# NOTE

# WHEN SCHOOLS REFUSE TO "SAY GAY": THE CONSTITUTIONALITY OF ANTI-LGBTQ "NO-PROMO-HOMO" PUBLIC SCHOOL POLICIES IN THE UNITED STATES

*Ashley E. McGovern**

*The wave of very public Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) youth suicides in recent years has become a source of national attention. As a result, many parents, teachers, school boards and even the federal government have sought solutions to protect LGBTQ young people. There has been very little attention, however, given to a number of formal state and local so-called "no-promo-homo" policies that formally proscribe a hostile, unwelcome, and unconstitutionally restrictive environment for LGBTQ youth in school.*

*In seven states and number of localities, these so-called "no-promo-homo" policies explicitly prohibit teachers from discussing LGBTQ[1] lives and histories to students, even to address bullying. This note argues that no-promo-homo policies are unconstitutional for the social meaning that they convey, the widespread stigmatization they create against LGBTQ youth, and the unequal treatment that they encourage towards LGBTQ communities.*

*As a result, advocates should rigorously challenge these policies in court and couple that litigation with rigorous educational advocacy that teaches tolerance and acceptance in schools, similar to the policies created by California's new FAIR Education law. The alternative is grim,*

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* J.D. Candidate, Cornell Law School, 2013; B.A. *magna cum laude*, Cornell University, 2008. I would like to thank Professors Michael C. Dorf and Sidney G. Tarrow for their helpful feedback in developing this note. I would also like to thank Professor Anna Marie Smith for many years of mentorship and guidance. Finally, I would like to thank my parents, Lisa and Kevin, my brother Jarrett, and Courtney for their constant love and support.

[1] Although no-promo-homo policies do not explicitly address transgender students or gender non-conformity, I will count transgender and gender non-conforming youth as victims and targets of these laws, regardless of their sexual orientation. No-promo-homo policies use inaccurate assumptions about gender and sexuality to prohibit and punish "non-normative" expressions of identity within the school context, including gender non-conformity—often confused for, or marked as, an indication of non-normative sexual orientation or expression. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*," 83 CAL. L. REV. 1, 6–7 (1995).

*and the lives of our LGBTQ and non-LGBTQ youth depend on an adequate legal and policy solution.*



## INTRODUCTION

Despite favorable political outcomes and increasing visibility of Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ") communities in the United States, the number of violent crimes perpetrated against LGBTQ people has increased in recent years.[2] Although this development may be surprising, the correlation between LGBTQ visibility and violence is tragically intuitive: this violence is a backlash to more LGBTQ people being open about their lives than ever before. Although this backlash presents a significant point of concern for LGBTQ people generally, LGBTQ youth are at a unique disadvantage by virtue of their social isolation, inaccessibility to role models, and the tacit approval that

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[2] FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2009 Table 1 (2010), http://www2.fbi.gov/ucr/hc2009/index.html; NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, VIOLENCE AGAINST GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED COMMUNITIES ("LGBTH VIOLENCE REPORT") 7, 17 (2011), http://www.avp.org/documents/NCAVPHateViolenceReport2011Finaledjlfinaledits.pdf (reporting a 13% increase in hate violence on the basis of sexual orientation from 2009 to 2010); *see also* Lee Romney, *Hate Crimes Against Gay, Transgender People Rise, Report Says*, L.A. TIMES, July 13, 2011, at A12.

authority figures in their lives often exhibit when they are mistreated or reprimanded.[3]

The percentage of LGBTQ youth experiencing severe forms of in-school harassment has remained relatively constant for the past decade,[4] despite increasing nation-wide acceptance of LGBTQ people.[5] According to a national project from 2009 surveying over 7,200 middle and high school students, 85% of those surveyed reported harassment in school because of their real or perceived sexual orientation.[6] Over 40% reported having been physically assaulted.[7] Over 64% of students reported being harassed because of their real or perceived gender identity or expressions and almost 40% said they feel unsafe in school.[8] Despite these numbers, only 18% of students reported that their school has a policy in place to address their specific safety needs.[9]

While most school systems' curricular policies and educational codes do not address the issues of sexual orientation or gender identity at all, many schools explicitly and implicitly prohibit teachers from speaking about the topic, creating confusion among teachers about how or if to address bullying and violence directed toward LGBTQ students and fear and desperation for the LGBTQ students who are targeted. In at least seven states, and a number of localities, school districts and state governments have adopted so-called "no-promo-homo" or "don't-say-gay" policies.[10] Under the harshest of these policies, teachers may only discuss LGBTQ people in class if they are portrayed as immoral, unhappy, or disease-prone.[11]

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3 *See* Jason D.P. Bird et al., *The Impact of Role Models on Health Outcomes for Lesbian, Gay, Bisexual, and Transgender Youth*, 50(4) J. ADOLESCENT HEALTH 353, 353–54 (2012), *available at* http://www.sciencedirect.com/science/article/pii/S1054139X11002813.

4 JOSEPH G. KOSCIW ET AL., 2009 NATIONAL SCHOOL CLIMATE SURVEY xix-xx (Gay, Lesbian & Straight Education Network 2010).

5 *See* Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold*, GALLUP (May 25, 2010), http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx.

6 KOSCIW, *supra* note 4, at 16.

7 *Id.* at 26.

8 *Id.* at 22.

9 *Id.* at 61.

10 Sexuality Information and Education Council of the United States, *A Portrait of Sexuality Education and Abstinence-Only-Until-Marriage Program in the States: Sexuality and HIV/STDS Education Policies*, SEICUS, (2010), http://www.siecus.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=73&documentFormatId=73 (last updated 2010); Mary Bonauto, *Background Information on "No Promo Homo" Policies*, GLSEN: GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, http://www.glsen.org/cgi-bin/iowa/all/news/record/30.html.

11 For example, in South Carolina discussing "alternate sexual lifestyles from heterosexual relationships" in health education programs is prohibited except in the context of sexually transmitted diseases. S.C. CODE ANN. § 59-32-30(A)(5) (2008).

This article will address the role of these policies within the broader context of ongoing political struggles involving anti-LGBTQ violence, stigmatization, and the emerging constitutional right to be "out."[12] It will also note the shift among today's LGBTQ youth regarding the "coming out" process. This demographic is more likely to be open, and at a younger age, than any generation before them.[13] As a result, they have also become more visible as targets. Their openness has garnered national attention and inspired a vocal counter-movement intent on lobbying against laws and other initiatives that affirm, validate, and support America's LGBTQ young lives.[14]

Part I outlines the dangers LGBTQ youth face in their struggle for inclusion, acceptance, and tolerance in school. By understanding the ways in which harassment, bullying, and school-sanctioned intolerance promote these dangers, the need for a solution will become clear. Part II explores the policies themselves, explaining both the literal and social meaning that such policies convey. This section draws important distinctions between gender identity and sexual orientation, and gives attention to the unique challenges transgender youth face, as well as the unique issues that LGBTQ youth of color, particularly those from low-income backgrounds, experience.

Part III discusses the legal doctrine underlying what some scholars have called an emerging constitutional "right to be out."[15] This section will apply this right to LGBTQ students in the school setting as it relates to no-promo-homo policies. This section will explore the landmark case of *Tinker v. Des Moines* and outline subsequent legal decisions that have affirmed and rejected elements of its holding. This section also outlines arguments against the conservative narrative which asserts that allowing LGBTQ students to be open about their identities is a form of "disruptive

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12 *See* STUART BIEGEL, THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS (Univ. of Minn. Press, 2010) (discussing the legal foundations of students' right to be out in public schools).

