

Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools

STEVEN J. MACIAS*

TABLE OF CONTENTS

I.	INTRODUCTION	791
II.	THE PERFECT STORM OF POLITICS, LAW, AND ADOLESCENT SEXUALITY: THE EXAMPLE OF PROPOSITION 8.....	795
III.	A PRAGMATIC VIEW OF SCHOOLING	800
IV.	A CRITICAL THEORETICAL FRAMEWORK.....	804
V.	HETERONORMATIVE FIRST AMENDMENT CASE LAW	812
VI.	CONCLUSION: CREATING THE LINK BETWEEN REAL HARM AND REAL STUDENTS.....	820

I. INTRODUCTION

“Tonight, somewhere in America, a young person, let’s say a young man, will struggle to fall to sleep, wrestling alone with a secret he’s held as long as he can remember. Soon, perhaps, he

* Assistant Professor, Southern Illinois University School of Law. A.B., B.S., Stanford University; J.D., M.A., Ph.D. (History), University of California, Berkeley; LL.M., University College London. Many people in many settings have contributed to the development of this Article. I would like to thank the audience at the Lavender Law Conference, and Elizabeth Glazer and Bill Araiza in particular; the 2010 LatCrit workshop audience; the participants in the Oregon faculty “flash mob”; Ann Tweedy for listening to this Article one too many times; and finally, the 2010 People of Color Conference and Marc Poirier for all of his wonderful suggestions. I welcome comments at smacias@siu.edu or macias@alumni.stanford.edu.

will decide it's time to let that secret out. What happens next depends on him, his family, as well as his friends and his teachers and his community. But it also depends on us—on the kind of society we engender, the kind of future we build.”

—President Barack Obama¹

“Severe harassment . . . blends insensibly into bullying, intimidation, and provocation, which can cause serious disruption of the decorum and peaceable atmosphere of an institution dedicated to the education of youth.”

—Judge Richard A. Posner²

“A bullied gay teenager who ends his life is saying that he can't picture a future with enough joy in it to compensate for the pain he's in now.”

—Dan Savage, It Gets Better Founder³

Although acknowledging “setbacks and bumps along the road,” in October 2009, President Obama thought that “the future is bright for that young person” he described above, the one hypothetically struggling to come to terms with his homosexuality.⁴ Yet one year later, in the fall of 2010, the onslaught of media coverage about gay teenage suicides caused gay-rights advocate and columnist Dan Savage to begin the It Gets Better Project.⁵ Savage's goal was to speak directly to gay adolescents via YouTube, letting them know that others had come before them, faced similar difficulties in school, and found that life got better after they toughed it out.⁶ Even President Obama contributed to the project with a message of his own, perhaps recognizing that the “setbacks and bumps along the road” were more severe than he had suggested one year earlier.⁷ Unfortunately,

1. President Barack Obama, Remarks by the President at Human Rights Campaign Dinner (Oct. 11, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-human-rights-campaign-dinner>.

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

3. Dan Savage, *Introduction* to IT GETS BETTER: COMING OUT, OVERCOMING BULLYING, AND CREATING A LIFE WORTH LIVING 1, 3 (Dan Savage & Terry Miller eds., 2011).

4. Obama, *supra* note 1.

5. Savage, *supra* note 3, at 1–4; *About Us*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Sept. 23, 2012).

6. Savage, *supra* note 3, at 4.

7. See Barack Obama, *President Obama Shares His Message of Hope and Support for LGBT Youth Who Are Struggling with Being Bullied*, in IT GETS BETTER, *supra* note 3, at 9, 9–10.

the suicides continue, as does the harassment of adolescents, especially young males, because of their sexual orientation.⁸

For a variety of reasons, public schools have not been adamant about protecting gay students from harassment while in their care. Those schools that have made attempts to curb bullying and harassment have found themselves subjected to criticisms and lawsuits for First Amendment violations. As the *New York Times* recently reported, “Angry parents and religious critics . . . charge that liberals and gay rights groups are using the antibullying banner to pursue a hidden ‘homosexual agenda,’ implicitly endorsing, for example, same-sex marriage.”⁹ More recent instances of how antigay students and parents are undermining antibullying efforts are occurring through lawsuits claiming that bullying and harassing words constitute First Amendment speech. Thus, during an antibullying week at a northern Illinois high school, several students showed up wearing shirts that read “Straight Pride” on the front and quoted Leviticus on the back to the effect that homosexuals are “an abomination and shall surely be put to DEATH.”¹⁰ Because of a recent lawsuit won by an antigay student involving a similar fact pattern, students like those wearing the “Straight

8. See, e.g., *16-Year-Old Arrested for Antigay Beating*, ADVOCATE.COM (Mar. 7, 2011, 1:35 PM), http://www.advocate.com/News/Daily_News/2011/03/07/16_Year_Old_Arrested_for_Antigay_Beating/ (discussing a high school student who severely beat and attacked his openly gay classmate); Ben Deci, *Bullied Elementary Student Arrested After Wishing for Gun*, FOX40 (Mar. 3, 2011, 6:11 PM), <http://www.fox40.com/news/headlines/ktxl-elementary-student-arrested-after-wishing-for-gun-in-yuba-city20110303,0,3339845.story> (reporting about an eleven-year-old boy named Brenton who was arrested at elementary school for saying that he wished he had a gun because bullies called him “‘Brentina,’ and ‘homo,’ and ‘fag’”); Kim Hone-McMahan, *Rittman Boy May Have Died Because of Bullying*, OHIO.COM (Mar. 10, 2011, 7:28 PM), <http://www.ohio.com/news/rittman-boy-may-have-died-because-of-bullying-1.205703> (discussing thirteen-year-old boy who shot himself because of rumors that he might have been gay); *Lance Lundsten’s Death Ruled Suicide Due To Mixed Drug Ingestion*, CARING FOR OUR CHILDREN FOUND. (Mar. 7, 2011), <http://www.caringforourchildrenfoundation.org/?p=3369> (reporting openly gay high school senior who committed suicide was “bullied at school for his sexual orientation”).

9. Erik Eckholm, *In Schools’ Efforts To End Bullying, Some See Agenda*, N.Y. TIMES, Nov. 7, 2010, at A16. For a gay perspective on Focus on the Family’s criticism of antibullying efforts see Current, *That’s Gay Salutes: Focus on the Family*, YOUTUBE (Aug. 26, 2010), <http://www.youtube.com/watch?v=1t3cPaSIbWs>.

10. *‘Straight Pride’ T-Shirts with Bible Quotation Cause Stir at St. Charles North High School*, HUFFINGTON POST (Nov. 12, 2010, 7:10 PM), http://www.huffingtonpost.com/2010/11/12/straight-pride-t-shirts-wi_n_782816.html (internal quotation marks omitted); see also James Fuller, *‘Straight Pride’ Shirts Become Free Speech Fight at St. Charles North*, DAILY HERALD (Nov. 11, 2010, 9:04 AM), <http://www.dailyherald.com/article/20101110/news/711119792/>.

Pride” shirts can feel relatively untouchable by school authorities.¹¹ Indeed, even the local spokesperson for the American Civil Liberties Union (ACLU) gave the antigay students implicit encouragement by labeling the regulation of their harassment “extraordinarily difficult” because it concerned “the important right of students to engage in free speech.”¹² One of the main points of this Article is that preventing bullying carried out through attacks on gay self-worth should be extraordinarily easy, not extraordinarily difficult, because it is not the sort of political speech in which public school students have any right to engage.

Part II examines the popular conception of the relationship between childhood and sexuality by considering the political and legal fallout of the same-sex marriage debate, especially the Proposition 8 debate in California. Part III then sets out a pragmatic view of schooling, drawing upon the work of philosophers Richard Rorty and Amy Gutmann. This Part examines the social function of public schooling and explains its fundamental incompatibility with a strong rights-based argument for student-harasser autonomy. Part IV employs critical theory in an attempt to understand why First Amendment defenses to gay harassment have such widespread appeal in both popular and legal circles. Part V then examines the recent case law with two primary objectives: (1) to expose the heteronormative underpinnings of the legal treatment of children and (2) to expose the liberal individualistic theory that underlies the student cases. Part of the explanation involves an exploration of how the heteronormativity of the case law undermines gay students’ existential status and how the dominant liberal theory undermines the social purposes of public schooling. Finally, the Article concludes with some suggestions for how the legal system can make good use of various social science evidence on public schooling, thus creating a link between real harm and real students.

11. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874 (7th Cir. 2011) (upholding nominal damages and injunctive and declaratory relief against a public school for attempting to ban a shirt that read “Be Happy, Not Gay”). As I explain below, however, the problem is not with Judge Posner’s rationale in this case or its earlier incarnation. *See supra* text accompanying notes 151–58; *see also* *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008) (reversing the denial of a preliminary injunction in the same case). Rather, the problem is the school’s complete lack of resourcefulness in explaining how bullying, including insulting t-shirts, causes actual harm to gay adolescents and therefore meets the legal criteria of causing “substantial disruption” to the school environment. *See Nuxoll*, 523 F.3d at 673–74.

