

3-8-2017

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### Repository Citation

Emily Suski, *A First Amendment Deference Approach to Reforming Anti-Bullying Laws*, 77 La. L. Rev. (2017)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol77/iss3/7>

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# A First Amendment Deference Approach to Reforming Anti-Bullying Laws

Emily Suski\*

## INTRODUCTION

At the risk of making a large understatement, bullying among students is a complicated problem. It can take multiple forms: physical, verbal, relational, which includes imposing social isolation on another, and cyberbullying.<sup>1</sup> Bullying also occurs on a large scale. According to at least one study, approximately one-third of students in middle school grades have reported experiencing bullying.<sup>2</sup> In addition, the effects of bullying are varied and

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1. The Centers for Disease Control and Prevention (“CDC”) has developed a uniform definition of bullying. That definition is as follows:

[A]ny unwanted aggressive behavior(s) by another youth or group of youths who are not siblings or current dating partners that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated. Bullying may inflict harm or distress on the targeted youth including physical, psychological, social, or educational harm.

R.M. GLADDEN ET AL., CTRS. FOR DISEASE CTRL. & PREVENTION, BULLYING SURVEILLANCE AMONG YOUTHS 7 (2014). The CDC also notes the multiple forms of bullying, including physical, verbal, and relational, as well as damage to property. *Id.* at 7–8.

2. Simone Robers et al., *Indicators of School Crime and Safety: 2012*, 2012 DOJ BUREAU JUST. STAT. ANN. REP. 46 (2013), <http://nces.ed.gov/pubs2013/2013036.pdf> [<https://perma.cc/X8QH-L54V>]. In some studies these numbers are even higher. One study found that 39% of sixth grade students reported bullying. VICTORIA STUART-CASSEL ET AL., SOCIAL BULLYING: CORRELATES, CONSEQUENCES, AND PREVENTION 3 (2013), [http://safesupportivelearning.ed.gov/sites/default/files/1315%20NCSSLE%20Social%20Bullying%20d7\\_lvr\\_0.pdf](http://safesupportivelearning.ed.gov/sites/default/files/1315%20NCSSLE%20Social%20Bullying%20d7_lvr_0.pdf) [<https://perma.cc/NYC6-GW85>].

significant, ranging from negative academic outcomes to suicide.<sup>3</sup> Despite the complicated and widespread nature of the problem, most states' anti-bullying laws call for a school-level response to bullying that lacks a level of nuance to match the problem.<sup>4</sup> Most laws call for, and sometimes require, schools to respond to bullying no differently than any other serious student disciplinary problem, which usually means suspending, expelling, or otherwise excluding students who bully from school.<sup>5</sup> This is so despite the fact that social science research indicates that school exclusion rarely works in response to bullying and can actually exacerbate it.<sup>6</sup>

In addition, when bullying takes the form of speech—as much of it does—school interventions also implicate the First Amendment. Public schools are arms of the state.<sup>7</sup> Thus, any intervention in response to

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3. *Infra* Part I.A.

4. All of the states now have anti-bullying laws, and almost without exception, these laws place the responsibility on the schools for addressing the problem. The vast majority focus schools' responses implicitly or explicitly on school exclusion. *See infra* note 50 and accompanying text. Kentucky, Idaho, and arguably Montana are the three states that do not call for schools to intervene when bullying happens. Kentucky and Idaho's laws are in the states' criminal codes, so the criminal justice system, not the public schools, has responsibility for combatting bullying in those states. IDAHO CODE ANN. § 18-917A (West 2016); KY. REV. STAT. ANN. § 158.150 (West 2016). In Montana, which had no anti-bullying law until 2015, the law prohibits bullying in schools, but does not specifically require schools to take actions to address it. Bully-Free Montana Act, 2015 Mont. Laws 253 (codified at MONT. CODE ANN. § 20-5-207 through § 20-5-210 (West 2016)). Instead, it states that victims can take any recourse available to them under state or federal law. *Id.* That said, the law also does not preclude schools from punishing bullies—it just does not require it.

5. *Infra* note 57; *see also* Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 AM. SOC. REV. 1067, 1069–70 (2014) (defining and discussing school exclusion).

6. *Infra* notes 196–202 and accompanying text. That is not to say that the bullying laws even with their focus on school exclusion have had no effect. New research does suggest that the laws have done something to stem the tide of bullying. Mark L. Hatzenbuehler et al., *Associations Between Antibullying Policies and Bullying in 25 States*, 169 JAMA PEDIATRICS ONLINE 10 (2015). The study did not identify the reason bullying laws have had some effect—whether from raising awareness and therefore increased reporting of bullying or for some other reason.

7. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969) (noting “the State in the person of school officials” can impinge on students' First Amendment rights in school under some circumstances).

bullying that also constitutes speech raises First Amendment questions.<sup>8</sup> This Article explores the problems associated with school exclusion as a response to bullying in light of the complicated nature of the problem and the attendant First Amendment concerns. It argues in favor of drawing on First Amendment jurisprudence, particularly by deconstructing rationales for the deference afforded schools to suppress student speech, to develop better, more comprehensive legal approaches to combatting bullying that also address those First Amendment concerns. In doing so, it also seeks to fill a gap in the literature on bullying. Although scholars have explored the limits that the Constitution, including the First Amendment, places on anti-bullying laws, they have not done so in light of the complicated nature of the problem, the interventions called for in response, or by examining the rationales for public school deference to suppress student speech.<sup>9</sup>

First, to illustrate the difficulties with crafting responses to bullying, take the example of Hailee Lamberth. Hailee was a 13-year-old Nevada public school student who tragically committed suicide on December 12, 2013.<sup>10</sup> In her suicide note, Hailee said that she committed suicide because other students at school had been bullying her.<sup>11</sup> According to Hailee's father, the students had been calling Hailee names like "fat" and "ugly" repeatedly over a period of time.<sup>12</sup> Hailee's suicide note asked that her school be informed of the reasons she committed suicide so that "next

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8. *Infra* notes 94–96 and accompanying text.

9. These scholars have assessed how the anti-bullying laws can comply with First Amendment and Fourth Amendment limits. *See, e.g.*, Ari Ezra Waldman, *Hostile Educational Environments*, 71 MD. L. REV. 705 (2012) (arguing that a particular type of bullying laws, cyberbullying laws, can survive First Amendment challenges); Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641 (2011) (focusing on cyberbullying and proposing that cyberbullying laws comply with the standards set forth in relevant Supreme Court cases, including *Tinker v. Des Moines Independent Community School District*); Douglas E. Abrams, *Recognizing the Public Schools' Authority to Discipline Students' Off-Campus Cyberbullying of Classmates*, 37 NEW ENGLAND J. CRIM. & CIV. CONFINEMENT 181 (2011) (arguing that public schools should be responsible for addressing students' off-campus cyberbullying and can under the First and Fourth Amendments).

