimized because of their sexual orientation are frequently identified as the group most harmed by the lack of a private right of action.[195] Whereas Titles VI[196] and IX[197] allow students and their parents to seek recourse against school officials for "deliberate indifference" to "severe and pervasive" race- or gender-based harassment, respectively, there is no federal correlate for LGBT students.[198]

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191 Zamecnik v. Indian Prairie Sch. Dist. No. 204, 636 F.3d 874, 877–78 (7th Cir. 2011).

192 Katie Feiock, *The State to the Rescue: Using State Statutes To Protect Children from Peer Harassment in School*, 35 COLUM. J.L. & SOC. PROBS. 317, 327 (2002); *see also* Jason A. Wallace, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 IND. L.J. 735, 758 (2011) ("A private right of action is not necessarily a requirement for effective anti-bullying legislation, but it does provide students with an important tool to compel schools to take harassment seriously.").

193 Susan H. Duncan, *College Bullies—Precursors to Campus Violence: What Should Universities and College Administrators Know About the Law?*, 55 VILL. L. REV. 269, 270 (2010).

194 Laurie Bloom, Note, *School Bullying in Connecticut: Can the Statehouse and the Courthouse Fix the Schoolhouse? An Analysis of Connecticut's Anti-Bullying Statute*, 7 CONN. PUB. INT. L.J. 105, 118 (2007); *see also* Feiock, *supra* note 192, at 327 (arguing that the most effective enforcement mechanism would allow students both a private right of action and an administrative remedy).

195 *See generally* Jill Grim, Note, *Peer Harassment in Our Schools: Should Teachers and Administrators Join the Fight?*, 10 BARRY L. REV. 155 (2008) (discussing substantial doctrinal hurdles to student peer harassment claims).

196 42 U.S.C. § 2000d (2006).

197 20 U.S.C. § 1681 (2006).

198 The Supreme Court has held that teacher-student sexual harassment, *see* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992), and student-student sexual harassment, *see* Davis v. Monroe Cnty., 526 U.S. 629 (1999), are actionable under Title IX.

State tort suits by LGBT students have fared poorly because of the sovereign immunity defense,[199] while efforts to shunt sexual orientation discrimination suits into the Title IX framework have achieved differing levels of success.[200] Although other remedies may exist under state law, they are relatively rare.[201] For this reason, various academic commentators have argued that a federal statute extending protection and a private cause of action to LGBT students should supplement state anti-bullying laws.[202]

While this Note unhesitatingly accepts the premise that there is no justification for extending ex post legal recourse to bullied women and racial minorities and not to sexual minorities, I leave discussion of a potential federal analogue to Title IX for sexual orientation, and its political and legal viability, to other writers.[203] As the debate over a federal statute plays out, I argue that, even without a private right of action, state anti-bullying legislation that affords explicit protection to victims of anti-gay bullying transmits a normative message that is valuable in and of itself.

Expressive theory describes how actions by individuals, associations, or the state assume meaning when situated within the social and

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[199] *See* Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties To Supervise*, 77 TEMP. L. REV. 641, 663 (2004) ("[M]ost [litigants] cannot clear the substantial doctrinal hurdles courts have placed in the path of those seeking to hold state actors liable for injuries inflicted in the first instance by private actors.").

[200] *See* Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools To Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 149 (2009) ("The vast majority of victims . . . are bullied for reasons that do not fall under this civil rights umbrella."); *see also* Daniel Greene, *"You're So Gay!": Anti-Gay Harassment in Vermont Public Schools*, 27 VT. L. REV. 919, 944–45 (2002) (noting the difficulty for an openly gay student in bringing a Title IX claim if bullying consists largely of anti-gay slurs, and arguing that the same student would not be able to directly accuse abusers of homophobia because "if he or she does, she will almost certainly lose").

[201] *See* Bloom, *supra* note 194, at 107 (arguing that anti-bullying laws "provid[e] only false comfort, if any, to bullying victims, parents and school officials").

[202] *See* Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX To Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125 (2000) (arguing that gay students should have a private right of action under Title IX); Speraw, *supra* note 55, at 1191 (arguing for a federal anti-bullying statute modeled on the Title IX framework, which incorporates Title VI's hostile environment jurisprudence). This stance has been adopted by congressional representatives who have proposed legislation to this effect, most recently in the form of the Student Non-Discrimination Act, reintroduced in the Senate and House on March 10, 2011. *Student Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN (Mar. 15, 2011), http://www.hrc.org/laws-and-legislation/federal-legislation/student-non-discrimination-act.