12. Fuller, *supra* note 10 (internal quotation marks omitted).

II. THE PERFECT STORM OF POLITICS, LAW, AND ADOLESCENT SEXUALITY: THE EXAMPLE OF PROPOSITION 8

“Unless Proposition 8 passes, children will be taught about same-sex marriage in public schools. . . . And not only that, it’s gonna require that sex education classes include talking about, well, you know, gay and lesbian *relationships*.”

—Proposition 8 Commercial¹³

“It’s inevitable. This door’s wide open now. It’s gonna happen, whether you like it or not. This is the future, and it’s now. Courts across this country. We’re waking up.”

—Gavin Newsom, Mayor of San Francisco¹⁴

That was then-San Francisco Mayor Gavin Newsom speaking at a lunchtime rally at city hall on the day the California Supreme Court ruled that same-sex couples were entitled to equal marriage rights.¹⁵ Spoken in a stream-of-consciousness fashion, Newsom uttered the words that would come to haunt him and the marriage equality movement. Months later, proponents of a state constitutional amendment designed to overturn the court’s decision were running ads featuring Newsom’s guttural exclamation, “Whether you like it or not!”¹⁶ The television commercials

13. VoteYesonProp8, *California’s Children*, YOUTUBE (Oct. 24, 2008), <http://www.youtube.com/watch?v=dd7RzcPxA2E> (using emphasis to denote that the commercial voiceover says “relationships” in a clearly euphemistic way to imply “sex”).

14. JGarcia19, *Same-Sex Marriage May 15 SFCity Att. Herrera & Mayor Newsom*, YOUTUBE (May 15, 2008), <http://www.youtube.com/watch?v=d4Ke8gEc4Hs>.

15. See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. 1, § 7.5 (West, Westlaw through June 2012 ballot propositions).

16. VoteYesonProp8, *Yes on 8 TV Ad: Whether You Like It or Not*, YOUTUBE (Sept. 29, 2008), <http://www.youtube.com/watch?v=4kKn5LNhNto>. In a previous article, I celebrated Richard Rorty’s statement that “‘some hypothetical future reversal of *Bowers v. Hardwick*’ would [say], ‘*Like it or not*, gays are grown-ups, too.’” Steven J. Macias, *Rorty, Pragmatism, and Gaylaw: A Eulogy, a Celebration, and a Triumph*, 77 UMKC L. REV. 85, 107 (2008) (emphasis added) (quoting Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1818 (1990)). I have no particular affinity for the phrase “like it or not,” especially in the realm of public debate. In fact, I think Newsom’s use of it was a major political blunder. I value Rorty’s use of it, however, not as political speech, but as a means of explaining that decisions like *Lawrence v. Texas*, 539 U.S. 558 (2003), and the California *In re Marriage Cases*, 183 P.3d 384, are not motivated by any particular philosophical grounds or jurisprudential

appeared designed to taunt the viewing audience, egged on by the announcer who explained to potential voters, “We don’t have to accept this.”¹⁷ Despite the appearance to the contrary, Newsom was actually not mocking that element of the California public for not being as morally advanced as his own Bay Area. Instead, Newsom was saying that because the California Supreme Court is the most widely cited state supreme court in the nation,¹⁸ other state courts would inevitably follow the reasoning of *In re Marriage Cases*. Indeed, Newsom was somewhat vindicated by the Connecticut Supreme Court’s decision just five months later¹⁹ and the Iowa Supreme Court’s decision less than a year later²⁰—decisions that were clearly indebted to the California case. Instead of appreciating that educated observation, California voters outside of the Bay Area interpreted Newsom’s words as an undemocratic affront to their ultimate decisionmaking authority.²¹ However, anti-same-sex marriage forces did not rest upon a populist message alone. Newsom’s press conference enthusiasm was coupled with ads designed to frighten parents into thinking

principles, but rather by profound realizations that, like it or not, human misery will be decreased by their enforcement.

17. VoteYesonProp8, *supra* note 16. For additional advertisements in favor of Proposition 8, see VoteYesonProp8, *Uploaded Videos*, YOUTUBE, <http://www.youtube.com/user/VoteYesonProp8> (last visited Sept. 23, 2012).

18. See Jake Dear & Edward W. Jessen, “Followed Rates” and Leading State Cases, 1940–2005, 41 U.C. DAVIS L. REV. 683, 710 (2007) (“[T]he California Supreme Court has been the most followed state high court, and that trend continues.”); see also Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 180 (1985) (identifying California’s highest court as one of the most commonly cited state high courts); Jake Dear & Edward W. Jessen, *Measuring the Comparative Influence of State Supreme Courts: Comments on Our “Followed Rates” Essay*, 41 U.C. DAVIS L. REV. 1665 (2008) (elaborating on the findings from the previously cited study).

19. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 424 (Conn. 2008) (“We therefore agree with the California Supreme Court and conclude that the defendants’ contention that same sex and opposite sex couples are not similarly situated clearly lacks merit.”). The California decision is cited twenty-three times in the majority opinion. *Id. passim*. Although one opinion does not yet prove that “th[e] door’s wide open now,” it is encouraging. These are the most forceful examples of California’s influence: “Although the opinion of the California Supreme Court . . . represents the minority view, we agree fundamentally with the analysis and conclusion of that case that gay persons are entitled to heightened judicial protection as a suspect class.” *Id.* at 472 (footnotes omitted). “[W]e are not persuaded by the logic or analysis of the courts that have declined to grant suspect or quasi-suspect status to gay persons. We are persuaded, rather, by the California Supreme Court in *In re Marriage Cases* . . .” *Id.* at 472–73.

20. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). *Varnum* cited the California case at least seven times. *Id. passim*. The Connecticut case seemed to receive more mention within *Varnum* than the California case.

21. For a map of the vote by county, see *Proposition 8—Eliminates Right of Same-Sex Couples To Marry*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-8.htm (last visited Sept. 23, 2012). Only one county south of Monterey County voted against Prop. 8. *Id.*

the California Supreme Court—or “four activist judges in San Francisco,” as the majority was referred to in the state’s Voter Guide²²—Gavin Newsom, and the San Francisco Bay Area were on a collective mission to indoctrinate schoolchildren into the homosexual lifestyle.²³

During the 2008 election cycle, it seemed to many voters that Snow White and Cinderella might finally decide to ditch their intended princes in favor of tying the knot with each other. So frightened of that very possibility were some voters that gay marriage was rescinded in California largely because opponents asserted that its validation would require the public schools to “teach gay marriage” as part of the curriculum through children’s books such as *King & King* and *Heather Has Two Mommies*.²⁴ In an anti-same-sex marriage television advertisement, a little girl of about eight years old comes running from school into her house, where her apparently stay-at-home mother is awaiting her arrival, gleefully yelling, “Mom, guess what I learned in school today?”²⁵ The dotting mother responds, “What sweetie?” at which point the excited girl exclaims, “I learned how a prince married a prince, and I can marry a princess.”²⁶ A look of shock and disgust overtakes the mother’s

22. CAL. SEC’Y OF STATE, CALIFORNIA GENERAL ELECTION, TUESDAY, NOVEMBER 4, 2008: OFFICIAL VOTER INFORMATION GUIDE 56 (2008), available at <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.

23. VoteYesonProp8, *supra* note 13.

24. See *A Lesson About Prop. 8*, L.A. TIMES (Oct. 21, 2008), <http://articles.latimes.com/2008/oct/21/opinion/ed-prop8-21>; see also LINDA DE HAAN & STERN NIJLAND, KING & KING (2000); LESLÉA NEWMAN, HEATHER HAS TWO MOMMIES (10th anniversary ed. 2000). In a stunning turn of events, the chair of Maine’s “Yes on 1” campaign—Maine’s Question 1 was the equivalent of California’s Proposition 8—admitted, “You know, we say things like, ‘Teachers will be forced to (teach same-sex marriage)!’ Well, that’s not a completely accurate statement and we all know it isn’t, you know?” *Watch: Chair of Maine’s “Yes on 1” Campaign, Which Banned Same-Sex Marriage, Expresses Regret in New Doc*, TOWLEROAD (Apr. 18, 2011), <http://www.towleroad.com/2011/04/question1.html>.

25. VoteYesonProp8, *Yes on 8 TV Ad: It’s Already Happened*, YOUTUBE (Oct. 7, 2008), <http://www.youtube.com/watch?v=0PgjcqFYP4>.