10. Trevon Milliard, *Father: White Middle School Student's Suicide Related to Bullying*, L.V. REV. J. (Feb. 28, 2014, 7:26 PM), <http://www.reviewjournal.com/news/father-white-middle-school-student-s-suicide-related-bullying> [<https://perma.cc/5WAT-F8K4>].

11. *Id.*

12. *Id.*

time” the school would prevent what happened to her from happening to another student.<sup>13</sup> Notably, at the time Hailee committed suicide, Nevada had an anti-bullying law in place, one that called for discipline, which could include school exclusion as a means to address the problem.<sup>14</sup> Whether implemented or not, the law did not help Hailee. Indeed, even if school exclusion could have helped Hailee, though social science literature suggests it could not, such an intervention may not have been available to the school because any one-time instance of bullying that Hailee experienced may have been protected by the First Amendment.<sup>15</sup>

Although schools do have more latitude to suppress student speech, including student-bullying speech, than other state actors, that deference is limited. First, any anti-bullying law has to comply with First Amendment overbreadth constraints.<sup>16</sup> In addition, and as a general matter, schools can only suppress student speech that would otherwise be protected by the First Amendment if the schools can reasonably anticipate the speech will cause a substantial disruption to the work of the schools or infringe on the rights of others.<sup>17</sup> Although this standard effectively gives schools increased authority to suppress student speech, it still protects some speech. Thus, the kind of speech that harmed Hailee Lamberth must either be disruptive to the school or injure another’s rights. An individual instance of name-calling, like that to which Hailee was subjected, arguably does not rise to this level. The first time Hailee was called “fat” or “ugly” may not have met this standard. Depending on the circumstances, the third or fifth time a student is called such a name may not have either. A one-time instance of name-calling may be part of a pattern of behavior that constitutes bullying, but it may not on its own disrupt the school or injure another person’s rights. Thus, a one-time instance is arguably protected by the First Amendment, meaning it cannot be suppressed by the public schools, whether through school exclusion or any other means of intervention.

Anti-bullying laws therefore raise questions both about the way the laws call for schools to respond to the problem of bullying and whether, given First Amendment constraints, the schools can even respond at all. Drawing both concerns together, this Article makes a twofold argument. First, it argues that the anti-bullying laws represent a limited response to the complicated problem of bullying that raise First Amendment concerns despite the deference afforded schools to suppress student speech. Second, it contends that First Amendment jurisprudence, particularly the rationales

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13. *Id.*

14. NEV. REV. STAT. ANN. § 388.1351(2) (Supp. 2013).

15. *Infra* note 93 and accompanying text.

16. *Infra* Part II.A.

17. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969).

for giving schools this deference, offers ways both to reform the laws and satisfy those First Amendment concerns.

This Article begins by providing an overview of the anti-bullying laws. To explain how these laws constitute a narrow approach to the problem, it summarizes the scope and effects of bullying. It then describes how the majority of states take a punitive approach to bullying that is focused on school exclusion.<sup>18</sup> Part II explores the First Amendment implications, including the doctrine on overbreadth with respect to student speech and the deferential standards applied to schools when they act to suppress student speech. It also examines the rationale underlying that deference, one that is based on the Supreme Court's particular understandings about the work of public schools. More specifically, it identifies the particular analytic framework for affording schools deference to suppress student speech as dependent on both the type of speech and its understanding of the school role in relation to that speech. Part III then analyzes the anti-bullying laws in light of the First Amendment doctrine on overbreadth, the deferential standards applied to the suppression of student speech, and the rationales for that deference. It explains how the anti-bullying laws can at times run afoul of the First Amendment both facially on overbreadth grounds and as applied despite the deferential standard for when schools can constitutionally suppress student speech. In addition, it explains how the means for suppressing that speech—often school exclusion—stand in tension with the rationale underlying the deference given schools for suppressing it. Part IV then explores how resolving this tension offers a way forward. It contends that if the anti-bullying laws were better aligned with the Court's understanding of schools' work, then an argument exists that schools should receive more deference in suppressing student-bullying speech. In doing so, it calls for adding a layer to the framework that depends on the type of speech and schools' role in relation to it so that the analysis includes consideration of the means schools use for fulfilling their roles in the bullying context. This framework, then, makes the deference given schools dependent on not just the type of speech and the schools' role in relation to it, but also on the means the schools use to suppress the speech. Under this framework, if legislatures called for schools to use means of addressing bullying that better align with the Court's understanding of schools' work, or at least did not use means such as school exclusion that are known to be ineffective, then schools should get more deference to suppress bullying speech. Such a framework would make the anti-bullying laws more workable, avoiding the First Amendment problems the laws

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18. *Infra* Part I.B.

now face, and more effective for victims, students who bully, and schools. Perhaps most importantly, more workable bullying laws could better prevent tragedies like Hailee's.

### I. ANTI-BULLYING LAWS: LIMITED SOLUTIONS FOR A COMPLEX PROBLEM

Although the problem of bullying is widespread and its effects are complex, the anti-bullying laws require schools to respond to bullying in a fairly limited way—by imposing discipline or consequences on the students who bully.<sup>19</sup> Not only do the anti-bullying laws all take a punitive approach to bullying, the overwhelming majority of anti-bullying laws further focus interventions on school exclusion by explicitly or implicitly identifying it as a means to accomplish that discipline.<sup>20</sup> Understanding just how limited the laws' responses to bullying are requires an understanding of the scope and nature of the bullying problem and its effects.

#### *A. The Scope and Effects of the Bullying Problem*

Bullying happens frequently and affects a large proportion of students in school. In 2009-2010, bullying occurred on a weekly or daily basis in 23% of schools.<sup>21</sup> That statistic, though, reflects the prevalence of bullying across all age groups and grade levels.<sup>22</sup> Disaggregating the bullying rate by grade level indicates that the percentage of students who have been bullied is even higher in certain grades. Perhaps unsurprisingly those grades are middle school grades. In 2011, approximately 37% of sixth

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19. In the spring of 2015, Montana became the last state to pass an anti-bullying law. The law defines and prohibits bullying in school. However, the law only states that students can seek redress for bullying under any available civil or criminal law. Bully-Free Montana Act, 2015 Mont. Laws 253 (codified at MONT. CODE ANN. § 20-5-207 through § 20-5-210 (West 2016)). It does not specifically call on schools to impose consequences on the bully. Even so, as the law prohibits bullying in school, a good case can be made that it violates school rules. As a result, then, a school administrator could impose discipline for bullying.