13 *See* RITCH C. SAVIN-WILLAMS, THE NEW GAY TEENAGER 14 (Harvard Univ. Press, 2005) ("To understand what it's like being young with same-sex attractions now often means discarding out previous ideas about what it means to be gay. We can't know about these adolescents' lives by looking at the experience of their older gay brothers and lesbian sisters. Indeed, researchers studying gay adolescents should acknowledge the fragility of their findings because aspects of their data are old news by the time they are published. For example, the age at which developmental milestones [including coming out] are reached become younger with each generation sampled."); Marilyn Elias, *Gay Teens Coming Out Earlier to Peers and Family*, USA TODAY, (Feb. 11, 2007, 6:34 AM), http://www.usatoday.com/news/nation/2007-02-07-gay-teens-cover_x.htm; Benoit Denizet-Lewis, *Coming out in Middle School*, N.Y. TIMES MAG., Sept. 27, 2009, *available at* http://www.nytimes.com/2009/09/27/magazine/27out-t.html?pagewanted=allatMM36.

14 *See e.g.*, KOSCIW, *supra* note 4, at xx (analyzing current trends of LGBT bullying in schools and urging schools to implement anti-LGBT bullying programs in response).

15 *See* BIEGEL, *supra* note 12.

speech" and offensive to the First Amendment rights of parents, religious students, and others who are anti-LGBTQ. This section will then explore the Fourteenth Amendment Equal Protection arguments that have succeeded in many cases where students have lobbied courts and their school districts to take their rights and their bullying seriously. This section concludes by arguing that, in light of the social meaning behind no-promo-homo policies and the emerging right for students to be out, no-promo-homo policies are constitutionally intolerable and must be systematically challenged and overturned.

Finally, Section IV discusses recent policy efforts to address LGBTQ student rights and argues that in many respects this political fight is intensifying, as state legislators continue, even this year, to push for adoption of state-wide no-promo-homo policies. This section emphasizes that legal efforts to strike down these policies on a constitutional basis are necessary, but are also only one part of the struggle in shifting our culture of violence and disapproval towards LGBTQ people and LGBTQ youth in particular. Specifically, this section outlines federal and state initiatives that have been proposed to address LGBTQ youth safety, with a specific focus on California's FAIR Education Act, which made California the first state in the nation to require that public schools adopt textbooks which are inclusive of LGBTQ people and other marginalized group histories. This section argues that the fight for LGBTQ youth in public schools (even in California) is far from done and that a wide range of initiatives will be necessary to keep LGBTQ youth safe, confident, and alive.

## I. LGBTQ YOUTH BULLYING IN CONTEXT

Aside from hurt feelings and bodies, physical and verbal harassment directed towards LGBTQ youth has led to higher rates of substance abuse, sexual risk factors, and a highly publicized wave of LGBTQ youth suicides over the past few years.[16] The social disapproval of LGBTQ people that inspires such behavior also accounts for a disproportionately high level of suicides in the general LGBTQ population as well.[17] LGBTQ youth, like their adult counterparts, are disproportionately more likely to be homeless and susceptible to mental illness and

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16 Daniel Bontempo and Anthony D'Augelli, *Effects of At-School Victimization and Sexual Orientation on Lesbian, Gay, or Bisexual Youths' Health Risk Behavior* 30(5) J. ADOLESCENT HEALTH 364, 364–74 (2002).

17 Jay P. Paul et al., *Suicide Attempts Among Gay and Bisexual Men: Lifetime Prevalence and Antecedents*, 92 AM. J. PUB. HEALTH 13138, 13138 (2002). (In a representative study, higher levels of an index of violence and victimization were predictive of suicide attempts. Among LGB youth, suicide attempters have also been found to be more likely than non-attempters to report prior verbal insults, property damage, and physical assaults.).

substance abuse as a result of peer and family rejection.[18] LGBTQ youth of color face additional challenges in relation to their white peers, in that they must confront homophobia from within their own racial or ethnic group, racism from LGBTQ people who identify with other racial or ethnic communities, and endure a combination of both racism and homophobia or transphobia from society at large.[19] Transgender youth also face particular vulnerabilities, especially transgender youth of color, as authority figures, including teachers, are almost always complicit in the gender policing perpetrated by peers as a result of their own misunderstanding or bias about transgender identity. No-promo-homo policies not only ignore these issues, they also reaffirm the sense of inferiority and disapproval that LGBTQ youth already endure by silencing their experiences or explicitly disapproving of them.

Physical harassment and violence are a common reality for LGBTQ youth.[20] In 2008, Lawrence King, a Latino, gay and gender non-conforming[21] 15-year-old in California was killed after being shot in the head at close range by his classmate one day after coming out as gay in school.[22] This past year, an African-American transgender teenager's torso was found in Detroit, burnt nearly beyond recognition, separated from the rest of her body, in one of many instances of the systemic, brutal violence perpetrated against transgender people, particularly transgender women of color.[23] Finally, in Tennessee, where the state senate recently approved a no-promo-homo bill,[24] a 17-year-old white student was allegedly assaulted by his school principal after wearing a t-shirt to support the creation of his school's first LGBTQ-positive student

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[18] *See* Nat'l Mental Health Ass'n, *Bullying in Schools: Harassment Puts Gay Youth at Risk*, www.NMHA.ORG, http://www.nmha.org/go/information/get-info/children-s-mental-health/bullying-and-gay-youth.

[19] *See* Jason Cianciotto & Sean Cahill, THE NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE, EDUCATION POLICY: ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH 17 (2003); KEVIN K. KUMASHIRO, RESTORIED SELVES: AUTOBIOGRAPHIES OF QUEER ASIAN/PACIFIC AMERICAN ACTIVISTS (2004).

[20] *See* LGBTH VIOLENCE REPORT, *supra* note 2, at 7.

[21] There has been discussion about whether Lawrence was transgender, although he did not identity that way at the time of his death. *See* Jillian T. Weiss, *What the Hung Jury Means in the Larry King Case*, THE BILERCO PROJECT, September 2, 2011, http://www.bilerico.com/2011/09/what_the_hung_jury_means_in_the_larry_king_murder.php.

[22] Rebecca Cathcart, *Boy's Killing, Labeled a Hate Crime, Stuns a Town*, N.Y. TIMES, Feb. 23, 2008, at A11.

[23] Martin Weil, *Man Convicted of Attack Against Transgender Woman*, WASH. POST, Nov. 19, 2011, at C04; Michael Lavers, *70 Percent of Anti-LGBT Murder Victims are People of Color,* COLOR LINES BLOG (July 18, 2011), http://colorlines.com/archives/2011/07/70_percent_of_anti-lgbt_murder_victims_are_people_of_color.html

[24] Sen. B. SB0049, 107th Gen. Assemb. (Tenn. 2011).

group.[25] These are only a few examples of this type of targeted and intentional violence.

## II. "NO-PROMO-HOMO" POLICIES: SOCIAL MEANINGS AND LITERAL CONTENT

In promoting no-promo-homo policies and similar measures, conservative advocates often argue that if children are exposed to information about non-normative gender identities and sexual orientations, they will be "indoctrinated" or "recruited" into the gay or transgender "lifestyle."[26] At the very least, they argue, children will begin to see such lifestyles as normal, when instead, they should be condemned and corrected.[27] No-promo-homo policies are a product of this narrative, which has also been used to argue against a wide variety of LGBTQ-specific initiatives including same-sex marriage, same-sex adoption, employment nondiscrimination, and even allowing transgender people to appear openly on widely broadcast TV shows.[28] At their core, these policies and narratives attempt to keep LGBTQ people and the histories that precede them in the closet.