26. *Id.* Melissa Murray has done a deconstructive reading of this commercial, noting how the ad reinforces traditional notions of gender and family. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. C.R. & C.L. 357, 381–83 (2009). In invalidating Proposition 8 as having no noninvidious motivation, Judge Vaughn Walker used evidence that this commercial promoted the message that “if Prop 8 failed, the public schools are going to turn my daughter into a lesbian” and “that unless Proposition 8 passes, children will be exposed to indoctrination on gay lifestyles.” *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 989–90, 991 (N.D. Cal. 2010) (internal quotation marks omitted), *aff’d sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

visage, when Professor Richard Peterson of Pepperdine Law School²⁷ comes on screen to explain how this scenario is itself not a fairytale but in fact the reality in Massachusetts, where same-sex marriage is legal.²⁸ According to Professor Peterson, Massachusetts second graders are taught that “boys can marry boys,” and “the courts ruled that parents have no right to object.”²⁹

Once her little princess gets to high school, the mother in the anti-same-sex-marriage commercial will no doubt be even more surprised and disappointed to learn that public-school teenagers have been forming gay-straight alliances, even in conservative areas such as Poway, California, Naperville, Illinois, and Ponce de Leon, Florida.³⁰ To combat this unwelcome force, antigay teens have attempted to respond by wearing t-shirts with slogans written on them, such as “Homosexuality is Shameful”³¹ and “Be Happy, Not Gay.”³² They have met with varying success in the courts against school administrators’ attempts to prevent their t-shirt displays. On the other hand, at least one antigay principal attempted to prevent straight students from wearing “Gay Pride” t-shirts.³³

Yet, what poses more of a conundrum to antigay students, parents, teachers, and administrators—even more troubling to them than progay storybooks and progay clubs—are actual progay gays. These are real-life students who cannot be censored like books or clubs, or scared away by t-shirts, however unfashionable. Their very presence in the public schools is a constant reminder of what antigay political factions attempt to obliterate—the existence of gay identity. Regardless of how well they isolate their children, how intense their Bible study proves to be, or how many antigay

27. It initially seemed that Pepperdine was embarrassed by Peterson’s appearance because the school made him alter the identification information on the commercial after its first airing. See Jaimie Franklin, *Proposition 8 Ad Angers Students, Pep Intervenes*, PEPP. U. GRAPHIC (Oct. 2, 2008), <http://graphic.pepperdine.edu/news/2008/2008-10-02-gay-marriage.htm> (“[A]dministrators requested the reference to Pepperdine be removed from the ad.”). However, then-Dean Ken Starr of the very same law school later successfully argued the validity of Proposition 8 before the California Supreme Court. Pepperdine Graphic Web Admin, *Starr Defends Prop 8 Before Calif. Supreme Court*, PEPP. U. GRAPHIC (Mar. 19, 2009), <http://www.pepperdine-graphic.com/news/starr-defends-prop-8-before-calif-supreme-court/>.

28. *VoteYesonProp8*, *supra* note 25.

29. *Id.* During the ad, *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), which held that parents objecting a public school’s use of books featuring same-sex couples as part of a family failed to state a claim upon which relief could be granted, flashes on the screen without explanation.

30. I classify these areas as “conservative” by the fact that Republican members of Congress represent all three cities in the U.S. House of Representatives as of September 2012.

31. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1170–71 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

32. See *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 670 (7th Cir. 2008).

33. See *Gillman v. Sch. Bd. for Holmes Cnty.*, 567 F. Supp. 2d 1359, 1362–63 (N.D. Fla. 2008).

pieces of legislation they get passed, the gays refuse to go away. As a result, gay students not only face silence about their existence in the curriculum and vitriolic t-shirts on campus, they also face threatened and actual physical violence and emotional hardship, along with do-nothing or complicit school staffs. Victimized students have had some success in the legal arena, winning civil rights lawsuits in federal and state courts, but usually not before severe beatings and suicide attempts.³⁴ Thus, what is needed is a legal argument for stronger preventative measures taken by the public schools—measures that would cut the harassment off at the source—rather than simply a legal solution once the damage is done.

For schools to have a strong argument that they need to protect an identifiable group of students from targeted harassment, both educational and legal actors must first agree that such a group exists and that the offensive conduct strikes the students at the core of their beings. Therefore, what follows is an examination of gayness—affirmative gay identity—within the public school realm. Portrayals of gayness enter the schoolhouse through the curriculum,³⁵ through student-initiated groups and activities,³⁶ and through the very presence of gay-identified students.³⁷ Bound up with these examples are legal questions of parents' rights, free speech, free exercise of religion, and equal protection from discriminatory treatment. However, I propose to consider sexuality in the public schools from a pragmatic perspective that begins with the acknowledgement of

34. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 456–58, 460–61 (7th Cir. 1996) (allowing equal protection claim against school for failure to prevent students from physically assaulting plaintiff); *Donovan v. Poway Unified Sch. Dist.*, 84 Cal. Rptr. 3d 285, 293–94 (Ct. App. 2008) (allowing a state law claim against the school district for peer sexual harassment by fellow students).

35. See, e.g., *Parker v. Hurley*, 514 F.3d 87, 90 (1st Cir. 2008) (discussing a challenge to storybooks that religious parents claimed promoted homosexuality); *Citizens for a Responsible Curriculum v. Montgomery Cnty. Pub. Sch.*, No. Civ.A. AW-05-1194, 2005 WL 1075634, at *1 (D. Md. May 5, 2005) (discussing challenge to health education curriculum as promoting the “homosexual lifestyle”).

36. See, e.g., *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004); *Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003); *Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp.*, No. IP01–1518 C–M/S, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002); *E. High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166 (D. Utah 1999).

37. Whether identification is voluntary or not, and whether homosexual orientation is real or misperceived, is of no moment.

the existence of gay students—a proposition by no means obvious or agreeable to all sides.³⁸

III. A PRAGMATIC VIEW OF SCHOOLING

“When people on the political right talk about education, they immediately start talking about truth. . . . When people on the political left talk about education, they talk first about freedom.”

—Richard Rorty³⁹

“Whereas liberals tend to worry that children will be given too little freedom too late, conservatives tend to worry that they will be given too much too early.”

—Amy Gutmann⁴⁰

A pragmatic view of public schooling would realize “that the word ‘education’ covers two entirely distinct, and equally necessary, processes—socialization and individuation.”⁴¹ Socialization is the process whereby American youngsters come to understand and appreciate that they are part of an already existing community, complete with rules, norms, and acceptable modes of behavior, that is, social truths. Education for socialization is the realm in which future citizens should learn how to treat others with respect and dignity. Moreover, it is during this time that children should be taught not to inflict needless pain—emotional or physical—on other individuals. In order to fully absorb this rule and make all of it that they can, children must also be taught to recognize pain in others, especially if the cause of one’s pain is not universally shared by others.⁴²

38. For an interesting take on this same basic instinct, see Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269 (1996). See also Bruce MacDougall, *The Legally Queer Child*, 49 MCGILL L.J. 1057 (2004), which examines Canadian “judicial involvement in erasing or diminishing the existence of gay, lesbian, and other queer children.”

39. RICHARD RORTY, *Education as Socialization and as Individualization*, in PHILOSOPHY AND SOCIAL HOPE 114, 114 (1999).

40. Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 529 (1997).

41. RORTY, *supra* note 39, at 117.

42. This last point gets at the heart of the concept of empathy. Many people, but especially young children, lack empathy for animals. This is why toddlers must be taught, not without challenge, to not pull the cat’s tail or the dog’s ears—they fail to understand that their actions can cause pain to a sentient being. The process of learning to identify and to empathize with other sentient beings is the process of learning to become a moral adult—one who refuses to inflict needless pain on another. Of course

By contrast, education for individuation should “help students realize that they can reshape themselves—that they can rework the self-image foisted on them by their past, the self-image that makes them competent citizens, into a new self-image, one that they themselves have helped to create.”⁴³ In other words, individuation is freedom from past socialization. Ideally, humanistic university education would aid young adults in criticizing those elements of our society that do not quite live up to the patriotic ideals taught to them since in kindergarten. Students in the process of individualistic critical thinking should come to question just how well the teachings of their childhood churches, parents, or high school government teachers match up with their own concepts of liberty or the pursuit of happiness.

Taking this view of education as my ideal, I argue that the American public school system is failing to make the most of its socialization responsibilities by ignoring the existence of gay citizens and especially gay students placed in its care. I do not argue that any complex, or even simple, theories of sexuality should be taught to the very young. Nor do I argue that the schools should engage in the exploration of the origins of sexual attraction at any point in the curriculum. Those questions can await the critical thinking encouraged in more advanced educational settings. What I do think the public schools can and should do is stop denying the social existence of gay individuals—including gay students—and instead teach students to recognize the excessive pain caused to their fellow gay students by relentless harassment.⁴⁴

In order to ensure the emotional and physical happiness of gay students, however, much more is required than mere attention to students’ mental and bodily safety. Obviously, young students should be taught not to cause embarrassment to their fellow classmates based upon some core feature of their persons. This simple lesson is best taught not through

humans, unlike other animals, possess the unique capability of being able to experience emotional, and not just physical, pain. Because the causes of emotional pain are more varied than the causes of physical pain, the moral lessons are more difficult on this front. But that difficulty does not mean that the actual pain experienced as a result of verbal attacks on one’s identity is any less morally consequential.

43. RORTY, *supra* note 39, at 118.

44. The term *social existence* is deliberately used to indicate my basic agreement that, legally and politically, we need worry only about social realities and not about “natural” or biological ones, whatever those might be. In other words, to borrow a description from Judith Butler, a person is “one who might be said *to be* a social practice, one whose ontology is that of an ongoing and revisable social practice or set of social practices. . . . No practice, no person.” Judith Butler, “*Appearances Aside*,” 88 CALIF. L. REV. 55, 58 (2000).

negative action, such as official proscription followed by punishments for the offender, but rather by fostering an intellectual and social atmosphere that recognizes gay people as an equal category of fellow American citizens. For the very young, this means presenting to them same-sex relationships on par with cross-sex relationships while passing no comparative moral judgment on either pairing but simply pointing out to students their social reality.⁴⁵ Once students begin to study the history of social movements, the gay rights movement might be sequenced behind the movements for racial equality and women's rights. But again, this might be done from a nonnormative perspective by explaining that each movement had its supporters and detractors, each with their own historically contingent set of concerns. Finally, as students begin to gain more self-consciousness as social beings—say in high school or perhaps slightly before then—they may demand more information, now from a political perspective, about where they fit into society at large. At this stage they may want to form clubs to express their social identity and seek out other like-minded students. For gay students, this point in their lives would be made much easier if they and their fellow straight students had been made aware of the social and historical existence of the social phenomenon of gayness since their earliest memories in kindergarten.