20. Kentucky's law and Idaho's law do not call on schools to respond to bullying because their anti-bullying laws are in their criminal codes. Therefore, students who engage in bullying behavior can face criminal penalties. IDAHO CODE ANN. § 18-917A (West 2016); KY. REV. STAT. ANN. § 525.070 (West 2016).

21. Robers et al., *supra* note 2, at 32.

22. *Id.*

grade students reported being bullied.<sup>23</sup> In the same year, 30% of seventh grade students and 31% of eighth grade students reported being bullied.<sup>24</sup>

When these studies discuss bullying, they identify it as taking any one of four forms: physical, verbal, relational, and cyberbullying. Of these forms of bullying, perhaps the one most commonly thought of as traditional bullying is physical bullying. Physical bullying involves, as the name suggests, physical attacks such as kicking, hitting, and punching.<sup>25</sup> Verbal bullying consists of name-calling and harmful, hurtful teasing.<sup>26</sup> Social, or relational, bullying occurs by means such as social isolation, rumor spreading, and friendship manipulation.<sup>27</sup> It has “the effect of undermining social status and threatening feelings of support, security, and closeness in youth relationships.”<sup>28</sup> Cyberbullying, the newest form of bullying whose rise is associated with the increased use of technology as a form of communication, is similar to verbal and social bullying, but is distinctive in its means.<sup>29</sup> Cyberbullying involves the use of electronic methods of communication to bully.<sup>30</sup> No matter the form it takes, bullying is distinguished from playful or even hostile teasing by a power imbalance.<sup>31</sup> The bully has more power than the victim and uses it against

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23. *Id.* at 46. In some studies, these numbers are even higher. One study found that 39% of sixth grade students reported bullying. STUART-CASSEL ET AL., *supra* note 2, at 3.

24. Robers et al., *supra* note 2, at 46. Although the percentage of students who report being bullied goes down in high school, approximately one-quarter of students still report bullying in high school. The follow shows the percentage of high school students who reported bullying in 2011: 26% of ninth, 28% of tenth, 24% of 11th, and 22% of 12th graders. *Id.*

25. Tracy E. Waasdorp & Catherine P. Bradshaw, *The Overlap Between Cyberbullying and Traditional Bullying*, 56 J. ADOLESCENT HEALTH 483, 483 (2015); Jing Wang et al., *School Bullying Among US Adolescents: Physical, Verbal, Relational, and Cyber*, J. ADOLESCENT HEALTH 368, 369 (2009).

26. Waasdorp & Bradshaw, *supra* note 25; Wang et al., *supra* note 25, at 369.

27. Waasdorp & Bradshaw, *supra* note 25; Wang et al., *supra* note 25, at 369.

28. STUART-CASSEL ET AL., *supra* note 2, at 1. Relational bullying also tends to be more common among girls than boys. *Id.* at 3.

29. Waasdorp & Bradshaw, *supra* note 25; Wang et al., *supra* note 25, at 369.

30. Waasdorp & Bradshaw, *supra* note 25; Wang et al., *supra* note 25, at 369.

31. Dewey Cornell et al., *Perceived Prevalence of Teasing and Bullying Predicts High School Dropout Rates*, 105 J. EDUC. PSYCHOL. 138, 138 (2012); Shane R. Jimerson et al., *International Scholarship Advances Science and Practice Addressing Bullying in Schools*, in HANDBOOK OF BULLYING IN SCHOOLS 1 (Jimerson et al. eds., 2010); Dan Olweus, *Understanding and Researching Bullying: Some Critical Issues*, in HANDBOOK OF BULLYING IN SCHOOLS 11 (Jimerson et al. eds., 2010). Scholars have worried about punishing

the victim by way of one or more of the forms of bullying.<sup>32</sup> In this sense, then, bullying is exploitive.

Bullying also wreaks havoc on victims, and its effects range from the relatively minor to the tragic. The academic achievement of the victims of bullying tends to be lower than other students who have not experienced bullying.<sup>33</sup> Victims are also more likely to avoid school and drop out of school entirely.<sup>34</sup> Victims experience a number of negative psychological effects as well, with increased rates of depression and anxiety.<sup>35</sup> Alarming, victims also have an increased sense of hopelessness. That increased sense of hopelessness coupled with depression puts victims at increased risk for suicide.<sup>36</sup>

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students and youth for behavior that is typically adolescent. In particular, they have understandably raised concerns about how typical adolescent or youthful behavior has led to involvement in the juvenile or criminal justice system. Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 386–87 (2013) (arguing that the juvenile justice system treats youth of color more harshly because it fails to recognize their behavior as a product of their immaturity—that is, that the behavior is normal adolescent behavior). The bullying social science researchers have turned their attention to is distinguished from playful or even hurtful teasing by the power imbalance that is central to the concept of bullying behavior. See Dewey Cornell and Sharmila Bandyopadhyay, *The Assessment of Bullying*, in HANDBOOK OF BULLYING IN SCHOOLS 265 (Jimerson et al. eds., 2010); Jimerson et al., *supra* at 2; Olweus, *supra* at 11.

32. Cornell et al., *supra* note 31, at 138; Jimerson et al., *supra* note 31; Olweus, *supra* note 31.

33. Susan M. Swearer et al., *What Can Be Done about School Bullying? Linking Research to Educational Practice*, 39 EDUC. RESEARCHER 38 (2012) [hereinafter *What Can Be Done About Bullying?*]; Cornell et al., *supra* note 31, at 139.

34. *What Can Be Done About Bullying?*, *supra* note 33, at 38–39; Cornell et al., *supra* note 31, at 147.

35. Hannah L. Schacter et al., “*Why Me?*”: *Characterological Self-Blame and Continued Victimization in the First Year of Middle School*, 44 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 446 (2014); Susan M. Swearer et al., *Assessment of Bullying/Victimization: The Problem of Comparability Across Studies and Across Methodologies*, in HANDBOOK OF BULLYING IN SCHOOLS 312, 323 (Jimerson et al. eds., 2010) [hereinafter *Assessment of Bullying/Victimization*].