In at least seven states, schoolteachers are either required to portray same-sex relationships as unnatural and dangerous or are prohibited from speaking about the subject entirely.[29] While some states attempt to do

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[25] Susan D. James, *Student Alleges Principal Bullied Him for Organizing Gay-Straight Alliance*, ABC NEWS (Oct. 5, 2011), http://abcnews.go.com/Health/tennessee-student-alleges-principal-assaulted-gay-shirt/story?id=14674464.

[26] *See, e.g.*, *Family Focus in News: Gay Activists Admit to Indoctrination*, Focus on the Family Daily Broadcast (May 31, 2011), *available at*, http://www.citizenlink.com/2011/05/31/gay-activists-admit-to-indoctrination/ (A Focus on the Family Affiliate); *Can They Do That in My School?*, TRUE TOLERANCE, *available at* http://www.truetolerance.org/educate-yourself/ ("Too often, classroom materials promoted in the name of "safety," "tolerance" or "anti-bullying" teaching go far beyond the realm of safety prevention into political advocacy, and even indoctrination.").

[27] *See,* e.g., Candi Cushman, *Capturing Children's Minds*, TRUE TOLERANCE (2010), http://www.truetolerance.org/2011/capturing-childrens-minds/ ("Can we really afford to teach the next generation that there is nothing distinctive or particularly beneficial about having a mother and a father?").

[28] *See* Keith Ablow, *Don't Let Your Kids Watch Chaz Bono on 'Dancing with the Stars'*, FOX NEWS (Sept. 2, 2011), *available at* http://www.foxnews.com/opinion/2011/09/02/dont-let-your-kids-watch-chaz-bono-on-dancing-with-stars/; *see* Video: Family Research Council Supports the Stop SB 48 Referendum, STOP SB 48, (Aug. 26, 2011), *available at* http://stopsb48.com/video-family-research-council-supports-the-stop-sb-48-referendum/.

[29] *See, e.g.*, ALA. CODE § 16-40A-2(c)(8) (West 2008) (requiring sex education course materials to emphasize that "in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state"); LA. REV. STAT. ANN. § 17:281(A)(3) (West 2008) (prohibiting "sexually explicit materials depicting male or female homosexual activity"); S.C. CODE ANN. § 59-32-30(A)(5) (2008) (prohibiting health education programs from discussing "alternate sexual lifestyles from heterosexual relationships" except in the context of sexually transmitted disease instruction); TEX. HEALTH & SAFETY CODE ANN. § 85.007 (2008)

this "neutrally" by enacting a blanket prohibition on all discussion of LGBTQ sexuality and gender-related topics, other states discard the façade of neutrality and require teachers to actively condemn same-sex sexual practices. The state of Louisiana's policies exemplify the "neutral" camp of no-homo-policies. In Louisiana, school officials are prohibited from distributing or discussing "sexually explicit materials depicting male or female homosexual activity."[30] In 1994, a Louisiana state court held that the policy was tolerable and that a guide book for teachers and parents—encouraging them to "counsel" LGB students to make a "*choice* that best serves the individual and the community" and "objectively discuss the wisdom of certain choices" in relation to their identity—was not a specific attack on same-sex sexual practice.[31] Like Louisiana, South Carolina also requires teachers to remain "neutral" by prohibiting them from discussing "alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships" unless the discussion is in the context of mentioning the risks of sexually transmitted diseases.[32] This bill also contains a provision stating that any teacher who does not comply with the policy will be terminated.[33]

In fewer states, legislators very explicitly require school officials to condemn same-sex relationships and LGBTQ people. In Texas, for example, the state-wide Health and Safety Code requires programs targeted at youth under eighteen to assert "that homosexual conduct is not an

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(requiring education programs for those eighteen and younger to "state that homosexual conduct is not an acceptable lifestyle and is a criminal offense . . . ."); *see also* ARIZ. REV. STAT. ANN. § 15-716(c)(1) to (3) (West 2008) (prohibiting any course of study that "[p]romotes a homosexual life-style," "[p]ortrays homosexuality as a positive alternative life-style," or "[s]uggests that some methods of sex are safe methods of homosexual sex"). Additionally, for caveats attached to antidiscrimination provisions, *see* CONN. GEN. STAT. ANN. § 46a-81r (West 2008); N.H. REV. STAT. ANN. § 21:49 (2008); R.I. GEN. LAWS § 11-24-2.1(h) (2008 & Supp. 2011). For an overview of "No Promo Homo" policies, *see* Bonauto, *supra* note 10.

30 LA. REV. STAT. ANN. § 17:281(A)(3) (West 2008) ("(3) No contraceptive or abortifacient drug, device, or other similar product shall be distributed at any public school. No sex education course offered in the public schools of the state shall utilize any sexually explicit materials depicting male or female homosexual activity.")

31 Coleman v. Caddo Parish Sch. Bd., 635 So. 2d 1238, 1254 (La. Ct. App. 1994), *writ denied*, 94-1387 La. 7/1/94, 639 So. 2d 1171 and *writ denied*, 94-1431 La. 7/1/94, 639 So. 2d 1171 (emphasis added).

32 S.C. CODE ANN. § 59-32-30(A)(5) (West 2008) ("The program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases.").

33 Penalty for teacher's violation of or refusal to comply with chapter, S.C. CODE ANN.§59-32-80 (2011), *available at* http://www.scstatehouse.gov/code/t59c032.php# ("Any teacher violating the provisions of this chapter or who refuses to comply with the curriculum prescribed by the school board as provided by this chapter is subject to dismissal.").

acceptable lifestyle and is a criminal offense,"[34] despite the fact that the Supreme Court struck down anti-sodomy laws *in Texas* (as well as in the entire country) in 2003.[35] Further, in Arizona, the state education code prohibits teachers from putting together curricula that "promotes a homosexual life-style," "portrays homosexuality as a positive alternative lifestyle," or "[s]uggests that some methods of sex are safe methods of homosexual sex."[36] There are also several state anti-discrimination policies that have clauses which specify that the respective state does not endorse same-sex relationships.[37]

Whether explicit or neutral, the message schools and states send through these policies is clear: LGBTQ identities are wrong and should not be promoted, discussed, or even mentioned. These statements have dangerous consequences for the LGBTQ youth that they are directed towards. For example, in the Minnesota school district of Anoka-Hennepin where a no-promo-homo policy was overturned in a legal settlement in March 2012, eight students committed suicide in just a two-year period after being relentlessly bullied and harassed due to their real and perceived sexual orientation and gender identity.[38] Seven more were hospitalized for attempted suicides.[39] Although teachers and administrators recognized the problem before students took their lives, many did not know what to do out of fear of losing their jobs and confusion over the limits of the no-promo-homo policies.[40] "LGBTQ students don't feel safe at school," said one Anoka Middle School for the Arts teacher, "they're made to feel ashamed of who they are. They're bullied. And there's no one to stand up for them, because teachers are afraid of being fired."[41]

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34 TEX. HEALTH & SAFETY CODE ANN. § 85.007 (2008) ("(a) The department shall give priority to developing model education programs for persons younger than 18 years of age. (b) The materials in the education programs intended for persons younger than 18 years of age must: (1) emphasize sexual abstinence before marriage and fidelity in marriage as the expected standard in terms of public health and the most effective ways to prevent HIV infection, sexually transmitted diseases, and unwanted pregnancies; and (2) state that homosexual conduct is not an acceptable lifestyle and is a criminal offense under Section 21.06, Penal Code.").