To the extent this sounds heavy-handed or overly optimistic, I would point readers to the public opinion polls that demonstrate that the younger generations have a much less negative view about their fellow gay citizens than older generations.⁴⁶ The most intuitive explanation for this divergence is that the young have grown up with somewhat normalized depictions of gayness in popular culture. This onset of normalization in the youth culture, in turn, leads more gay youth to declare their sexuality early on in adolescence. When combined, these two occurrences make the existence of gayness very concrete, and perhaps even unremarkable, for a large segment of children because they see gayness not only on television, in movies, and in music, but also in the classroom, in the lunchroom, and at the mall. This qualitative—if not quantitative—

45. Of course, recognizing the social reality of some situation is necessarily passing a moral judgment upon it. What I mean here is that both types of intimate relationships might be presented as though they were morally inconsequential relative to each other, thus eliminating the significance of the presently recognized difference between such relationships.

46. See, e.g., Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP POL. (May 25, 2010), <http://www.gallup.com/poll/135764/Americans-Acceptance-Gay-Relations-Crosses-Threshold.aspx>. According to this poll, 62% of men under age 50 consider same-sex relationships to be moral, while only 44% of men over age 50 hold that view. *Id.* The difference among women under and over age 50 was almost as great: 59%–43%. *Id.*

prevalence of gayness results in youths viewing fellow gay students as merely fellow students. Moreover, unlike older generations who view gayness as a social novelty or aberration rather than a social fact, the young better appreciate the sadistic quality of discriminatory treatment designed to socially annihilate gayness.⁴⁷ It is this attitudinal change that should be fostered in the public schools, mainly through the mechanism of socialization. Too often, however, judges are dumbstruck when new social issues, especially ones that involve sexuality, face them in the courtroom. Instead of educating themselves in the social realities of the times, they apply the only thing they know, outdated precedent and case law from another era.⁴⁸

Amy Gutmann offers a more substantive theory for why public schools should commit themselves to teaching the value of tolerance, even over the objection of intolerant parents and schoolchildren.⁴⁹ “[T]he realm of public schooling is a democratic government’s single most powerful and legitimate means of teaching respect for reasonable political disagreement.”⁵⁰ For Gutmann, it comes down to “a commitment to treating adults as free and equal beings.”⁵¹ A characteristic of free and equal beings is that they should be able to “offer one another morally defensible reasons for mutually binding laws.”⁵² The civic responsibility of offering one’s fellow citizens engaging justifications for one’s public policy choices requires “the ability

47. For example, a recent bill filed in the Tennessee General Assembly would prohibit public elementary and middle schools from providing “any instruction or material that discusses sexual orientation other than heterosexuality.” H.R. 229, 107th Gen. Assemb., 1st Sess. (Tenn. 2011); S. 49, 107th Gen. Assemb., 1st Sess. (Tenn. 2011). One can only assume that the supporters of the bill believe that if young children do not hear about the existence of homosexuality then they themselves will not become homosexual. By contrast, the premise of this Article is that homosexuality is a social phenomenon that cannot be legislated away.

48. RICHARD A. POSNER, *SEX AND REASON* 346 (1992) (“[W]hat . . . judges mainly know is their own prejudices plus what is contained in judicial opinions.”).

49. See AMY GUTMANN, *DEMOCRATIC EDUCATION*, at xii (rev. ed. 1999); Amy Gutmann, *Civic Minimalism, Cosmopolitanism, and Patriotism: Where Does Democratic Education Stand in Relation to Each?*, in 43 *NOMOS: MORAL AND POLITICAL EDUCATION* 23 (Stephen Macedo & Yael Tamir eds., 2002) [hereinafter Gutmann, *Civic Minimalism*]; Amy Gutmann, *Civic Education and Social Diversity*, 105 *ETHICS* 557 (1995) [hereinafter Gutmann, *Civic Education*]; Gutmann, *supra* note 40. On the relevance of Gutmann’s work to the rights of public school teachers, see Merle H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 *TENN. L. REV.* 597, 658–61 (1999).

50. Gutmann, *Civic Education*, *supra* note 49, at 579.

51. Gutmann, *Civic Minimalism*, *supra* note 49, at 25.

52. GUTMANN, *supra* note 49, at xii.

to think, reason, and discuss public matters publicly.”⁵³ It is precisely this ability with which the public school should be most concerned.

As Gutmann tells us, “Schools cannot possibly remain neutral in their practices—they practice either tolerance or intolerance, racial discrimination or nondiscrimination.”⁵⁴ Therefore, in addition to teaching reading, writing, and arithmetic, public schools should also be in the business of teaching the civic and deliberative virtues such as “veracity, nonviolence, practical judgment, civic integrity, and civic magnanimity.”⁵⁵

Gutmann’s views of democratic education entail consequences for student speech. She suggests a sliding scale for free speech in the public schools that would increase as the students’ level of maturity, and presumably their capacity for justice, increases.⁵⁶ The very young have no moral imagination and therefore it is necessary to teach them right from wrong without entertaining any challenges from them. As they begin to develop their own conceptions of morality, as individuals and social beings, then the schools might allow them more leeway in expressing their own reasoned judgments. It is always important to keep in mind, however, that free speech is not an end in itself, and dissent for its own sake should not be sanctioned by the schools. Gutmann also points out how disagreement among students can be most useful to the hearers rather than the speakers, but only if the speech itself is the product of public reason.⁵⁷

IV. A CRITICAL THEORETICAL FRAMEWORK

“[A]cceptance of homosexuality is a political disagreement and debate.”

—Judge Alex Kozinski, Ninth Circuit⁵⁸

“[O]ne may doubt just how close debate by high-school students on sexual preferences really is to the heart of the First Amendment.”

—Judge Richard A. Posner, Seventh Circuit⁵⁹

53. Gutmann, *Civic Minimalism*, *supra* note 49, at 25.

54. *Id.* at 37.

55. *Id.* at 26.

56. Gutmann, *supra* note 40, at 523.

57. *Id.* at 529.

58. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1197 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated as moot*, 549 U.S. 1262 (2007).

59. *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 673 (7th Cir. 2008).

One of the most underappreciated features of the existing case law is the political nature of the legal appellation of the word *speech* to various utterances or acts, thereby bringing them within the protecting embrace of the First Amendment. In particular, I am interested in showing how the judicial decision to label attacks on gay identity as “political speech” or “the expression of a point of view” is itself a political decision that puts the juridical power of the court behind those who would deny gay adolescents their socioexistential status. The claim here is not that this political act is deliberate or conscious, but rather is the result of the heteronormative outlook of the judges and the existing First Amendment precedent.

Judith Butler has performed a “rhetorical reading” of the cross-burning case *R.A.V. v. City of St. Paul*,⁶⁰ which helps explain the political nature of judicial decisions that deny the violence caused by hate speech.⁶¹ In explaining how the Supreme Court’s decision to label a burning cross placed in a black family’s front yard as the expression of a “viewpoint” rather than an instance of “fighting words”—and therefore protected speech rather than unprotected—Butler shows how the “court’s speech carries with it its *own* violence.”⁶² The most useful features of Butler’s work do two important things. First, she exposes the “contradictory set of rhetorical strategies at work in the decision.”⁶³ Second, Butler demonstrates how “the very institution that is invested with the task of adjudicating the problem of hate speech recirculates and redirects that hatred in and as its own highly consequential speech, often by co-opting the very language that it seeks to adjudicate.”⁶⁴

The contradictory set of rhetorical strategies that Butler describes is revealed through an examination of the distinct ways in which the Court treats the victims of hate speech and their attackers. Frequently, we see courts inverting the victim and harasser roles. That is, those who spout hate speech are characterized as the victims of the First Amendment’s enemies, whereas the hate speech’s actual victims are portrayed as enablers of constitutional violations. Although Butler focuses on those who express racist sentiments and those who are their victims, the same

60. *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

61. Judith Butler, *Burning Acts: Injurious Speech*, 3 U. CHI. L. SCH. ROUNDTABLE 199, 207 (1996).

62. *Id.* at 208.

63. *Id.*

64. *Id.*

analysis might be used to analyze courts' treatment of antigay speech in the school setting.

In the *R.A.V.* case, the Court characterized those who would silence the cross burners because of their "reprehensible" act as themselves setting fire to the First Amendment.⁶⁵ As Butler observes, "The analogy suggests that the ordinance is itself a kind of cross-burning"⁶⁶ More importantly, she concludes that the Court's own use of the fire metaphor "affirms the destructiveness of the cross-burning that the decision itself effectively denies, the destructiveness of the act that it has just elevated to the status of protected verbal currency within the marketplace of ideas."⁶⁷ We will see this contradictory rhetorical approach in the antigay school speech cases as well. In those cases, either the gay students or the schools will claim that those students who utter antigay or antiidentity speech must be silenced in order for gay students to obtain equal educational opportunities. By contrast, some courts have held that it is the harassing and bullying students who are the real victims because they would be unable to say what is on their minds. Butler helps us see that if this is the real harm with which courts are concerned—the inability to express oneself—then it is the gay students who are harmed far more by the atmosphere created by the antiidentity speech.