36. Rina A. Bonano & Shelley Hymel, *Beyond Hurt Feelings: Investigating Why Some Victims of Bullying Are at Greater Risk for Suicidal Ideation*, 56 MERRILL-PALMER Q. 420, 433 (2010). While some student suicides related to bullying make national news, other suicides only make local news. In 2013, Rebecca Ann Sedwick, a 12-year-old Florida girl, committed suicide by jumping off a silo at an abandoned cement plant, and it was reported in the New York Times. Lizette Alvarez, *Girl’s Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES (Sept. 13, 2013),

Furthermore, studies have shown that the effects of bullying on victims are equal to, or more severe than, child maltreatment and are longer lasting.<sup>37</sup> A recently published study found that a child who is bullied continues to face negative consequences of bullying into young adulthood.<sup>38</sup> Many of these long-term negative consequences are similar to those that victims of bullying experience at the time of the bullying.<sup>39</sup> They include depression, anxiety, self-harm, suicidal ideation, and suicide itself.<sup>40</sup>

The negative consequences of bullying are not limited to the victims. Although perhaps less sympathetic than the victims, students who bully also experience negative consequences that relate to their bullying behavior.<sup>41</sup> They are more likely to be angry, depressed, and more aggressive than other students.<sup>42</sup> Students who bully are also more likely to have conduct problems<sup>43</sup> and problems with delinquency.<sup>44</sup> Moreover, like victims, the bullies too have an increased incidence of depression and suicidal ideation.<sup>45</sup>

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<http://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-web-sites.html> [<https://perma.cc/3G2S-WD7U>]. When Hailee Lamberth committed suicide, it was reported in local news reports. Milliard, *supra* note 10. Although reporting these suicides helps spur action, the suicides are also personal tragedies for the families of the students. As such, it seems safe to assume that some suicides do not make the news at all.

37. E.g., Suzet T. Lereya et al., *Adult Mental Health Consequences of Peer Bullying and Maltreatment in Childhood: Two Cohorts in Two Countries*, 2 LANCET PSYCHIATRY 524 (2015).

38. *Id.* at 529.

39. *Id.*

40. *Id.*

41. *Assessment of Bullying/Victimization*, *supra* note 35, at 323.

42. *Id.*; Susan M. Swearer et al., *Internalizing Problems in Students Involved in Bullying and Victimization: Implications for Intervention*, in BULLYING IN AMERICAN SCHOOLS 63, 65–66 (Dorothy L. Espelage & Susan M. Swearer eds., 2004) [hereinafter *Internalizing Problems*].

43. *Assessment of Bullying/Victimization*, *supra* note 35, at 323.

44. *What Can Be Done About Bullying?*, *supra* note 33.

45. *Id.*; *Internalizing Problems*, *supra* note 42, at 65–66. In addition to students who bully and students who are victims, there are also students who fall into the category of bully-victims. Bully-victims are students who both bully and are victims of bullying. Clayton R. Cook et al., *Predictors of Bullying and Victimization in Childhood and Adolescence: A Meta-Analytic Investigation*, 25 SCH. PSYCHOL. Q. 65, 76 (2010). The research on these students suggests they too feel the complicated effects of bullying and are in need of individualized interventions. *Id.* at 78–80.

*B. State Anti-Bullying Laws*

Recognizing these harmful effects of bullying, in December 2010, the Secretary of Education, Arne Duncan, called the bullying problem an urgent one and took a series of steps in response.<sup>46</sup> The Department of Education, in conjunction with the Departments of Health and Human Services, Agriculture, Interior, Defense, and Justice, held a summit to study the problem and launched a website with information about bullying.<sup>47</sup> The Department of Education also published guidance for states and school districts in an effort to spur efforts addressing bullying.<sup>48</sup> The federal government has not been alone in calling for action to address bullying. For years, parents, activists, and scholars, among others, have been calling on states and schools to stem the tide of this widespread problem.<sup>49</sup>

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46. Letter from Arne Duncan, U.S. Sec’y of Educ., to Colleagues (Dec. 16, 2010), <http://www2.ed.gov/policy/gen/guid/secletter/101215.html> [<https://perma.cc/MBX9-5XHV>].

47. *Id.*

48. The guidance provided by the United States serves as technical assistance and outlines what it terms “key strategies” of anti-bullying laws. The key strategies include developing a specific definition of bullying, consistent with federal and state law, and prohibiting such conduct. It calls on states to develop or require schools to develop procedures for reporting bullying and for investigating and responding to reports of bullying. In responding to bullying, the technical assistance document suggests that anti-bullying laws and policies should describe consequences, which need to be imposed, and they should be graduated. The document does not ignore the victim and suggests a process to refer the victim to counseling. *Id.*

49. See, e.g., Sandra Cherub, *Nevada Gov. Brian Sandoval Signs Anti-Bullying Legislation*, L.V. REV. J. (May 20, 2015, 2:53 PM), <http://www.reviewjournal.com/news/nevada-legislature/nevada-gov-brian-sandoval-signs-anti-bullying-legislation> [<https://perma.cc/8PXR-2XAJ>]; Milliard, *supra* note 10; Goodno, *supra* note 9; Kelly A. Albin, *Bullies in a Wired World: The Impact of Cyberspace Victimization on Adolescent Mental Health and the Need for Cyberbullying Legislation in Ohio*, 25 J.L. & HEALTH 155 (2012); Dan Savage, *Anti-Gay Bullying Claims Another Victim*, SLOG (July 17, 2013, 11:59 AM), <http://slog.thestranger.com/slog/archives/2013/07/17/anti-gay-bullying-and-hate-claims-another-victim> [<https://perma.cc/V5KC-ZGBH>]; *Our Mission*, STOMP OUT BULLYING, <http://www.stompoutbullying.org/index.php/about/mission/> [<https://perma.cc/RC2N-VWEM>] (last visited Sept. 27, 2016); *October is National Bullying Prevention Month*, PACER’S NAT’L BULLYING PREVENTION CTR., <http://www.pacer.org/bullying/nbpm/> [<https://perma.cc/Y5BW-MGTX>] (last visited Sept. 27, 2016).

Every state has heeded the call to respond to the problem of bullying by passing anti-bullying laws.<sup>50</sup> Despite the pervasive nature of the bullying problem and the complexity of its effects, bullying laws often do not call for adequate intervention. Although they do reflect an effort to cover all forms of bullying, the laws typically fail to require schools to intervene in more than a relatively limited way.