35 Lawrence v. Texas, 539 U.S. 558, 558 (2003).

36 ARIZ. REV. STAT. ANN. § 15-716(c)(1) to (3) (West 2008).

37 *See* CONN. GEN. STAT. ANN. § 46a-81r (West 2008); N.H. REV. STAT. ANN. § 21:49 (2008); R.I. GEN. LAWS § 11-24-2.1(a)(7) (2008).

38 Erik Eckholm, *Eight Suicides in Two Years in a District*, N.Y TIMES (Sept. 13, 2011), at A4.

39 Stephanie Mencimer, *The Teen Suicide Epidemic in Michele Bachmann's District*, MOTHER JONES (July 25, 2011 3:00 AM), http://motherjones.com/politics/2011/07/michele-bachmann-teen-suicide?page=1.

40 Sabrina Rubin Erdely, *One Town's War on Gay Teens*, p. 1 (Feb. 2, 2012 10:55 AM), ROLLING STONE, http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202#ixzz1pnSGNMkr.

41 *Id.* at 1.

The school district decided to change its original policy in 2009 after a lawsuit was filed, from one that explicitly prohibited the normalization of LGBTQ identification in the classroom, to one that was "neutral" and prohibited teachers from mentioning "homosexuality" in any context, positive or negative.[42] The new policy, however, still left teachers confused and students vulnerable. As another Anoka teacher explained, "[i]f you can't talk about [LGBTQ issues] in any context, which is how teachers interpret district policies, kids internalize that to mean that being gay must be so shameful and wrong . . . . And that has created a climate of fear and repression and harassment."[43] This policy was enacted in the same district where Michelle Bachman, outspoken anti-LGBTQ spokesperson and former presidential candidate works as a congressperson with her husband, Marcus Bachman, a practitioner of ex-gay "reparative therapy."[44]

In another case, upstate New York teen Jamey Rodemeyer killed himself after being relentlessly bullied for coming out as bisexual in school, adding to a number of other suicides around that time.[45] Shortly before his death, Jamey posted a video on the "It Gets Better" website, which was created to discourage LGBTQ youth suicide.[46] He described the horrific treatment he experienced in school and encouraged fellow victims of LGBTQ bullying that to maintain hope that things would "get better."[47] Though in each of these cases administrators and teachers knew about the harassment, the school did not address the problem. In fact, in some cases, the victims were told that they were provoking others by being too flamboyant, and that they should stay out of the way in order to avoid abuse.[48]

Although the conservative groups who advocate for these policies hope they will stop discussion of sexual orientation and gender identity

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[42] *Id.* at 2.

[43] *Id.*

[44] Brin Ross et al., *Bachmann Silent on Allegations Her Clinic Offers Gay Conversion Therapy*, ABC NEWS (July 12, 2011), http://abcnews.go.com/Blotter/michele-bachmann-silent-allegations-clinic-offers-gay-conversion/story?id=14057215; John M. Becker, *I Received 'Ex-Gay' Therapy at Marcus Bachmann's Clinic*, TRUTH WINS OUT BLOG (July 18, 2011), http://www.truthwinsout.org/pressreleases/2011/07/17519/.

[45] Susan Donaldson James, *Gay Buffalo Teen Commits Suicide on Eve of National Bullying Summit*, ABC NEWS (Sept. 21, 2011), http://abcnews.go.com/Health/gay-buffalo-teen-commits-suicide-eve-national-bullying/story?id=14571861#.TtqfvUrGl_w.

[46] The "It Gets Better Project" is a website featuring self-made videos of youth and adults who have experienced bullying and harassment in the past but who wish to deliver hope to those watching that their lives have gotten better with time. Prominent LGBT Activist Dan Savage initiated this project in response to a string of LGBT teen suicides in 2010. It is meant to be a resource for youth considering suicide because of bullying and mistreatment.

[47] Video: Jamey Rodemeyer, YOUTUBE (Sept. 21, 2011), http://www.youtube.com/watch?v=IiXMPW_EjUw.

[48] Complaint at 4, Doe v. Anoka-Hennepin School District No. 11, (No. 11-cv-01999-JNE-SER) (2011).

outside of the home (where, they argue, such discussions properly belong),[49] it is impossible for LGBTQ students to avoid degrading and unwelcome scrutiny of their sexuality or gender. Harassment, whether severe or mild, both inside and outside of the classroom, impacts LGBTQ students' ability to be effective in school. Over 72% of LGBTQ students surveyed in 2009 reported hearing homophobic remarks, such as "faggot" or "dyke" frequently or often while in school.[50] Almost 30% of them missed a class at least once as a result of safety concerns, compared to only 8% and 6.7%, respectively of a national sample of secondary school students.[51] According to the Gay and Lesbian Education Network (GLSEN), a leading advocate for LGBTQ-safe schools, the reported grade point average of students who were more frequently harassed because of their sexual orientation or gender expression was almost half a grade lower than for students who were less often harassed.[52] Though the policies themselves bear a significant responsibility for limiting the ability of school officials to take action, the animus against LGBTQ people that inspires and justifies their codification is at the root of the issue.

## III. CONSTITUTIONAL PROTECTIONS FOR LGBTQ STUDENTS IN SCHOOL: THE RIGHT TO BE OUT

An emerging constitutional right to be "out" stems from both the First and Fourteenth Amendments.[53] The First Amendment helps establish a right for LGBTQ students to express their sexuality and gender expressions openly, while the Fourteenth Amendment helps ensure that students are protected, and treated equally, in exercising that freedom.[54]

### A. *Freedom of Expression for Students:* Tinker *and its Progeny*

In 1969, the U.S. Supreme Court ruled in *Tinker v. Des Moines Independent Community School District*[55] that individuals do not "shed" their federally guaranteed constitutional rights "at the schoolhouse gate."[56] The Court held that students and teachers who were disciplined for wearing black armbands in a public school, in protest of the Vietnam War, were entitled to do so with impunity under the First Amendment's guarantee of freedom of expression.[57] The Court went on to emphasize that the ability to exercise one's First Amendment freedoms, even within

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49 Video: Family Research Council Supports the Stop SB 48 Referendum, *supra* note 28.
50 KOSCIW, *supra* note 4, at 16.
51 *Id.* at xvii.
52 *Id.* at 17.
53 *See* BIEGEL, *supra* note 12, at 3–4.
54 *Id.* at 4.
55 Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
56 *Id.* at 506.
57 *Id.* at 505–06.

the school context, "has been the unmistakable holding of this Court for almost 50 years,"[58] while cautioning that such protections may be limited if the expression in question "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school."[59]

Subsequent Supreme Court cases have clarified the boundaries and applicability of *Tinker*. In the plurality opinion of Board of Education of *Island Trees Union Free School District No. 26 v. Pico*,[60] the Court invalidated a school's discretionary removal of controversial books from the school library using *Tinker's* assertion that students do not shed their First Amendment rights while in school.[61] In *Bethel School District No. 403 v. Fraser*,[62] the Court found that the punishment of a student, who used sexist, offensive, and degrading language in reference to his peer, at a mandatory school assembly, did not run afoul of the Constitution.[63] The Court argued that the First Amendment does not protect the use of lewd, obscene, and sexually "vulgar" language, and that the rights possessed by students in public schools are not "automatically coextensive with the rights of adults in other settings."[64]

Several years later, in *Hazelwood v. Kuhlmeier*,[65] the Court found that a school principal was justified in censoring a story about teen pregnancy and divorce in a school newspaper, and did not violate the First Amendment.[66] The Court distinguished this case from *Tinker* by arguing that *Hazelwood* involved the ability of schools to control curricular decisions.[67] Justice White pointed out that,

> [T]he question that we addressed in *Tinker*-is different from the question whether the First Amendment requires a school affirmatively to promote [a] particular student speech. The former question addresses the educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter

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58 *Id.* at 506.