[203] I do note that the ability of Title VI and Title IX to provide redress for victimized students and their families should not be overemphasized, as the Supreme Court has read these statutes to extend in the school context to only the most egregious incidents of harassment. *See supra* note 60 (highlighting *Monroe*'s stringent requirements for a finding of Title IX liability).

political contexts in which they take place. It is a basic tenet of expressive theory that, "[a]t the level of state action . . . deliberative principles and policies can be appropriately interpreted as expressing official state beliefs"[204] and "attitudes toward various substantive values."[205] Though perhaps self-evident, this idea has great utility in the anti-bullying context.

A state's statutory pronouncement that sexual minorities must be protected from bullying conveys a strong, unambiguous message that LGBT students' lives are valued and that their well-being will not be infringed.[206] Just as "the state can, as a norm entrepreneur," regulate behavior by "endorsing or rejecting doctrines of racial superiority," it can also choose to "endors[e] or reject[ ]" doctrines of heterosexual superiority.[207] The inclusion of an enumeration provision in anti-bullying legislation definitively rejects such a dangerous hierarchy. By imbuing certain behavioral choices with positive or negative connotations, legislation determines how that behavior is viewed by others.[208] A state that explicitly prohibits anti-gay bullying actively transforms the meaning of the behavior itself—from something previously normalized and acceptable to an infrequent and disfavored occurrence.[209] By enunciating a norm of equality, enumerated legislation thus shapes the school environment to discourage anti-gay bullying ex ante. Although I do not go so far as to argue that "only a cultural shift for everyone involved is likely to produce the kind of supervision by school officials that will bring [bullying] to the light and stop it,"[210] I do believe that such a shift is a necessary prerequisite to the elimination of anti-gay bullying.

Conversely, the absence of legal protection can enact further harm on top of what bullying itself causes, such that failure to include

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[204] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1506 (2000).

[205] *Id.* at 1504.

[206] *See* Wallace, *supra* note 192, at 758 (arguing for value in "the symbolic message that Congress values *all* children, gay or straight, and is dedicated to passing laws that will protect them from harm").

[207] Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765, 787 (1998).

[208] *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51 (1997) (describing how law can influence public perceptions of behavior); *see also* Anderson & Pildes, *supra* note 204, at 1528 ("[A]ddressees [do not have to] believe, approve of, or accept the [state's] message. They simply have to understand it.").

[209] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1014–15 (1995) ("To the extent that the government then subsidizes or penalizes a certain structure of social meaning, that meaning can be transformed.").

[210] Weddle, *supra* note 199, at 679; *see* Sacks & Salem, *supra* note 200, at 190 (suggesting that schools develop preventative policies that "change school norms by promoting school-wide respect for diversity").

proscriptions on anti-gay bullying can be just as much an act of expressive harm as failure to enact a statute at all.[211] It is "itself another story with a message, perhaps unintended, about the relative value of different human lives."[212] Failing to communicate in a context that so urgently demands a response tells the receiver that the essential precepts of justice and security do not apply to some groups of people. By declining to provide redress, the legal system "conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance."[213] This second injury may be even more painful and damaging than the initial act of hatred.[214]

The expressive meaning attributed to a particular piece of legislation depends on the context in which it is enacted,[215] and in our sharply polarized political climate, maintaining the status quo is often the easier route. Gay rights opponents' vehement opposition to enumerated anti-bullying legislation has already forced some states to remove enumeration provisions from their anti-bullying statutes.[216] The socially stigmatizing structures that tolerate such opposition are deeply ingrained in many, if not most, schools, and attacking preestablished social meaning requires "overcom[ing] the existing structures of social stigma and implement[ing] new structures in line with one's desired meaning."[217]

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211 *See* Anderson & Pildes, *supra* note 204, at 1529 ("Recognition and appropriate condemnation can, in certain contexts, be necessary to ensure that political and social relationships remain constituted according to the principles previously thought to govern them.").

212 Matsuda, *supra* note 41, at 18.

213 Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, *in* WORDS THAT WOUND, *supra* note 41, at 89, 93.