The definitions of bullying found in the anti-bullying laws acknowledge that bullying, as defined in social science research, takes multiple forms. Thus, the laws generally prohibit bullying regardless of form—physical, written, verbal, or cyber.<sup>51</sup> In addition, the laws outline the degree of

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50. ALA. CODE § 16-28B-1–16-28B-9 (2016); ALASKA STAT. ANN. § 14.33.200 (West 2016); ARIZ. REV. STAT. ANN. § 15-341 (2016); ARK. CODE ANN. § 6-18-514 (West 2016); CAL. EDUC. CODE § 48900 (West 2016) (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)); COLO. REV. STAT. ANN. § 22-32-109.1 (West 2016); CONN. GEN. STAT. ANN. § 10-222d (West 2016); DEL. CODE ANN. tit. 14, § 4112D (West 2016); D.C. CODE ANN. § 2-1535.01 (West 2016); FLA. STAT. ANN. § 1006.147 (West 2016); GA. CODE ANN. § 20-2-751.4 (West 2016); HAW. CODE R. § 8-19-2 (LexisNexis 2016); IDAHO CODE ANN. § 18-917A (West 2016); 105 ILL. COMP. STAT. 5/27-23.7 (West 2016); IND. CODE ANN. § 20-33-8-0.2 (West 2016); IOWA CODE ANN. § 280.28 (West 2016); KAN. STAT. ANN. § 72-8256 (West 2016); KY. REV. STAT. ANN. § 158.150 (West 2016); LA. REV. STAT. §§ 14:40.7, 17:416.13 (2016); ME. STAT. tit. 20-A, § 6554 (2016); MD. CODE ANN., EDUC. § 7-424 (West 2016); MASS. GEN. LAWS ch. 71, § 370 (2016); MICH. COMP. LAWS ANN. § 380.1310b (West 2016); MINN. STAT. ANN. § 121A.031 (West 2016); MISS. CODE ANN. § 37-11-67 (West 2016); MO. ANN. STAT. § 160.775 (West 2016); MONT. CODE ANN. § 20-5-209 (West 2016); NEB. REV. STAT. ANN. § 79-2137 (West 2016); NEV. REV. STAT. ANN. § 388.121–388.1327 (West 2016); N.H. REV. STAT. ANN. § 193-F:3 (2016); N.J. STAT. ANN. § 18A:37-14 (West 2016); N.M. CODE R. § 6.12.7.7 (LexisNexis 2016); N.Y. EDUC. LAW § 11 (McKinney 2016); N.C. GEN. STAT. ANN. § 115C-407.15 (West 2016); N.D. CENT. CODE ANN. § 15.1-19-17 (West 2016); OHIO REV. CODE ANN. § 3313.666 (West 2016); OKLA. STAT. tit. 70, § 24-100.3 (2016); OR. REV. STAT. ANN. § 339.351 (West 2016); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A (West 2016); R.I. GEN. LAWS ANN. § 16-21-33 (West 2016); S.C. CODE ANN. § 59-63-120 (2016); S.D. CODIFIED LAWS § 13-32-15 (2016); TENN. CODE ANN. § 49-6-4502 (West 2016); TEX. EDUC. CODE ANN. § 37.0832 (West 2016); UTAH CODE ANN. §§ 53A-11a-102, 53A-11a-201 (West 2016); VT. STAT. ANN. tit. 16, § 11 (West 2016); VA. CODE ANN. § 22.1-276.01 (West 2016); WASH. REV. CODE ANN. § 28A.300.285 (West 2016); W. VA. CODE ANN. § 18-2C-2 (West 2016); WIS. STAT. ANN. § 118.46 (West 2016); WYO. STAT. ANN. § 21-4-312 (West 2016).

51. *E.g.*, CAL. EDUC. CODE § 48900 (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)); IOWA CODE ANN. § 280.28; N.H. REV. STAT. ANN. § 193-F:3.

severity that the acts must achieve to constitute bullying. In some states, a single act is sufficient to constitute bullying under the law if it is severe enough.<sup>52</sup> Others states require repeated, but not necessarily very severe, acts to meet the legal definition of bullying.<sup>53</sup>

The definitions of bullying also reflect some of the parameters of other laws. For example, because bullying is akin to harassment, and harassment is unlawful if it is based on a prohibited category and creates a hostile educational environment,<sup>54</sup> a number of anti-bullying laws include acts that “create[] a hostile educational environment” as one definition of what constitutes bullying.<sup>55</sup> Some laws go even further and define a hostile educational environment as one that is created by “substantially interfering with a student’s educational benefits, opportunities, or performance, or with a student’s physical or psychological well-being.”<sup>56</sup>

Once a student has engaged in an act or acts that constitute bullying, the laws call for school intervention. This is where the anti-bullying laws fail to reflect the complexity of the bullying problem and its effects. When bullying occurs, all anti-bullying laws call for the bully to face some sort of discipline or consequences. Of the states, 36 do not identify any consequences or responses tailored to addressing the problem of bullying in particular, and thus they implicitly or explicitly focus the schools’ responses on school exclusion.<sup>57</sup> Of those 36 states, 29 either explicitly or

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52. *E.g.*, IOWA CODE ANN. § 280.28; N.H. REV. STAT. ANN. § 193-F:3.

53. *E.g.*, ALA. CODE § 16-28B-3(2); DEL. CODE ANN. tit. 14, § 4112D.

54. Letter from Arne Duncan, *supra* note 46. The prohibited categories are race, color, national origin, sex, and disability. *Id.*

55. N.J. STAT. ANN. § 18A:37-14; *see also, e.g.*, ARK. CODE ANN. § 6-18-514; CONN. GEN. STAT. ANN. § 10-222d(a)(1); IND. CODE ANN. § 20-33-8-0.2(a).

56. *E.g.*, MD. CODE ANN., EDUC. § 7-424(a)(2)(i) (West 2016). Other statutes, such as North Dakota’s anti-bullying statute, effectively define a hostile education environment without using that term. N.D. CENT. CODE ANN. § 15.1-19-17(1)(a)(i) (West 2016). The North Dakota statute provides that behavior “so severe, pervasive, or objectively offensive that it substantially interferes with the student’s educational opportunities” constitutes bullying. *Id.*; *see also* Letter from Arne Duncan, *supra* note 46.

57. Those states are the following: Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. ALA. CODE § 16-28B-5; ALASKA STAT. ANN. § 14.33.200(b) (West 2016); ARIZ. REV. STAT. ANN. § 15-341(A)(36) (2016); ARK. CODE ANN. § 6-18-514; CAL. EDUC. CODE § 48900 (West 2016) (amended by 2016 Cal. Legis. Serv. 95 (West

implicitly identify school exclusion as the sole or primary method of intervention when bullying takes place.<sup>58</sup> The other seven states' anti-