59 *Id.* at 509.

60 Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

61 *Id.* at 853 (1982).

62 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

63 *Id.* at 683–84 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.") (internal citations omitted); *see id.* at 685.

64 *Id.* at 682.

65 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

66 *Id.* at 260.

67 *Id.* at 270–71.

> question concerns educators' authority over school sponsored publications . . . that . . . members of the public might reasonably perceive to bear the imprimatur of the school.[68]

Finally, in the case of *Morse v. Frederick*,[69] the Supreme Court found that the protections afforded to student speech established in *Tinker* do not apply to speech that promotes illegal drug use.[70] Although there has been discussion about whether this case weakens the First Amendment protections established in *Tinker*, two of the five justices joined this opinion on the understanding that:

> (1) 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 and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . . .[71]

As a result of this caveat, the holding is clearly limited.

Taken together, these cases demonstrate that *Tinker* is still good law, but with some notable restrictions. Though the Court in *Bethel* upheld the decision of school administrators to punish a student for offensive speech, it appears they did so because the speech was sexist, objectively crude, and threatening towards a female student. Although in *Hazelwood,* the Court found a principal's censoring of the school's newspaper articles to be constitutionally tolerable, this case can be distinguished from the issue of whether LGBTQ students have a right to express their identities, even if school administrators are morally or politically opposed to them. The Court emphasized the legitimacy of the school's fear that the opinion pieces may be confused inadvertently with an official statement from the school, because the paper bore its name. When students express their personal identity openly, it would be unreasonable and nonsensical for one to confuse that expression with an official statement by the school, since it is an individual identification. Finally, in the *Morse* plurality opinion, the Court explicitly sought to limit the restriction on *Tinker* to speech involving illegal activities, such as drug use.

Additionally, although *Rust v. Sullivan*[72] does not involve speech in schools, it does raise important concerns about whether it is constitu-

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68 *Id.*

69 Morse v. Frederick, 551 U.S. 393 (2007).

70 *Id.* at 397, 403.

71 *Id.* at 422 (Alito & Kennedy, JJ., concurring).

72 Rust v. Sullivan, 500 U.S. 173 (1991).

tional for the government to support one type of content-based expression over another.[73] In *Rust*, both Congress, through a statute, and the Department of Health and Human Services, through regulations, restricted the dispersal of federal funds to family planning initiatives that included information about abortion.[74] In response, Rust (a doctor) and others alleged that the regulations violated their First Amendment right to prescribe treatment that comports with their own political views.[75] The Court rejected this argument, citing the fact that lack of information from a specific doctor does not amount to a blanket restriction on a woman's right to receive an abortion.[76] The Court also argued that the government has broad discretion in choosing which programs to fund, even where these programs involve the exercise of a fundamental right.[77]

This case can be distinguished, however, from the issue of whether schools, in acting as government entities, can restrict one type of speech and not another through no-promo-homo policies. The rights asserted in both cases, and the dignity at stake for each of the parties, are discernibly different. In prohibiting doctors from discussing abortions with their patients, the government clearly intended to limit the practice of abortions and stigmatize the procedure itself. When schools refuse to discuss sexuality and gender identity, however, although they do stigmatize lesbian and gay sexual practices, they also demean an entire class of people and relegate them to a form of second-class citizenship by implying they are not deserving of mention, or worse, that they should be explicitly condemned.

For example, although it can be a very impactful procedure, women generally do not define themselves by the abortions they receive. Although women who have abortions may feel guilt if such procedures are stigmatized, they are not treated as second-class citizens in their everyday life, and the stigmatization of the procedure is not akin to the stigmatization of an entire class of persons based on what is widely viewed as a fundamental characteristic to one's identity. By contrast, when LGBTQ youth are denied the opportunity to be open about their lives, they, and the LGBTQ communities of which they are a part, are stigmatized in a very basic but systemic way that impacts their ability to navigate everyday life.

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[73] *Id.* at 193.

[74] *See id.* at 178.

[75] *Id.* at 181.

[76] *Id.* at 196–98.

[77] *Id.* at 193.

### B. *Tensions Between Parental Disapproval of School Curricula and Students' Rights*

Although families have a strong right to control the upbringing of their children, public schools have an arguably broader and stronger right to create informative curricula and give children appropriate and important information that may curb violence or hate. Parents who challenge curriculum-based decisions in court are rarely successful due to the significant deference courts typically give to school boards and districts in creating curricula. This deference is at least partially because these decisions are often made by democratically elected officials, and parents have the ability to vote those officials in or out of office if they so choose.[78] As the Supreme Court reaffirmed in *Tinker*:

> Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[79]

A case that typifies this line of decisions is *Mozert v. Hawkins*.[80] In 1987, seven Tennessee families challenged school curriculum they found objectionable to their religious and moral beliefs. The families did not belong to a specific church, though they identified as born-again Christians who outlined a long list of objections to certain curricula, ranging from "such familiar concerns of fundamentalist Christians as evolution and 'secular humanism' to less familiar themes such as 'futuristic supernaturalism,' pacifism, magic[,] and false views of death."[81] The Court's opinion, which has been taken as a national decision on this subject, ruled against the families in question.[82] The court made an important

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[78] BIEGEL, *supra* note 12, at 81 ("Although there is a concurrent right of families *not* to receive information and ideas, buttressed by the long-standing right of parents to direct the upbringing of their children, the right to receive information is much stronger and much less limited in its scope. Parents who challenge curriculum-related decisions in a court of law are rarely successful, with courts implicitly relying on the principle that members of the community have delegated the responsibility of developing curricular requirements and identifying appropriate instructional materials to duly elected officials at the state and local levels. Should families become unhappy with these decisions, they are seen as able to replace the officials with new representatives who can then change the status quo.").

[79] W.Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[80] Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

[81] BIEGEL, *supra* note 12, at 82.

[82] *Id.*

distinction between "exposure" to an idea that could offend a family morally or religiously, with forcing a student to affirm or approve of a particular idea without the ability to openly disagree or respond. The court pointed out that,

> the plaintiffs appeared to assume that materials clearly presented as poetry, fiction and even "make-believe" in the Holt series were presented as facts which the students were required to believe. Nothing in the record supports this assumption.[83]

The Court went on to emphasize the importance of religious and civic tolerance:

> [T]olerance of divergent . . . religious views referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must 'live and let live.'[84]

Most importantly, the Court concluded that there was no evidence that students were forced to participate in any way beyond reading and discussing the materials—they were not disciplined for disagreeing with the lessons or reprimanded for posing opposing viewpoints.[85]

There are also a series of cases that firmly establish the right of Gay-Straight Alliance groups to exist on public school campuses, even where there is some disapproval by teachers or parents. One such case is *Downs v. LAUSD*[86], where a school teacher, who opposed the school's recognition of June as gay pride month, put up posters opposing same-sex relationships across from gay pride displays on campus.[87] The court found that as a government actor, the teacher could not engage in speech on school grounds that ran contrary to the District's memorandum setting up the parameters of the event, which was meant to educate and inform students about LGBT history. The court notes that,

> An arm of local government such as a school board may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives.[88]

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[83] *Mozert*, 827 F.2d at 1063–64.
[84] *Id.* at 1069.
[85] *Id.* at 1063–1064
[86] Downs v. Los Angeles Unified School District, 228 F.3d 1003 (9th Cir. 2000).
[87] *Id.* at 1013.
[88] *Id.* at 1014.