In exploring how the Court invests hate speech with content, thus turning it into political speech, Butler explains, "[W]hat is needed is not a better understanding of speech acts or the injurious power of speech, but the strategic and contradictory uses to which the court puts these various formulations."⁶⁸ Butler shows the strategy and contradiction at work by contrasting *R.A.V.* with the obscenity cases, pointing out how the Court in the latter cases exempts sex-infused speech from First Amendment protection using "the very [same] rationale proposed by some arguments in favor of hate crime legislation."⁶⁹ In allowing that a work might lack serious "literary, artistic, political, or scientific value"⁷⁰—the standard for obscenity—the Court must be saying that the work is "immediately and

65. *R.A.V.*, 505 U.S. at 396 ("St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.").

66. Butler, *supra* note 61, at 208.

67. *Id.*

68. *Id.* at 216.

69. *Id.*; see also KEVIN W. SAUNDERS, DEGRADATION: WHAT THE HISTORY OF OBSCENITY TELLS US ABOUT HATE SPEECH 194 (2011) (arguing that hate speech should be exempted from First Amendment protection just like obscenity because both are sources of "a degraded view of humanity"). Saunders's work is especially valuable to the argument of this Article as he points out that we have even more reason to be hesitant to apply the First Amendment to children in the contexts of obscenity and hate speech. *Id.* at 167–92.

70. Butler, *supra* note 61, at 217 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)).

unobjectionably injurious” and thus “excluded from the thematic and the valuable and, hence, from protected status.”⁷¹ This willingness to grant that such words or images might be sufficiently injurious “must be read against the unwillingness to countenance the injuriousness of the burning cross in front of the black family’s house.”⁷² Further, “whereas the ‘injury’ claimed by the viewer of graphic sexual representation is honored . . . , the injury sustained by the black family with the burning cross out front . . . proves too ambiguous, too hypothetical to abrogate the ostensible sanctity of the First Amendment.”⁷³

This second part of Butler’s analysis is relevant to antigay identity school speech on two different fronts. At one level, gay students are in the same position as the black family in *R.A.V.* in the sense that the courts refuse to classify their experiences as injuries, instead finding any harm from the antiidentity speech too ambiguous and too hypothetical. At another level, however, we can detect in many court opinions a fear of homosexuality—likely a fear of sexuality more generally—the same sort of fear that allows courts to easily find obscenity to be unexpressive. In analyzing the Court’s conclusions in *R.A.V.*, Butler finds the Court “allying itself with those who would seek protection from a spectre wrought from their own fantasy. Thus the Court protects the burning cross as free speech, figuring those it injures as the site of the true threat”⁷⁴ The same might be said of courts’ fears of mixing homosexuality and adolescence. By allying themselves with antigay identity speech, courts are labeling gay youths as the real source of threat, and if not the youths themselves, then at the very least the abstraction of homosexuality. But as explained elsewhere, to a gay adolescent—or any gay individual—the separation of sexual identity and human identity is nonsensical and can only be understood as a condemnation of his or her self-identity.⁷⁵

If Judith Butler helps us see how the attribution of the label “political speech” to attacks on adolescent gay identity is itself a political act, then

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 218. The “true threat” Butler has in mind here is African-Americans, whose potential to riot and commit other criminal acts is the true threat to law and order and thus, the Justices themselves. *See id.*

75. Butler, *supra* note 44, at 61. Butler talks about categories with “constitutive power,” like race and gender, such that “we cannot have a conception of a person without first determining that person’s sex, for instance.” *Id.* Sexual orientation is such a constitutive category such that “the elimination of the category eliminates the person as well.” *Id.*

Cheshire Calhoun furthers our understanding of why this political move so frequently goes unnoticed and unremarked upon even by traditional gay allies.⁷⁶ As Calhoun explains, there is a double standard for heterosexual as opposed to homosexual identity, which “is based on the assumption that heterosexuality is and ought to be constitutive of what it means to be a public actor and citizen.”⁷⁷ In other words, our entire First Amendment doctrine is premised on the notion of a heterosexual speaker. This insight helps to clarify why gay students are so frequently met with challenges from their fellow heterosexual students, faculty, administrators, and not least of all, judges. These challenges assert that it is *they*—the gay students—who are being political in expressing their gay identity. From this premise it then follows, under traditional First Amendment doctrine, that remarks attacking students’ gay identity are merely political expressions, usually reactions to the gay students’ initiation of a political debate.⁷⁸ By better understanding the double standard of sexuality self-representation, we can expose the heteronormative bias of the seemingly neutral First Amendment.

When Calhoun tells us, “Heterosexuals move about in the public sphere as heterosexuals, and that identity is by no means a private matter,”⁷⁹ she forces us to recognize several important features of public life. First, contrary to many opinions that will come under analysis,⁸⁰ sexuality is a regular feature of public discourse, even though it might not be recognized as such. Second, it is a very specific sexuality, namely heterosexuality, which is so ubiquitous in society that it largely goes unnoticed. Finally,

76. I have in mind here the ACLU in particular. There is no doubt that the ACLU champions gay rights to a certain extent. *See LGBT Rights*, ACLU, <http://www.aclu.org/lgbt-rights> (last visited Sept. 23, 2012). However, in many of the speech cases, the ACLU thinks that the abstraction of “free speech” trumps the abstraction of “adolescent identity protection.” It is the goal of this Part to explain how the ACLU might reconsider by understanding that gay students are effectively silenced by antiidentity speech, and thus, the abstraction of free speech might nevertheless be used in reversing course.

77. Cheshire Calhoun, *Sexuality Injustice*, 9 NOTRE DAME J.L. ETHICS & PUB. POL’Y 241, 253 (1995).

78. *See, e.g.*, *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 677–78 (7th Cir. 2008) (Rovner, J., concurring). The concurring judge characterized an attack on gay identity as follows: “They have initiated a dialogue in which Nuxoll wishes to participate.” *Id.* at 678. In this instance, “they” were the school’s gay-straight alliance and the “dialogue” was the Day of Silence, better characterized as a plea to realize the pain caused to gay students by the social ignorance of their existence. *Id.* at 670 (majority opinion). Nuxoll’s “participation” was a t-shirt with the slogan “Be Happy, Not Gay,” hardly an argument in a nonexistent debate. *Id.*

79. Calhoun, *supra* note 77, at 253.

80. *See, e.g.*, *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871 (N.D. Ohio 2003) (discussing principal who told a harassed student that “if he shut his mouth about gay rights, he would stop getting into so many fights” (internal quotation marks omitted)); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1070 (D. Nev. 2001) (discussing how rather than taking steps to end harassment or discipline the harasser, an English teacher told a gay student “that his sexuality was a private matter that should be kept to himself”).

public identifications as heterosexual do not routinely qualify as revelations of one's private life and thus assume no attendant risk of politicizing one's identity. Thus a heterosexual is free to move about in the public sphere—as a citizen, parent, schoolteacher, or First Amendment speaker—and never have his heterosexual self-representation—a picture of his wife or girlfriend, or his casual mention of a date—called into question as the assertion of a political point of view.

In explaining why the statement, “I am a woman,” would not ordinarily be considered a political expression or the expression of a private viewpoint, Calhoun tells us that it is because gender is “constitutive of being a speaker.”⁸¹ Calhoun further explains:

[G]ender is such a fundamental social category that it is the first thing people want to know about the persons with whom they interact. . . . Furthermore, in our social world the psychological process of becoming gendered is part of the process of becoming a self, a subject, an “I”. In short, speakers enter into the world . . . as gendered subjects.⁸²

All this leads up to Calhoun's fundamental point about how identity speech differs from political expression: “[G]ender is better viewed as a feature of being a speaker rather than simply something one might wish to express to others.”⁸³ This same analysis should apply to sexuality.