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(effective Jan. 1, 2017)); CONN. GEN. STAT. ANN. § 10-222d; DEL. CODE ANN. tit. 14, § 4112D(b); FLA. STAT. ANN. § 1006.147(4) (West 2016); GA. CODE ANN. § 20-2-751.4 (West 2016); IDAHO CODE ANN. § 18-917A (West 2016); IOWA CODE ANN. § 280.28; KAN. STAT. ANN. § 72-8256(c) (West 2016); KY. REV. STAT. ANN. § 158.150 (West 2016); MD. CODE ANN., EDUC. § 7-424; MICH. COMP. LAWS ANN. § 380.1311 (West 2016); MINN. STAT. ANN. § 121A.031 (West 2016); MISS. CODE ANN. § 37-11-69 (West 2016); MO. ANN. STAT. § 160.775 (West 2016); MONT. CODE ANN. § 20-5-201(2) (West 2016); NEB. REV. STAT. ANN. § 79-267 (West 2016); N.H. REV. STAT. ANN. § 193-F:4; N.M. CODE R. § 6.12.7.7(c)(5) (LexisNexis 2016); N.Y. EDUC. LAW § 13 (McKinney 2016); N.C. GEN. STAT. ANN. § 115C-407.15(6)(b)(4) (West 2016); N.D. CENT. CODE ANN. § 15.1-19-18(2); OHIO REV. CODE ANN. § 3313.666 (West 2016); OR. REV. STAT. ANN. § 339.356 (West 2016); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A (West 2016); S.D. CODIFIED LAWS § 13-32-16 (2016); TENN. CODE ANN. § 49-6-4503 (West 2016); UTAH CODE ANN. §§ 53A-11a-102, 53A-11a-301 (West 2016); VT. STAT. ANN. tit. 16, § 570 (West 2016); VA. CODE ANN. § 22.1-276.01 (West 2016); W. VA. CODE ANN. § 18-2C-2 (West 2016); WIS. STAT. ANN. § 118.46 (West 2016); WYO. STAT. ANN. § 21-4-312 (West 2016). At least one study has found that generally school culture is resistant to alternatives to school exclusion because staff believe that problem behaviors should be punished, and students with problem behaviors should be served in segregated settings. Linda M. Barbara et al., *Perceived Barriers and Enablers to Implementing Individualized Positive Behavior Interventions and Supports in School Settings*, 25 J. POSITIVE BEHAVIOR INTERVENTIONS 1, 11 (2012). Thus in a state like Virginia, where the bullying statute is part of the student discipline code, or Utah, where the bullying statute calls for student discipline, the research suggests that schools and school culture will lead schools to use school exclusion as the response to bullying.

58. Those states are the following: Alaska, Arkansas, Delaware, Georgia, Idaho, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. ALASKA STAT. ANN. § 14.33.200; ARK. CODE ANN. § 6-18-514; DEL. CODE ANN. tit. 14, § 4112D; FLA. STAT. ANN. § 1006.147; GA. CODE ANN. § 20-2-751.4; IDAHO CODE ANN. § 18-917A; IOWA CODE ANN. § 280; KAN. STAT. ANN. § 72-8256; KY. REV. STAT. ANN. § 158.150; MD. CODE ANN., EDUC. § 7-424; MICH. COMP. LAWS ANN. § 380.1311; MINN. STAT. ANN. § 121A.031; MISS. CODE ANN. § 37-11-67; MO. ANN. STAT. § 160.775; MONT. CODE ANN. § 20-5-201(2); NEB. REV. STAT. ANN. § 79-267; N.M. CODE R. § 6.12.7.7; N.Y. EDUC. LAW § 11; N.C. GEN. STAT. ANN. § 115C-407.15; N.D. CENT. CODE ANN. § 15.1-19-17; OHIO REV. CODE ANN. § 3313.666; OR. REV. STAT. ANN. § 339.356; S.D. CODIFIED LAWS § 13-32-16; TENN. CODE ANN. § 49-6-4503; UTAH CODE ANN. §§ 53A-11a-102, 53A-11a-201; VT. STAT. ANN. tit. 16, § 570; VA. CODE ANN. § 22.1-276.01; WASH. REV. CODE ANN., §

bullying laws both implicitly focus on school exclusion and also identify additional, non-punitive approaches schools can take to address the effects of bullying on the bully, victim, or both, such as referring the involved students for counseling.<sup>59</sup> However, the alternative steps supplement, but do not supplant, the punishment requirement and few, if any, require direct interventions by the schools.<sup>60</sup> Relatively few states expressly identify alternative forms of discipline for bullying that could supplant school exclusion, such as the loss of privileges or extracurricular activities.<sup>61</sup> Only

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28A.300.285 (West 2016); W. VA. CODE ANN. § 18-2C-2; WIS. STAT. ANN. § 118.46; WYO. STAT. ANN. § 21-4-312. In Washington, the statute is at best vague about any responses schools must take when bullying happens. However, the model policy the statute requires be developed calls for corrective measures and contemplates those will include suspensions and expulsions because it refers to the aggressor's appeal rights, which apply to suspensions and expulsions. *Bullying and Harassment (HIB) Toolkit*, OFF. OF SUPERINTENDENT OF PUB. INSTRUCTION, <http://www.k12.wa.us/Safetycenter/BullyingHarassment/default.aspx> [<https://perma.cc/FFY5-ESWK>] (last updated Apr. 13, 2016); WASH. REV. CODE ANN. §§ 28A.600.010, 28A.600.015, 28A.600.020, 28A.600.022.

59. Those states are the following: Alabama, Arizona, California, Connecticut, Florida, New Hampshire, New Jersey, Pennsylvania, and West Virginia. ALA. CODE § 16-28B-5; ARIZ. REV. STAT. ANN. § 15-341; CAL. EDUC. CODE §§ 48900, 48900.5 (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)); CONN. GEN. STAT. ANN. § 10-222d; FLA. STAT. ANN. § 1006.147; N.H. REV. STAT. ANN. § 193-F:4; N.J. STAT. ANN. § 18A:37-15; 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A; W. VA. CODE ANN. § 18-2C-2. Including Arizona in this group might constitute generosity. Arizona's law states that provisions must be made for protecting the health and well-being of students who are harmed by bullying, but it limits those protections to students who are physically harmed. ARIZ. REV. STAT. ANN. § 15-341.

60. ALASKA STAT. § 14.33.200; ARIZ. REV. STAT. ANN. § 15-341; CAL. EDUC. CODE § 48900 (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)); CONN. GEN. STAT. ANN. § 10-222d; FLA. STAT. ANN. § 1006.147; N.H. REV. STAT. ANN. § 193-F:3; N.J. STAT. ANN. § 18A:37-15; 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A; W. VA. CODE ANN. § 18-2C-2.