The court concluded by analogizing the speech to racist speech against students of color, which was deemed to be inherently problematic, and well within the jurisdiction of the school board to prohibit.[89]

Finally in the case of *Morrison v. Board of Education*, a group of conservative families challenged the constitutionality of a mandatory training program that addressed the issue of LGBTQ harassment and bullying in school.[90] The school district was required to put on this training in response to a lawsuit filed against them due to incidents of harassment and abuse directed towards LGBTQ youth in the district.[91] The district made the programs age-appropriate, and also had separate trainings for staff and students.[92] Despite these efforts, the families still claimed that their children were being "indoctrinated" without receiving a counter-message that they viewed as morally appropriate, which was that LGBTQ identities are wrong.[93]

The court found that despite the families' claims, it was well within the district's legal jurisdiction to develop programming that addresses LGBTQ issues in both middle and high school, even without securing parental permission.[94] They went on to say that by addressing the issue in a dispassionate and objective manner, even though anti-LGBT narratives were excluded, the district did not violate and rights of the families. It was also clear to the court that no form of "indoctrination" took place, and that the right of the district to develop such programming outweighed the objections of parents involving mere exposure to LGBTQ lives and histories.[95]

### *C. "Coming Out" as Disruptive Speech?*

Anti-LGBTQ advocates often argue that limitations on speech created by no-promo-homo policies are actually for the LGBTQ students' (and their peers') own good, because "coming out" is inherently disruptive process that violates the tenets of *Tinker*. Several lower court cases have, using both First and Fourteenth Amendment guarantees, concluded that a student's right to be "out" outweighs a school's interest in using silence or forced conformity as a means of "protecting" them from other students.

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89 *See id.* at 1016.

90 *See* Morrison v. Bd. of Educ. of Boyd Cnty., Ky., 419 F. Supp. 2d 937 (E.D. Ky. 2006).

91 *See* BIEGEL, *supra* note 12, at 85.

92 *Id.*

93 *Id.*

94 *Id.* at 86.

95 *Id.* at 85.

In *Fricke v. Lynch,*[96] perhaps the first case to apply *Tinker* in an LGBTQ-specific context, a federal court in Rhode Island rejected a school principal's claim that two boys could not attend prom together because their peers' reaction could "lead to disruption . . . and possibly to physical harm."[97] The court found that even though the principal had a genuine concern for the student's safety, prohibiting these students from attending prom would give those who might attack or harass them a "heckler's veto" by allowing the harassers ". . . to decide—through prohibited and violent methods—what speech will be heard."[98]

Since *Fricke*, a number of First Amendment cases in lower courts have established the right of students to form Gay-Straight Alliance ("GSA") clubs on public school campuses.[99] These lawsuits have been almost universally successful in establishing that students have a right to form these clubs, despite the potential controversy that might result. In one such case, a federal court in Kentucky used both *Fricke* and *Tinker* to establish that a disruptive response (i.e. a student harassing another student) was not a relevant *Tinker* consideration because such a limitation, again, would give those opposing certain speech a type of veto power. Instead, the court stated that "only upon a showing that Plaintiffs' *own* disruptive activities have interfered with Defendants' ability to maintain order and discipline"[100] should the *Tinker* rule apply. In a similar case, one federal court even concluded that the GSA clubs actually help avoid educational disruptions that occur when students are harassed as a result of their sexual orientation because the clubs help create a more tolerant school environment—a finding that is confirmed by relevant data.[101]

### *D. The Right to Equal Treatment and Equal Protection for LGBTQ Youth*

The right for students to be out in school undoubtedly bolsters the proposition that no-promo-homo laws are unconstitutional, and indeed, is likely enough to establish their unconstitutionality independent of other considerations. There is also a strong argument to be made, however, that because these laws are based on animus, they are independently un-

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96 Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980).

97 *Id.* at 383–84.

98 *Id.* at 387.

99 *See* Colin v. Orange Unified Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000); Boyd Cnty. High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667 (E.D. Ky. 2003); Straights and Gays for Equal. v. Osseo Area Sch. Dist. .No. 279, 471 F.3d 908, 909–10 (8th Cir. 2006); Gillman v. Sch. Bd. for Holmes Cnty., Fla., 567 F. Supp. 2d 1359 (N.D. Fla. 2008); Complaint at 3, Ngoun v. Wolf, No. SACV05-868-JVS (MLGx) (C.D. Cal. Sept. 7, 2005).

100 Gay Straight Alliance v. Bd. of Ed., 258 F. Supp. 2d 667, 681 (E.D. Ky. 2003).

101 *See Colin*, 83 F. Supp. 2d at 1144–46.

constitutional under the Fourteenth Amendment's guarantee of equal protection.[102]

After *Lawrence v. Texas*[103] and *Romer v. Evans*,[104] it is clear that laws distinguishing people based on sexual orientation receive, at a minimum, some level of heightened rational basis scrutiny.[105] It is also clear that when a law is expressly motivated by animus, it is very likely to fail even rational basis scrutiny.[106] In *Romer*, the Supreme Court used rational basis scrutiny to invalidate a Colorado initiative that repealed all state and local laws prohibiting discrimination against gay, lesbian, and bisexual people.[107] In *Lawrence*, the Court used a similar heightened rational basis analysis to hold that states cannot ban consensual, private sexual activity between people of the same gender because states disapprove of their practices.[108] In both cases, the Court emphasized the dangerous stigma such laws attached to lesbian and gay people.[109]

The Court in *Lawrence* found that a statute criminalizing consensual same-sex relationships "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[110] Justice Kennedy's opinion in *Romer* and Justice

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102 U.S. Const. amend XIV, § 1.

103 Lawrence v. Texas, 539 U.S. 558 (2003).

104 Romer v. Evans, 517 U.S. 620 (1996).

105 *See* Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528, 1530 (2004) ("Although it requires some effort to articulate precisely what standard of review the Court deployed in its analysis, there is no question that, whatever test it used, the Court eradicated the last vestiges of state power to criminalize private consensual adult sexual behavior solely on the basis of morality, without any showing of harm either to persons or to legally protected institutions."); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1943 (2004) ("In deciding that the laws banning sodomy should be so regarded, the Lawrence majority did not articulate a doctrinal "test" as such, or even a specific mode of analysis, but—as perhaps befits a Court more comfortable with the exposition of common law than with the construction of theory—it laid down markers that future courts might retrace and extend less through abstract speculation than by the light of unfolding experience. For its part, the Lawrence majority manifestly drew on its observations of—indeed, its immersion in—a social reality, both within the United States and, in an increasingly shared culture, in Canada and Europe as well, that exposed an ugly dynamic of oppression concretely at work in the prohibition of sodomy. Such a prohibition, whether or not cast in terms that expressly singled out same-sex relationships, operated to stigmatize those relationships in particular by reducing them to a forbidden sexual act. The result was to brand as less worthy than others those individuals who did no more than seek fulfillment as human beings by forming voluntary intimate relationships with others of the same sex. This stigmatization locked an entire segment of the population into a subordinate status and often forced such individuals either to transform or to suppress important dimensions of their identities in order to escape second-class treatment in the public realm.").

106 *Romer*, 517 U.S. at 632–33.

107 *Id.*

108 *Lawrence*, 539 U.S. at 560.

109 *Id.* at 575.