“For better or worse, we have inherited a view of sexuality as something that, like gender, pervades the entire personality and orients persons in the social world.”⁸⁴ First Amendment actors enter the world as sexualized subjects—adults as presumptive heterosexuals, children as protoheterosexuals.⁸⁵ Unlike gender, or in many instances race, an individual speaker's sexuality is presumed, and self-representations that reinforce that presumption are the unremarkable norm.⁸⁶ However, when in the course of public dialogue a nonnormative sexual self-representation is made, such as the assertion of gay identity, that speaker's social existence is challenged as a contestable point of view.⁸⁷ This occurrence is best viewed as a challenge to the ability of a gay-identified subject to speak at all.⁸⁸ As Calhoun concludes, although the First Amendment protects what may be

81. Calhoun, *supra* note 77, at 259.

82. *Id.*

83. *Id.*

84. *Id.* at 260.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

said, “[i]t does not protect speakers, guaranteeing that some sorts of speakers *may do the saying*.”⁸⁹

The upshot of the predicament in which gay and lesbian speakers find themselves is that they are entitled only to “*politicized* publicity and only to the public sphere of *political* debate.”⁹⁰ “[B]y entering the public sphere only . . . as *debatable* speakers,”⁹¹ gays and lesbians find that the First Amendment’s formal equality results in de facto inequality because in a heteronormative social world, where the presumption is a heterosexual speaker, it is only homosexuals who face the burden of reversing the heterosexual presumption. If First Amendment doctrine views every attempt to reverse that social presumption as political speech, then it is favoring those who never find themselves forced into such an explicit self-identification burden. Heterosexuals will be able to live their private lives in a “public *nonpoliticized* space,” while gays and lesbians will find no protection for themselves as First Amendment rights-bearing speakers.⁹²

In a series of articles, Nan Hunter has very thoroughly examined the problems inherent in identity speech. In exploring “the relationship between expression and equality,”⁹³ Hunter has identified the point in time when gayness became a political point of view, namely in 1979, when the California Supreme Court held that coming-out speech was an “important aspect of the struggle for equal rights,” and thus “explicitly political.”⁹⁴ Hunter concludes that the political environment surrounding the court’s holding in *Gay Law Students* “marked the emergence of homosexuality as an openly political claim and as a viewpoint,” which, in turn, led the court to consider “gay speech as the advocacy of ideas.”⁹⁵ Although this was a victory for gay equality at the time, courts have had difficulty reconciling political equality with identity speech in subsequent cases.⁹⁶

In 1993, Hunter concluded her first article on the relationship between speech and equality by noting that “the law needs a much more clearly articulated conceptualization of the intrinsic role of expression at the very heart of equality.”⁹⁷ Because speech itself is “a major factor in constructing identity[, i]dentity cannot exist without it.”⁹⁸ In other words, Hunter was set

89. *Id.*

90. *Id.* at 260–61.

91. *Id.* at 261.

92. *See id.* at 261–62.

93. Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1695 (1993).

94. *Id.* at 1705 (quoting *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 610 (Cal. 1979)).

95. *Id.* at 1704–05.

96. *See id.* at 1717–18 (criticizing legal doctrine for being unable to deal with identity claims).

97. *Id.* at 1718.

98. *Id.*

to recognize the importance of language in the social construction of something as fundamental as identity. Thus it is no surprise that in her next major article in 2000, Hunter relied explicitly on Judith Butler's notion of performativity in explaining that "universal rights like free speech too often translate[] into exclusionary blind spots and a failure to see that not everyone benefits equally from humanistic principles."⁹⁹

The main point of Hunter's second article was to explain why "expressive identity" was "not a conventional political viewpoint."¹⁰⁰ Instead of seeing gay self-expression as run-of-the-mill First Amendment speech, Hunter explained why the expression of a gay viewpoint was better seen as the expression of a gay "point of view(ing)."¹⁰¹ Putting identity speech squarely in its social context, Hunter showed how gay identity was itself the product of the sociopolitical subordination faced by homosexuals as a minoritized community.¹⁰² Thus, any utterance that could be interpreted as a gay viewpoint was better seen as the expression of an unequal social situation. Recalling Calhoun, the only reason an individual's expression of sexual identity gains notice as political speech is because it directly challenges the heteronormative assumptions thrust upon every speaker.¹⁰³ Hunter teaches us that every instance of gay self-expression is really an assertion of identity filtered through the lens of social hierarchy—a reminder of the inequality that the heteronormative social order would like us to forget.¹⁰⁴

Hunter maintains that the First Amendment can be a tool for gay equality as long as true dissent—the expression of a minority sexual identity—is protected.¹⁰⁵ However, in order for free speech law to promote "inclusion and genuine antiorthodoxy," the First Amendment must not be called in to silence gay identity speech.¹⁰⁶

To know identity speech when we see it requires a robust definition of identity that can be called upon both to protect gay identity from state interference and to allow states to protect it from private, third-party

99. Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 2 (2000); see also JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 134–41 (1990).

100. Hunter, *supra* note 99, at 7.

101. *Id.*

102. *Id.*

103. See *supra* text accompanying notes 84–89.

104. Hunter, *supra* note 99, at 5.

105. *Id.* at 54–55.

106. *Id.* at 26.

interference against competing First Amendment claims. Hunter describes identity as more than a label, but less than a prescriptive set of political viewpoints.

Why is it that fifteen years later the public school setting has become the ideal site to see the theories of Butler and Calhoun work themselves out with their many ramifications? The answer has to do, I think, with the confluence of sexuality and childhood and the growing acknowledgement of homosexuality as a normative social identity within and among youth culture. When the existence of gay adolescents is itself doubtful in many people's minds, yet the presence of homosexuality is on the rise in popular culture, then it is easier to ignore gay youths as First Amendment speakers and it is easier to see gayness as the real threat to adolescents rather than any injuries that might flow from antigay hate speech.

V. HETERONORMATIVE FIRST AMENDMENT CASE LAW

Analytically, courts have considered homosexuality in three major lights. First, and most commonly, judges have viewed any mention of gayness as a political issue, triggering ordinary First Amendment speech analysis. Second, many of those offended by gay students have attempted to argue that their insults and hurtful comments are really just an exercise of their religious liberty. Finally, conservative schools and parents have tried to claim that any mention of gayness is necessarily prurient in nature and thus ought to be censored or silenced as such.

Too often, courts have entertained the notion that any mention of the existence of homosexuality in either a nonjudgmental or an affirming light requires that antigay voices be given equal airtime. Occasionally, schools should not be surprised when dissenting voices clamor in response to school-initiated programs, like a progay forum or a new gay-positive curriculum. These one-time events or sudden changes might seem to demand a response, especially if they were the result of some secretive or nondeliberative process. On other occasions, it is the students themselves who initiate the progay messages, and it is their fellow students who claim for themselves nothing more than the opportunity to respond with an opposite message. In these scenarios, it is worth considering precisely what message antigay students think they are sending and how they intend that it be received. Finally, there are school antiharassment policies, ostensibly designed to create and maintain a harmonious learning environment. It is these policies that embody the sort of democratic socialization expected of public schools. Yet, schools have found themselves defending their policies against claims that they unconstitutionally stifle antigay "speech." It is with these most unlikely claims that we begin.

As discussed above, the primary purpose of public education is the socialization of our nation's youth in order to prepare them for life in a society committed to predetermined values concerning the treatment of fellow citizens. Chief among those social values is the idea that one individual should not harass another, thereby causing another unjustifiable physical or emotional pain. When school districts have attempted to codify such commonsense values in their official school policies or codes of conduct, some have been sued for alleged infringement of students' First Amendment rights. The usual response is that although antiharassment may well be a shared American value, so is the freedom to openly disagree and criticize others' views of what constitutes a good life. Perhaps even more central to American identity than a harassment-free social life is a citizenry filled with individuals unwilling to accept orthodoxy of whatever kind, including a government-sanctioned prescription not to harass others. Indeed, if one takes an overly rigid, liberal individualist view of the matter, then this tension might pose a real problem. However, a pragmatist sees no inherent conflict between allowing all students to grow and develop, intellectually and socially, in a harassment-free school environment and merely delaying the ability of some students to utter disparaging remarks until their target students are no longer in a captive setting. All this delay means is that students do not get to harass others until they are off campus. It also teaches students that certain settings are not socially appropriate venues for spouting whatever comes to mind, even if there is nothing legally wrong with expressing oneself to the fullest.

Consider the following antiharassment policy adopted by a Pennsylvania school district in 1999, which reads in relevant part: "Harassment means verbal or physical conduct based on one's actual or perceived . . . sexual orientation, . . . and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."¹⁰⁷ The policy further indicated that harassment could include "any unwelcome verbal, written or physical conduct which offends, denigrates, or belittles an individual because of [one's sexual orientation]."¹⁰⁸ From a theoretical perspective, the school was clearly attempting to socialize the youngsters in its care to believe that saying or doing something to a fellow student based upon that

107. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 218 app. (3d Cir. 2001).

108. *Id.*

student's sexual orientation that caused him or her to be intimidated or otherwise feel bad about himself or herself because of the student's sexuality was not a socially acceptable mode of behavior. However, once put in the hands of the judges, that simple policy goal was turned on its head, and instead a court found that it was the potential harassers who were the real victims.

In *Saxe*, students and their guardians sued the Pennsylvania school district that adopted the above policy.¹⁰⁹ The plaintiffs claimed that as Christians, they had a right and duty to “speak out about the sinful nature and harmful effects of homosexuality.”¹¹⁰ Then-Judge Alito agreed with the plaintiffs that the school's policy “strikes at the heart of moral and political discourse—the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment.”¹¹¹ One might have thought that a Christian student telling a gay student he is going to hell and distributing pamphlets that say the same constituted the real interference with “political discourse” and “democratic education,”¹¹² but not according to Judge Alito and the Third Circuit. For Judge Alito, the main problem with the antiharassment policy in *Saxe* was that it was overly broad because it apparently extended to cases in which a student's potentially harassing “speech” did not actually amount to harassment.¹¹³ “[S]peech that merely intends to [harass]” but fails to succeed was troublesomely covered by the policy.¹¹⁴

The most analytically unsound portion of Judge Alito's *Saxe* opinion concerns his discussion of why the case should be controlled by *Texas v. Johnson*,¹¹⁵ the flag-burning case. Judge Alito was particularly offended that the school would dare prohibit speech directed at criticizing another student's “values.”¹¹⁶ Because homosexuality was the only specific feature listed in the complaint, Judge Alito must have assumed that it was connected to or subsumed under the heading of “values.” He then quotes *Johnson* to the effect that free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”¹¹⁷ Only one with a perverse understanding of socialization in the service of democratic education would assert that conditions of unrest in a high school filled with

109. *Id.* at 202.