61. Colorado, Hawaii, Illinois, Indiana, Louisiana, Maine, Massachusetts, Nevada, New Jersey, Oklahoma, and Rhode Island are among them. COLO. REV. STAT. ANN. § 22-32-109.1 (West 2016); HAW. CODE R. § 8-19-6 (LexisNexis 2016); 105 ILL. COMP. STAT. 5/27-23.7(b) (West 2016); LA. REV. STAT. §§ 17:416.13; 14:40.7 (2016); ME. STAT. tit. 20-A, § 6554 (2016); MASS. GEN. LAWS ch. 71, § 370 (2016); NEV. REV. STAT. ANN. § 388.1351 (West 2016); N.J. STAT. ANN. § 18A:37-15(b)(7); OKLA. STAT. tit. 70, § 24-100.4(A)(12) (2016); 16 R.I. GEN. LAWS ANN. § 16-21-34 (West 2016).

two states' anti-bullying laws require that the schools take any steps to address the effects of bullying on the victims.<sup>62</sup>

This legal landscape, with the focus on discipline responses that are not tailored to the problem of bullying, such as school exclusion, reflects a limited response to the complicated problem of bullying. This disparate response calls to mind the quote from psychologist Abraham Maslow, "If the only tool you have is a hammer, [it is tempting] to treat everything as if it were a nail."<sup>63</sup> When the anti-bullying laws require schools to punish the bully, and traditional school discipline is the only identified means for doing so, then it is understandable that schools focus on school exclusion in response to bullying.

### *1. Anti-Bullying Laws that Explicitly or Implicitly Focus on School Exclusion*

Of the 36 states that focus on punishing the bully and using school exclusion as the primary method of punishment, only a few do so explicitly.<sup>64</sup> The remainder of states are more subtle, focusing on school exclusion without specifically naming it in the anti-bullying laws. In the few states that are explicit about school exclusion, anti-bullying laws provide that bullying is a ground for suspension, expulsion, or some other form of school exclusion.<sup>65</sup> Alaska's statute, for example, does not mince

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62. Those states are South Carolina and Texas. S.C. CODE ANN. § 59-63-425 (2016); TEX. EDUC. CODE ANN. § 25:0342 (West 2016). South Carolina's protections are provided only in limited circumstances where a protective order has been granted the victim. S.C. CODE ANN. § 59-63-425.

63. David McRaney, *Maslow's Hammer: Are We Entering a New Phase in Anthropology?*, PSYCHOL. TODAY (Mar. 27, 2012), <https://www.psychologytoday.com/blog/you-are-not-so-smart/201203/maslows-hammer> [<https://perma.cc/BL3F-3RGW>].

64. Those states are Alaska, Georgia, Idaho, and Nebraska. ALASKA STAT. ANN. § 14.33.200; GA. CODE ANN. § 20-2-751.4 (West 2016); IDAHO CODE ANN. §§ 18-917A, 33-205 (West 2016); NEB. REV. STAT. ANN. § 79-267 (West 2016). In addition, Kentucky's anti-bullying law is part of the state's criminal code. KY. REV. STAT. ANN. § 158-150 (West 2016). As bullying in Kentucky is punishable as a misdemeanor, meaning bullying is punishable by confinement not in a penitentiary, which would effectively involve school exclusion, the author includes it in this category. *Id.* § 431.060. Idaho's anti-bullying law is also part of its criminal code, but the punishment does not result in confinement upon conviction. IDAHO CODE ANN. §§ 18-111, 18-917A.

65. ALASKA STAT. ANN. § 14.33.200; GA. CODE ANN. § 20-2-751.4; IDAHO CODE ANN. § 18-917A; KY. REV. STAT. ANN. § 158.150; NEB. REV. STAT. ANN. § 79-267.

words in this respect. It states that schools' anti-bullying policies "must . . . include provisions for an appropriate punishment schedule up to and including expulsion."<sup>66</sup> Although Alaska's law does not make clear what those other appropriate punishments are, it clearly states that expulsion is appropriate and should be considered.<sup>67</sup> Georgia's anti-bullying law goes even further and leaves no room for discretion when using school exclusion in response to bullying. Upon the third instance of bullying by a student in grades 6 through 12, the Georgia anti-bullying law requires "such student [to] be assigned to an alternative school."<sup>68</sup>

Although anti-bullying laws are less explicit in the other states, discipline—often meaning school exclusion—is nonetheless present.<sup>69</sup> In these states, the anti-bullying laws all call for schools to impose "discipline" or "consequences" on students when they bully.<sup>70</sup> In other words, the anti-

66. ALASKA STAT. ANN. § 14.33.200.

67. *Id.*

68. GA. CODE ANN. § 20-2-751.4(b)(1).

69. ALA. CODE § 16-28B-1, *et seq.* (2016); ARIZ. REV. STAT. ANN. § 15-341 (2016); ARK. CODE ANN. § 6-18-514 (West 2016); CAL. EDUC. CODE § 48900 (West 2016) (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)); CONN. GEN. STAT. ANN. § 10-222d (West 2016); DEL. CODE ANN. tit. 14, § 4112D (West 2016); FLA. STAT. ANN. § 1006.147 (West 2016); IOWA CODE ANN. § 280 (West 2016); KAN. STAT. ANN. § 72-8256 (West 2016); MD. CODE ANN., EDUC. § 7-424 (West 2016); MICH. COMP. LAWS ANN. § 380.1310b (West 2016); MINN. STAT. ANN. § 121A.031 (West 2016); MISS. CODE ANN. § 37-11-67 (West 2016); MO. ANN. STAT. § 160.775 (West 2016); Bully-Free Montana Act, 2015 Mont. Laws 253 (codified at MONT. CODE ANN. § 20-5-207 through § 20-5-210 (West 2016)); N.H. REV. STAT. ANN. § 193-F:3 (2016); N.J. STAT. ANN. § 18A:37-15 (West 2016); N.M. CODE R. § 6.12.7.7 (LexisNexis 2016); N.Y. EDUC. LAW § 11 (McKinney 2016); N.C. GEN. STAT. ANN. § 115C-407.15 (West 2016); N.D. CENT. CODE ANN. § 15.1-19-17 (West 2016); OHIO REV. CODE ANN. § 3313.666 (West 2016); OR. REV. STAT. ANN. § 339.356 (West 2016); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A (West 2016); S.D. CODIFIED LAWS § 13-32-16 (2016); TENN. CODE ANN. § 49-6-4502 (West 2016); UTAH CODE ANN. §§ 53A-11a-102, 53A-11a-201 (West 2016); VT. STAT. ANN. tit. 16, § 570 (West 2016); VA. CODE ANN. § 22.1-276.01 (West 2016); WASH. REV. CODE ANN. § 28A.300.285 (West 2016); W. VA. CODE ANN. § 18-2C-2 (West 2016); WIS. STAT. ANN. § 118.46 (West 2016); WYO. STAT. ANN. § 21-4-312 (West 2016).