110 *Id.*

O'Connor's concurrence emphasized the importance of respecting the dignity of lesbian and gay people by respecting their private choices and lives.[111] In *Romer*, the court emphasized that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[112]

As Professor Michael C. Dorf points out in his article on same-sex marriage and law's social meaning, government actions, words, and symbols that aim to degrade classes of people by relegating them to second-class citizenship are constitutionally impermissible as a result of the meaning they convey.[113] He argues, for example, that irrespective of the scrutiny level that lesbian and gay people have historically received, laws that relegate them to a form of second-class citizenship should receive special attention and heightened scrutiny. To illustrate this point, he discusses the linguistic distinction between civil unions and same-sex marriage. Even in states where both types of legal relationships technically provide partners with the state-specific benefits (even if not the same

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[111] *Romer*, 517 U.S. at 1626–27 ("In any event, even if, as we doubt, homosexuals could find some safe harbor in laws of general application, we cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."); *Lawrence*, 539 U.S. at 584 (" . . . Texas law confirms that the sodomy statute is directed toward homosexuals as a class. In Texas, calling a person a homosexual is slander per se because the word 'homosexual impute[s] the commission of a crime.' The State has admitted that because of the sodomy law, being homosexual carries the presumption of being a criminal. Texas' sodomy law therefore results in discrimination against homosexuals as a class in an array of areas outside the criminal law. In *Romer v. Evans*, we refused to sanction a law that singled out homosexuals 'for disfavored legal status.' The same is true here. The Equal Protection Clause "'neither knows nor tolerates classes among citizens.'"") (internal citations omitted) (O'Connor, J., concurring).

[112] Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1269 (2011)

[113] *Id.* at 1275 (2011) ("Although this Article ultimately concludes that laws withholding the term marriage from same-sex couples unconstitutionally convey the message of second-class citizenship, that concrete doctrinal point merely illustrates a broader argument. This Article aims chiefly to shed light on the general problem of the social meaning(s) of government acts, statements, and symbols. It considers both positive and normative questions. The methodology could be best characterized as "interpretive" in the Dworkinian sense. It articulates and unpacks the thesis that the Constitution forbids government acts, statements, and symbols that label some persons or relationships as second-class—with a special focus on those government actions, like the denial of the term marriage to some but not all couples, that have "only" a symbolic impact.").

federal benefits), it is clear that the label "civil union" is meant to convey a form of inferiority as compared to the label "marriage," thus its use should be constitutionally suspect.[114]

Although some advocates may argue that this is not the social meaning such distinctions are meant to convey, Dorf argues that it would be most useful to have a constitutional standard that asks what a reasonable victim would perceive the social meaning of a law to be. If that identifiable victim group perceives a law to be a degrading and intentional way to promote their "inferiority," it should be subject to heightened scrutiny.[115] In the case of same-sex marriage, same-sex couples would clearly view this linguistic distinction as a way to mark them as inferior or undesirably different, because of the social meaning and motivation behind the distinction. In fact, much of the language used by anti-same-sex marriage advocates admits that marriage is superior—and that it must be "preserved" and "protected."[116]

Although Professor Dorf discusses this test and this idea in the context of same-sex marriage, it is also helpful in analyzing the social meaning behind no-promo-homo policies and crafting an appropriate constitutional test. It is clear, both in the explicit language of the policies and the implicit disapproval they are founded upon, that the laws themselves aim to relegate LGBTQ people and their relationships to an inferior status. Even if reasonable minds could differ, however, it seems clear that LGBTQ youth and LGBTQ people, who are victims of these laws, would view them as based solely on animus and as an intentional statement about their perceived inferiority. Because students have a right to be out in school, no-promo-homo policies cannot be sincerely portrayed as anything other than based upon animus and disapproval of LGBTQ people and their identities. As a result, they are constitutionally impermissible, should be subject to heightened scrutiny, and systematically overturned.

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114 *Id.* at 1267, 1315.

115 *Id.* at 1332, 1337.

116 PROTECTMARRIAGE.COM, http://protectmarriage.com/about (last visited March 24, 2012) ("ProtectMarriage.com is a broad-based coalition of California families, community leaders, religious leaders, pro-family organizations and individuals from all walks of life who have joined together to defend and restore the definition of marriage as between a man and a woman. Well over 1**00**,**000** Californians have become active in supporting traditional marriage through ProtectMarriage.com. Protectmarriage.com is defending traditional marriage in the courts, through activism and advocacy, and through public education and academic research.").

## IV. POLICY INITIATIVES AND POTENTIAL SOLUTIONS

### A. *Possibilities for Change*

There are many opportunities for change through legal and policy-based initiatives. Despite the number of states that have no-promo-homo laws on the books, there are many more that do not have such laws, and are limited legally only by federal law and the Constitution. As this note discussed in the previous section, courts tend to defer curricular decision-making to school districts. Accordingly, there is ample room for creativity at the local, state, and federal level to create change.[117]

### B. *Changes in Federal Policy: Punitive Measures*

Invalidating no-promo-homo policies is only one step of many in the effort to protect LGBTQ youth from bullying and suicidality. While invalidating these laws will make a positive difference, the social message of inferiority and stigma that motivates anti-LGBTQ advocates to push for such laws will exist even if the policies are overturned.

In recent years, activists and governmental agencies have developed both punitive and preventative policy initiatives in order to address LGBTQ bullying. Punitive measures have included statewide anti-bullying statutes,[118] LGBTQ inclusive federal hate crimes legislation,[119] and a number of recent federal policy changes which allow the Department of Education and the Department of Justice, for the first time in history, to broaden their jurisdiction to pursue claims of bullying and harassment directed towards LGBTQ youth.[120] Although these changes are very significant, the discretion given to federal agencies means that any un-codified changes are vulnerable to elimination if an unfriendly administration comes into power.

As a result, activists have been pushing for a federal statute that would solidify these protections, using the measures available in federal

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117 *See* BIEGEL, *supra* note 12, at 81.

118 Fourteen states prohibit bullying based on sexual orientation and gender identity. U.S. DEPARTMENT OF EDUCATION, ANALYSIS OF STATE BULLYING LAWS AND POLICIES 28, (2011), http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf.

119 *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 42 U.S.C. § 3716(a)(2) (2009) ("(1) In general at the request of a State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that— (A) constitutes a crime of violence; (B) constitutes a felony under the State, local, or tribal laws; and (C) is motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or tribal hate crime laws.").

120 *See* Letter from Arne Duncan, U.S. Sec'y of Educ., to Sch. Dist. Heads (June 14, 2011), *available at* http://www2.ed.gov/policy/elsec/guid/secletter/110607.html.

hate crimes legislation as a model.[121] Though this would be an important step in remedying violence after it occurs and should be passed, preventative measures, like the FAIR Education Act in California (discussed below), should be used as opposed to punitive models that may not adequately address the systematic nature of the problem and may further criminalize already marginalized communities.

### C. *Criticisms of Punitive Remedies*

There has been significant criticism of measures that punish young bullies with prison sentences or other criminal fines. The most vocal of these criticisms come from activists who favor some form of prison abolition or mass-reformation, as a result of the racial and socio-economic disparities and discrimination that exist within the criminal legal system.[122] They argue against putting any young people in jail due to the disproportionate impact such laws have on poor people, particularly poor people of color. They also tend to assert that prisons are violent and problematic spaces for members of the LGBTQ community, particularly transgender people, therefore it is problematic to expose even non-LGBTQ youth, to these institutions in the name of LGBTQ equality and justice.[123] It is also not clear whether punishment is the most effective way to remedy the root causes of bullying and violence: heterosexism and trans-phobia.[124]

Federal punitive laws, like the recently passed Hate Crimes Act,[125] provide federal authorities with the ability to intervene in the criminal process where homophobic and transphobic local authorities will not. Ultimately, however, prison sentences for perpetrators of hate and ignorance-motivated violence will not remedy oppression and hate, and cannot be the sole or even a primary solution for LGBTQ bullying and suicide.