110. *Id.* at 203.

111. *Id.* at 210.

112. See generally GUTMANN, *supra* note 49.

113. *Saxe*, 240 F.3d at 210 (“The Policy extends to speech that merely has the ‘purpose’ of harassing another.”).

114. *Id.* at 216.

115. *Texas v. Johnson*, 491 U.S. 397 (1989).

116. *Saxe*, 240 F.3d at 210 (internal quotation marks omitted).

117. *Id.* (quoting *Johnson*, 491 U.S. at 408–09) (internal quotation marks omitted).

angry students were beneficial to either the students or society at large. This is especially the case when the unrest or anger is caused by discussion of sexuality—a personal feature better characterized as belonging to one’s identity than one’s set of values.

One might question just how central a free-for-all discussion of values is in the school setting. This is because the pragmatic view of education put forward above recognizes that it is the schools themselves that are charged with inculcating a good deal of their students’ values.¹¹⁸ As other courts have recognized, “mutual respect,” a value “manifest in the First Amendment[,]” means that there is no constitutional “right” to express one’s belief system through disrespectful and harassing actions.¹¹⁹ If schools cannot teach mutual respect without running afoul of the First Amendment, then the courts have sacrificed civil society upon the alter of liberalism. Although this is an important point to which I will return below, it is equally important to see that this tension can be avoided if courts stop characterizing sexuality as political.

In a more recent case, another “Christian who believe[d] that homosexuality is a sin” and who “further believe[d] that part of his responsibility as a Christian [was] to tell others when their conduct [did] not comport with his understanding of Christian morality” sued his school district over its antiharassment policy.¹²⁰ The policy prohibited “behavior based on . . . actual or perceived sexual orientation or gender identity . . . that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student’s education or creates a hostile or abusive educational environment.” Moreover, harassment included “the use of language, conduct, or symbols in such manner as to be commonly understood to convey hatred, contempt, or prejudice or to have the effect

118. The Supreme Court itself, before Justice Alito arrived, recognized that the “fundamental values” taught to students “must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). The Court commented even further:

Indeed, the “fundamental values necessary to the maintenance of a democratic political system” disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the “work of the schools.”

Id. at 683 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

119. *Parker v. Hurley*, 474 F. Supp. 2d 261, 264 (D. Mass. 2007), *aff’d*, 514 F.3d 87 (1st Cir. 2008).

120. *Morrison v. Bd. of Educ.*, 521 F.3d 602, 605 (6th Cir. 2008).

of insulting or stigmatizing an individual.”¹²¹ The policy, coupled with a training video shown to students, made some parents fear that their children would be “discourage[d]” from “speaking about their religious beliefs regarding homosexuality.”¹²² The Sixth Circuit rejected the challenge to the policy on standing grounds,¹²³ but only after the panel reversed itself on rehearing, causing the dissenting judge—who was previously in the majority—to express her consternation that “the district judge sitting by designation” had changed his mind.¹²⁴

Writing in dissent, Judge Karen Nelson Moore understood controlling precedent to provide “no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue.”¹²⁵ She worried that the antiharassment language would prevent students from pointing out “areas in which they disagree with other students.”¹²⁶ Moore never explains how, exactly, one would go about “disagreeing” with another person’s sexuality. Would it make any sense to Moore if someone wanted to “disagree” with another student’s race? Interestingly enough, just four months after the Sixth Circuit decided *Morrison*, it decided a case involving a student’s First Amendment challenge to a school dress code that prohibited him from wearing the Confederate flag on his t-shirt.¹²⁷ Judge Moore sided with the school district in the latter case.¹²⁸

Even though Judge Moore wrote the opinion upholding the student dress code in *Barr v. Lafon*, she did so on the basis of the proven disruption caused by the display of the Confederate flag in a school with high racial tensions.¹²⁹ The dress code prohibited clothing that “causes disruption to the educational process.”¹³⁰ Judge Moore satisfied herself that no First Amendment rights were violated because “[b]oth proponents of racial tolerance and proponents of racial hatred are forbidden to display the Confederate flag.”¹³¹ The whole opinion reads as though the Constitution prohibits schools from socializing its students to believe that “racial hatred” is un-American. This is an unfortunate opinion on at least two levels. First,

121. *Id.* at 605–06.

122. *Id.* at 606.

123. *Id.* at 605. Apparently the school district had changed its policy to something less objectionable and the challenged policy was no longer in effect and thus no longer preventing the plaintiff from speaking. *Id.*

124. *Id.* at 611 (Moore, J., dissenting).

125. *Id.* at 624 (quoting *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring)) (internal quotation marks omitted).

126. *Id.*

127. *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008).

128. *Id.* at 575.

129. *Id.* at 577.

130. *Id.* at 556 (emphasis omitted).

131. *Id.* at 572.

it threatens to render meaningful political debate meaningless by undervaluing it with such an undifferentiated notion of speech. Second, and most relevant to the school setting, the reasoning treats social truths as though they were an unimportant part of the educational mission of public schools.

Judge Moore would probably not see a First Amendment problem with a school sanctioning a student who wanted to “disagree” with the proposition “ $2+2=4$.”¹³² Some would call that a mathematical or scientific truth, but it is no less a social truth because some assign to it another ontological status.¹³³ One need only imagine the social disutility of turning out a large number of students who thought that proposition was up for debate. We, as a society, do not insist that students respect the “truth” of the proposition because it is “natural” or “scientific.” Rather we insist upon accepting it unquestioningly because every monetary transaction, indeed, nearly every social interaction, depends upon it. Society might be as insistent upon instilling, unquestioningly, the social truths of mutual respect and tolerance. If we took those values as seriously as we take the “+” operator, then we would treat those who wanted to preach “racial hatred” the same as those who wanted to preach “+ is the same as -”: as people who had failed the socialization process of elementary school. The problem, of course, is that there is more social unanimity as to what “+” means than there is about what “tolerance” means.

The increasing activism of gay students and their allies on school campuses has led to a backlash from antigay students claiming for themselves the right to espouse messages expressing their dissatisfaction with their fellow students’ outspokenness. One of the more organized

132. It is clear that there remains disagreement on the Supreme Court about the constitutional worth of false speech. At oral argument in *United States v. Alvarez*, Justice Kennedy “[could not] find in our cases” support for the proposition that “there’s no value to falsity.” Transcript of Oral Argument at 5, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210). By contrast, Justice Scalia expressed the view “that there is no First Amendment value in falsehood.” *Id.* at 15. The Court was unable to resolve this disagreement with a coherent theory, instead opting for a plurality opinion that applied strict scrutiny, *Alvarez*, 132 S. Ct. at 2543, a concurring opinion that applied intermediate scrutiny, *id.* at 2551 (Breyer, J., concurring), and a dissenting opinion that wrote, “false statements of fact merit no First Amendment protection in their own right.” *id.* at 2562 (Alito, J., dissenting).

133. The pragmatism I spout, which is that of the late Richard Rorty, does not care about the ontological status of anything. Hence, scientific truths, mathematical truths, and social truths are all on equal footing; they are *true* to the extent they are *useful*. See generally RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982).

activities has been the national Day of Silence led by the Gay, Lesbian, and Straight Education Network (GLSEN), a gay civil rights group that focuses on the rights of gay youths in schools.¹³⁴ GLSEN officially sponsors campus-based gay-straight alliances (GSAs) at high schools across the nation.¹³⁵ On a single day each year, campus GSAs lead the Day of Silence in which they urge all students not to speak throughout the day in recognition of the metaphorical silence gay students face every day of the year.¹³⁶ In anticipation of the Day of Silence, the more organized GSAs design t-shirts that reflect a message consistent with the day's theme and encourage all student supporters to wear them on the given day.¹³⁷ Antigay students, especially those who are religiously motivated, have attempted to counter the Day of Silence with the so-called Day of Truth, organized nationally by Focus on the Family.¹³⁸ Like their gay counterparts, the religious students also wear t-shirts. It is these antigay shirts that have sparked First Amendment lawsuits.

In the San Diego suburb of Poway, California, Tyler Chase Harper attempted to counter his school's Day of Silence by wearing a t-shirt the very next day that read, in part, "Homosexuality is Shameful."¹³⁹ In a similar act of Christian rebellion, Alexander Nuxoll of Naperville, Illinois, wore a t-shirt to his high school reading, "Be Happy, Not Gay," on the Day of Truth.¹⁴⁰ When school officials at both high schools ordered Harper and Nuxoll to remove their t-shirts, both boys interpreted the actions as violations of their First Amendment speech rights. A total of six judges heard Harper's and Nuxoll's cases—one three-judge panel in the Ninth Circuit and another in the Seventh Circuit. Out of the six judges, only two judges—one from each panel—agreed with the boys that their speech was, at its core, political speech of the sort the First

134. *See About the Day of Silence*, GLSEN, <http://www.dayofsilence.org/resources> (last visited Sept. 23, 2012).