214 *See* Matsuda, *supra* note 41, at 49 ("One can dismiss the hate group as an organization of marginal people, but the state is an official embodiment of the society we live in.").

215 *See* Anderson & Pildes, *supra* note 204, at 1525 ("The expressive meaning of a harm does not inhere in that norm in isolation, but is a product of interpreting the norm in the full context in which it is adopted and implemented.").

216 *See* Daniel B. Weddle & Kathryn E. New, *What Did Jesus Do?: Answering Religious Conservatives Who Oppose Bullying Prevention Legislation*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 325, 326–27 (describing how a Missouri legislator "stopped every bill that listed classes of students who should receive 'special protection'" and ultimately inserted an explicit *prohibition* on enumeration in Missouri's anti-bullying law); *supra* note 77 (noting Texas's removal of enumeration provisions in its anti-bullying and youth suicide prevention laws); *see also* Erik Eckholm, *In Schools' Efforts To End Bullying, Some See Agenda*, N.Y. TIMES, Nov. 7, 2010, at A16 (describing accusations by some parents and religious groups that anti-bullying legislation promotes a "homosexual agenda"); Eric Lach, *Focus on the Family: Anti-Bullying Efforts Are a Gay Front*, TPM MUCKRAKER (Aug. 31, 2010, 9:59 A.M.), http://tpmmuckraker.talkingpointsmemo.com/2010/08/focus_on_the_family_dont_let_gay_activists_hijack.php (describing similar criticism by the conservative group Focus on the Family).

217 Lessig, *supra* note 209, at 999.

Despite these challenges, there is promising potential for change in the anti-gay bullying context. The stigma attached to sexual minority status is already rapidly breaking down, and widely accepted norms of equality are taking its place.[218] With each marginal shift in the baseline, discriminatory speech loses its power to "construct[ ] the social reality that constrains the liberty" of those it targets.[219] Each state that passes an enumerated anti-bullying statute contributes to this shift—by conveying a powerful and unambiguous message of support for LGBT equality.

CONCLUSION

The message that anti-gay bullying legislation sends can and must supersede the message such bullying conveys. As historically rooted notions of inequality and subjugation intersect with a social movement for gay rights that "'has come further and faster . . . than any other that has gone before it in this nation,'"[220] it is time for states to act. The acute threat to LGBT youth from hateful, bias-motivated bullying is clear, and each tragic—and preventable—suicide by a child bullied because of his perceived sexual orientation makes the link more difficult to ignore. Although only a minority of states currently identify sexual orientation as a protected category, statutes are moving increasingly in this direction. In the face of properly drafted statutes, constitutional arguments against enumeration in speech regulation must fail.

This Note has demonstrated why these arguments should fail. Unlike scholars who criticize current state legislation for its lack of private enforcement mechanisms, I have chosen to approach anti-bullying statutes from a different angle—focusing on what they accomplish rather than what they do not. Statutory limitations on anti-gay speech in schools have proven more effective than broadly

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[218] *See* Michael Barbaro, *With Wait Over, Gay Couples Wed Across New York*, N.Y. TIMES, July 25, 2011, at A1 (describing legalization of gay marriages in New York); Elisabeth Bumiller, *A Final Phase for Ending 'Don't Ask, Don't Tell*,' N.Y. TIMES, July 23, 2011, at A13 (describing official repeal of the military's seventeen-year-old Don't Ask, Don't Tell policy); Letter from Eric H. Holder, Jr., Att'y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (stating that the Department of Justice will no longer defend Section 3 of the Defense of Marriage Act, which limits marriage to a man and a woman, because it "violates the equal protection component of the Fifth Amendment").

[219] Lawrence, *supra* note 167, at 62.

[220] Yoshino, *supra* note 46, at 1537 (quoting DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 13 (1999)). Yoshino asserts that a "'gay tipping point' occurred in the United States in the latter decades of the twentieth century." *Id.*

worded statutes at combating this particularly devastating type of bullying. Just as importantly, they send a strong, unambiguous message that anti-gay bullying—and the prejudice underlying it—is unacceptable in our nation's schools. As more states choose to include enumeration of protected characteristics in their anti-bullying laws, the expressive power of such legislation only grows stronger, supplanting an outmoded status quo with new norms of equality and tolerance.