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121 *See* Jason A. Wallace, *Bullycide in American Schools: Forging a Comprehensive Legislative Solution*, 86 Ind. L.J. 735 (2011) ("It seems possible that the more 'cosmopolitan' gathering of national legislators would be likely to pass a federal LGBT-inclusive anti-bullying bill, even if their insular counterparts at the state level would not necessarily enact such a policy. Ultimately, senators and representatives would be wise to view a comprehensive anti-bullying bill as protecting children of all races, genders, religions, and sexual orientation, but most importantly as a bill protecting *all children*.")

122 *See* Dean Spade and Craig Willse Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique, 21 CHICANO-LATINO L. REV. 38 (2000).

123 *Policy Statement on Gender Violence and the Prison Industrial Complex*, CRITICAL RESISTANCE AND INCITE! (2001), http://www.incite-national.org/index.php?s=92.

124 Angela Y. Davis, *Race, Gender, and the Prison Industrial Complex: California and Beyond*, MERIDIANS, 1–25 (2001).

125 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, 42 U.S.C. § 3716(a)(2) (2009).

### *D. The California FAIR Education Act: A Preventative Step*

In a study of five hundred young adults by the American Psychological Association, four distinct motivations for anti-LGBTQ aggression were identified: perceived self-defense, enforcement of gender norms, peer dynamics, and thrill seeking.[126] The study concluded that anti-LGBT violence "can be seen primarily as an extreme manifestation of pervasive cultural norms rather than as a manifestation of individual hatred" and that those "who have assaulted homosexuals typically do not recognize themselves in the stereotyped image of the hate-filled extremist."[127] A more recent study done in 2007 indicates that young men in particular—the group most likely to commit anti-LGBTQ violence—feel strongly that they must constantly "prove" they are not gay.[128]

Efforts to address anti-LGBTQ violence must aim to change and challenge these cultural norms, which are directly responsible for anti-LGBTQ violence and the codifications of anti-LGBTQ laws. To this end, in July 2011, California became the first state in the nation to pass an educational policy that requires public schools to adopt textbooks that are inclusive of, and affirm, the contributions of LGBTQ people and other marginalized groups.[129] In relevant part, the FAIR Education Act made substantial amendments to the California Education Code, requiring schools to adopt textbooks that include the histories of LGBT people as well as the histories of various racial and ethnic minorities.[130] The Act also ensures that state and local school boards and districts may not include any material in their curricula that portrays the lives and histories of LGBTQ people or racial minorities in an objectively negative light.[131]

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126 BIEGEL, supra note 12, at xviii (citing Karen Franklin, PSYCHOSOCIAL MOTIVATIONS OF HATE CRIME PERPETRATORS: IMPLICATIONS FOR PREVENTION AND POLICY 5–6 (1998)).

127 *Id.*

128 *See* C.J. PASCOE, DUDE, YOU'RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL (University of California Press, 2007).

129 *Id.*

130 S.B. 48, 2011-2012 Leg., Reg. Sess. (Cal. 2011) (codified at CAL. EDUC. CODE §§ 51204, 51204.5, 51500, 51501, 60040, 60044 (West 2011), *available at* http://info.sen.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_48_bill_20110714_chaptered.html) ("Existing law requires that when adopting instructional materials for use in the schools, governing boards of school districts shall include materials that accurately portray the role and contributions of culturally and racially diverse groups including Native Americans, African Americans, Mexican Americans, Asian Americans, European Americans, and members of other ethnic and cultural groups to the total development of California and the United States. This bill would revise the list of culturally and racially diverse groups to also include Pacific Islanders, lesbian, gay, bisexual, and transgender Americans, and persons with disabilities.").

131 *Id.* § 3 (codified at § 51591–60040) ("Section 51501 of the Education Code is amended to read: 51501. The state board and any governing board shall not adopt any textbooks or other instructional materials for use in the public schools that contain any matter reflecting adversely upon persons on the basis of race or ethnicity, gender, religion, disability, nationality, sexual orientation, or because of a characteristic listed in Section 220. SEC. 4. Section 60040 of the Education Code is amended to read: 60040. When adopting instructional

Despite this legislative victory, there has been consistent resistance against the codification of this policy since it was signed into law. A number of prominent Republicans politicians have condemned it strongly and and a political advocacy group called "Stop SB48" worked diligently after the bill was signed into law to overturn it by popular referendum in the 2012 election.[132]

Advocates for the FAIR Education Act, however, collected compelling data from California school districts about the positive effects of inclusive school programs under this model. They found that in districts where comparable policies were already in place, both LGBTQ and non-LGBTQ students experienced a lower rate of harassment and bullying[133] and students said they felt safer, on average, than students surveyed who did not have such programs.[134] The survey also found that students, both LGBTQ and non-LGBTQ, who learned about LGBTQ histories in school, were more likely than their peers to feel that they had a voice and could make an impact in school.[135] This data offers a compelling model that state and the federal government should look to when addressing LGBTQ bullying and suicide. These policies cannot be put in place, however, until no-promo-homo policies are overturned, and a shift occurs in the way LGBTQ youth and people generally are respected by our society.

## CONCLUSION

Anti-LGBTQ bullying, violence, and suicide have become national epidemics. Although no-promo-homo policies may not have contributed to each suicide or act of violence perpetrated against the LGBTQ community, the policies undoubtedly incorporate and convey a social meaning that degrades and demeans LGBTQ lives and histories by forcing

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materials for use in the schools, governing boards shall include only instructional materials which, in their determination, accurately portray the cultural and racial diversity of our society, including: (a) The contributions of both men and women in all types of roles, including professional, vocational, and executive roles. (b) The role and contributions of Native Americans, African Americans, Mexican Americans, Asian Americans, Pacific Islanders, European Americans, lesbian, gay, bisexual, and transgender Americans, persons with disabilities, and members of other ethnic and cultural groups to the total development of California and the United States. (c) The role and contributions of the entrepreneur and labor in the total development of California and the United States.").

132 "Stop SB48" fell short of the required signatures, in their first attempt, but they remain steadfastly committed to killing the law they insist promotes "harmful" sexual "lifestyles" and also enables "willful self-deception and a moral relativism." Frequently Asked Question, STOP SB48 BLOG, http://stopsb48.com/frequently-asked-questions-faq/ (last visited January 23, 2012).

133 California Safe Schools Coalition, Safe Schools Research Brief 4: LGBT Issues in the Curriculum Promotes School Safety Figure 2 (2006).

134 *Id.* at Figure 1.

135 *Id.* at 2.

them to be silent. As a result, no-promo-homo policies should not withstand constitutional scrutiny. Their existence and the movements of people who support them continue to promote a broader culture of disapproval and fear based on ignorance of non-normative sexualities and gender identities.

Although striking down no-promo-homo policies in the courts is a necessary step, and one that has yet fully to be realized, it is equally important to look beyond the courts, in order to address the culture of violence and degradation that contribute to the development of such policies. The only way to accomplish the arduous task of changing these cultural norms will be to use a multi-faceted approach, involving initiatives that advocate for change in policy, law, and education. This type of approach is the only way that the lives of LGBTQ people will be acknowledged as real and deserving of human respect and bodily integrity. Though the task is daunting, recent events have proven that this project is necessary, and that with diligent organizing and persistence, real change may be possible.