135. *About Gay-Straight Alliances*, GLSEN, <http://www.glsen.org/cgi-bin/iowa/all/library/record/2342.html?state=what> (last visited Sept. 23, 2012).

136. GLSEN, *supra* note 134.

137. *See, e.g., Day of Silence: Testimonials*, GLSEN, http://www.dayofsilence.org/content/gi_testimonials.html (last visited Sept. 23, 2012).

138. *See Day of Dialogue*, FOCUS ON THE FAMILY, <http://www.dayoftruth.org> (last visited Sept. 23, 2012). This website will now take you to <http://www.dayofdialogue.org>, as Focus on the Family has apparently changed the name of the event beginning in 2011. I do not think it is a coincidence that this name change coincides with Judge Ilana Rovner's use of the word *dialogue* to describe Alexander Nuxoll's attack on a fellow gay student while participating in the Day of Truth. *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 678 (7th Cir. 2008) (Rovner, J., concurring). *See also supra* note 78, where I discuss Rovner's concurrence as the sort of rhetoric that allows homosexuals to exist only as political actors, whose social worth is a matter of public dialogue.

139. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

140. *Nuxoll*, 523 F.3d at 670.

Amendment was designed to protect. However, Shannon Gilreath has recently argued that the t-shirt messages were nothing of the sort; they were pure “anti-identity” speech—an insidious type of “speech” that denies its victims existential status.¹⁴¹ However, before exploring the aspects of identity and its existential concerns, we must first attempt to understand the supposed equation between Harper’s and Nuxoll’s messages and political speech.

Judge Alex Kozinski laid blame for the *Harper* case squarely at the feet of the high school. The Day of Silence, he noted, was “a political activity that was sponsored or at the very least tolerated by school authorities. . . . So long as the subject is kept out of the school environment,” Judge Kozinski explained, “these differences of opinion need not clash.”¹⁴² If that were not clear enough, Judge Kozinski further wrote that “acceptance of homosexuality is a political disagreement and debate” and by permitting the GSA to conduct the Day of Silence on campus combined with silencing Harper, the school was “promoting one political or religious viewpoint over another.”¹⁴³ Judge Kozinski’s words fundamentally lack meaning to gay people because, as Part III illustrated above, for better or worse, sexuality, especially for male adolescents, has constitutive social power such that debating the “acceptance of homosexuality” is tantamount to putting up for debate the social worth of the student himself. This problem has been made painfully clear with a recent spate of adolescent male suicides, where the boys have literally ended their existence because they saw acceptance of their humanity on the losing side of a “political” debate.¹⁴⁴

141. See Shannon Gilreath, “*Tell Your Faggot Friend He Owes Me \$500 for My Broken Hand*”: *Thoughts on a Substantive Equality Theory of Free Speech*, 44 WAKE FOREST L. REV. 557, 558–59 (2009). Gilreath expands on his theory in SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* (2011).

142. *Harper*, 445 F.3d at 1196 (Kozinski, J., dissenting).

143. *Id.* at 1197 (quoting *Hansen v. Ann Arbor Pub. Sch.*, 293 F. Supp. 2d 780, 803 (E.D. Mich. 2003)).

144. In an important new work, Jeremy Waldron argues, “[H]ate speech is both a calculated affront to the dignity of vulnerable members of society and a calculated assault on the public good of inclusiveness.” JEREMY WALDRON, *THE HARM IN HATE SPEECH* 5–6 (2012). Although he does not feature the LGBT community in any prominent way in the book, his theory could certainly be extended to further the arguments of this Article.

VI. CONCLUSION: CREATING THE LINK BETWEEN REAL
HARM AND REAL STUDENTS

“[T]he proof is thin that the problems of gay students at school are linked to t-shirts expressing messages on issues of public concern.”

—Michael Kent Curtis, Law Professor¹⁴⁵

“Though the report calls ‘be happy, not gay’ particularly insidious, it does not indicate what effects it would be likely to have on homosexual students. . . . Russell’s is as thin an expert-witness report as we’ve seen.”

—Judge Richard A. Posner¹⁴⁶

“The organizing effect[] of ‘fag’ rhetoric on the gay consciousness of my informants was profound. This use of language, this naming within the patriarchy, sets up an internal dialogue within individuals. . . .

Over and over again informants talked about the process beginning with gossip and verbal abuse as creating an internal dialogue organizing their behavior.”

—George W. Smith, Ethnographer¹⁴⁷

The previous Parts provide us with the necessary critical tools to understand why it is only from a heteronormative vantage point that Michael Kent Curtis’s statement has logical appeal. Students’ attempts to undermine their fellow gay students’ social existence is only a “matter of public concern” if the constitutive power of sexual orientation to define the individual is up for debate. However, Curtis’s statement, despite failing to demonstrate any empathy for gay students, does highlight the central legal hurdle that many courts have successfully erected in the name of free speech protection. The doctrinal problem for gay students has been in satisfying the *Tinker* test, proving that the antigay speech at issue causes substantial disruption to the learning environment.¹⁴⁸ Thus,

145. 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, 487 (2009) (labeling attacks on gay identity as a matter “of public concern”).

146. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 881 (7th Cir. 2011).

147. George W. Smith, *The Ideology of “Fag”: The School Experience of Gay Students*, 39 SOC. Q. 309, 322–24 (1998).

148. See *Zamecnik*, 636 F.3d at 879–81 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

even empathetic jurists like Judge Posner have expressed frustration with the lack of evidence litigants have been able to produce to satisfy the “material disruption” test.¹⁴⁹ Recently, the Ninth Circuit breathed life into *Tinker*’s alternate test by refocusing its attention on whether the antigay messages would interfere with the rights of other students.¹⁵⁰ However, under either *Tinker* test—material disruption or interference with the right of others—it seems that there is promising social science research—yet to be fully utilized in these sorts of cases—that would go a long way in creating the causal link between antiidentity speech and potential physical and mental harm to gay students.

In the most recent t-shirt case, *Zamecnik*, the Seventh Circuit, speaking through Judge Posner, held that a public high school unjustifiably violated a student’s First Amendment rights by banning a t-shirt that read, “Be Happy, Not Gay.”¹⁵¹ Because the phrase did not amount to an instance of fighting words, the court felt that *Tinker* provided the appropriate standard: “To justify prohibiting [the t-shirt,] the school would have to present ‘facts which might reasonably lead school officials to forecast substantial disruption.’”¹⁵² Judge Posner explained that such facts might include “a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school.”¹⁵³ When the same panel of the Seventh Circuit had first heard an appeal at the preliminary injunction stage, Judge Posner then labeled the slogan “Be Happy, Not Gay” as “only tepidly negative,” and thus the burden was squarely on the school to mount some evidence that “substantial disruption” would result.¹⁵⁴ The school’s expert witness, Stephen T. Russell, a sociologist and a family and consumer sciences professor at the University of Arizona, failed to clear the *Tinker* hurdle.¹⁵⁵

Despite the guidance the court gave to the school in *Nuxoll*—the preliminary injunction appeal—the subsequent presentation of evidence was a complete failure, resulting in summary judgment for the antigay student, Heidi Zamecnik. The three types of evidence offered concerned “incidents of harassment of homosexual students; incidents of harassment of plaintiff

149. *Id.*

150. See *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (citing *Tinker*, 393 U.S. at 508), *vacated as moot*, 549 U.S. 1262 (2007).

151. *Zamecnik*, 636 F.3d at 875, 882.

152. *Id.* at 876 (quoting *Tinker*, 393 U.S. at 514).

153. *Id.*

154. *Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 676 (7th Cir. 2008).

155. *Zamecnik*, 636 F.3d at 880–81; see also *supra* text accompanying note 146.

Zamecnik; and the report of an expert [Russell].”¹⁵⁶ It is clear that had any one of those three types of evidence panned out, summary judgment against the school would have been inappropriate. To understand why the school lost, we need to see that the real problem was with the evidence, not the law as interpreted by the Seventh Circuit.

One might think that evidence of the harassment of gay students at a major suburban high school with an enrollment of “thousands of students”¹⁵⁷ would not be difficult to come by, unless the school engaged in no systematic effort to combat gay harassment in the first place.

Therefore, it seems the next step is clear: design laws that insist upon clear record keeping of reported harassment. To the extent the school environment is not conducive to student reporting, school staff, including teachers, administrators, and all other adults who interact with and observe students must have similar harassment reporting requirements.

However, there is also a growing body of social science evidence—sociological, psychological, ethnographic, and medical—that supports the findings that prevalent school harassment, including “mere” verbal harassment, has material negative effects on gay and lesbian students.¹⁵⁸ This material is ripe for examination by legal scholars, who can best explain to civil rights attorneys how they might make use of it in the next student harassment case. These studies would also help respond to Judge Posner’s calls for evidence—any evidence—that demonstrates that offensive t-shirts are much more than just that.

156. *Zamecnik*, 636 F.3d at 879.

157. *Id.*

158. The most recent studies of antiidentity bullying among adolescents come out of the United Kingdom. *See generally* MARK MCCORMACK, *THE DECLINING SIGNIFICANCE OF HOMOPHOBIA: HOW TEENAGE BOYS ARE REDEFINING MASCULINITY AND HETEROSEXUALITY* (2012); IAN RIVERS, *HOMOPHOBIC BULLYING: RESEARCH AND THEORETICAL PERSPECTIVES* (2011).