70. For example, Ohio's statute requires schools to have a "disciplinary procedure for any student guilty of . . . bullying." OHIO REV. CODE ANN. § 3313.666. Vermont's statute calls for "consequences or appropriate remedial action." VT. STAT. ANN. tit. 16, § 570c(5). Again, although not every statute uses the precise language "discipline" or "consequences," the states use similar and similarly vague, apparently discretionary language. For example, in Washington, the model anti-bullying policy

bullying laws in these states call for schools to discipline the bully, and by failing to provide any potential methods for accomplishing this discipline, the laws indicate that schools need to respond to bullying in the same way that the schools respond to any other form of student discipline. Nationwide statistics show that school administrators respond to serious student disciplinary problems by excluding students from school.<sup>71</sup> Across the country, the number of suspensions has more than doubled since the 1970s.<sup>72</sup> In 2011–2012, the years for which aggregate disciplinary numbers are most recently available, there were almost 3,200,000 suspensions and more than 110,000 expulsions.<sup>73</sup> School exclusion is happening at such high rates that the National School Boards Association has called the situation a “crisis.”<sup>74</sup> Although school discipline statistics do not disaggregate on the

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calls for “corrective measures.” *Featured Policies*, WASH. ST. SCH. DIRECTORS’ ASS’N, <http://www.wssda.org/PolicyLegal/FeaturedPolicies.aspx> [<https://perma.cc/DV3G-8ULA>] (last visited Jan. 30, 2016) (follow the “Procedure” hyperlink under “3207–Prohibition of Harassment, Intimidation and Bullying (including Cyberbullying)”). *See also Bullying and Harassment (HIB) Toolkit*, *supra* note 58; WASH. REV. CODE ANN. §§ 28A.600.010, 28A.600.015, 28A.600.020, 28A.600.022. In Wyoming, the statute prohibits bullying in school, thus making it a violation of the school rules. It does not state specifically that students are therefore subject to discipline, but any violation of a school rule can result in discipline, including suspensions and expulsions. U.S. DEPT. OF EDUC., COMPENDIUM OF SCHOOL DISCIPLINE LAWS AND REGULATIONS FOR THE 50 STATES, DISTRICT OF COLUMBIA, AND UNITED STATES TERRITORIES 4111 (2016), <http://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf> [<https://perma.cc/BYL2-9VA3>] [hereinafter COMPENDIUM]. Indeed, some bullying laws simply direct schools to the student code of conduct to determine the disciplinary measures that should be imposed when students bully. *Id.* As noted above, although Kentucky and Idaho’s anti-bullying laws do not call for school exclusion, the consequences for bullying there can be even more serious than the ones required in Georgia. McRaney, *supra* note 63 and accompanying text.

71. MICHAEL PLANTY ET AL., U.S. DEPT. OF EDUC., *THE CONDITION OF EDUCATION 2009*, at 70 (2009), <http://nces.ed.gov/pubs2009/2009081.pdf> [<https://perma.cc/7D8X-5AXT>].

72. Perry & Morris, *supra* note 5, at 1070.

73. Nat’l Ctr. for Educ. Statistics, *Table 233.30*, DIG. OF EDUC. STATS., [https://nces.ed.gov/programs/digest/d15/tables/dt15\\_233.30.asp](https://nces.ed.gov/programs/digest/d15/tables/dt15_233.30.asp) [<https://perma.cc/EK8N-62J9>] (last visited Dec. 13, 2016).

74. NAT’L SCH. BDS. ASS’N, *ADDRESSING THE OUT-OF-SCHOOL SUSPENSION CRISIS 2* (2013), <https://www.nsba.org/sites/default/files/0413NSBA-Out-Of-School-Suspension-School-Board-Policy-Guide.pdf> [<https://perma.cc/Q7TE-R89T>] (stating that during the 2009–2010 school year, 3.3 million students were issued out-of-school suspensions).

basis of bullying, given the increase in school exclusion as a method of school discipline, there is little reason to think that schools will treat an incidence of bullying any differently than they do any other school disciplinary matter, especially when lacking any guidance in the anti-bullying laws for responding differently.<sup>75</sup> It stands to reason, then, that even in the states that allow for schools to use their discretion in imposing consequences or discipline when bullying occurs, schools will use the methods of school exclusion that they increasingly have used.

Additionally, to the extent schools in these states have any guidance with respect to how to respond to bullying, guidance is found in general student discipline laws and regulations.<sup>76</sup> The only methods of discipline

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75. The statistics that disaggregate the rise in suspensions and expulsions do disaggregate based on type of offense—the number of offenses in the disaggregation is small and does not include bullying. Nat'l Ctr. for Educ. Statistics, *Table 233.10*, DIG. OF EDUC. STATS., [https://nces.ed.gov/programs/digest/d15/tables/dt15\\_233.10.asp](https://nces.ed.gov/programs/digest/d15/tables/dt15_233.10.asp) [<https://perma.cc/T3YE-FUH3>] (last visited Dec. 13, 2016). Although it can be argued that perhaps these numbers of suspensions and expulsions do not implicate bullying on a large scale because the statistics do not disaggregate on the basis of bullying, it is hard to imagine given the implicit and sometimes explicit focus on school exclusion in the anti-bullying laws that they do not. To illustrate the go-to nature of school exclusion in the eyes of schools, one need only look to one school's response to why they should not be liable for student-on-student gender-based harassment in the case of *Davis v. Monroe County Board of Education*. 526 U.S. 629 (1999). There the school argued they should not be liable for such harassment under Title IX because then in order to prevent such liability, schools would have to then require “nothing short of expulsion of every student accused of misconduct involving sexual overtones.” *Id.* at 648 (quoting Brief for Respondents at 16, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843), 1998 WL 847573). The Supreme Court made clear that such measures were not required to avoid liability and the schools only needed to “respond . . . in a manner that is not clearly unreasonable.” *Id.* at 649. That the schools argued expulsion was their only recourse demonstrates that it serves as their go-to response when confronted with serious student disciplinary problems like harassment, which bears a strong relationship to, and sometimes overlaps with, bullying.

76. In part, school discipline laws single out school exclusion because they implicate students' procedural due process rights. In *Goss v. Lopez*, the Supreme Court concluded that schools cannot suspend and expel students from school without at least some minimal due process. 419 U.S. 565, 580–81 (1975). Following *Goss*, states discipline laws spell out the process required before schools can suspend or expel students. For example, North Carolina has a subsection of its education code devoted to school discipline procedures, but they cover suspensions, expulsions, and subsequent readmissions. N.C. GEN. STAT. ANN. § 115C-390.1-393 (2016). By singling out specific disciplinary measures

identified in the general student discipline laws in these states are methods of school exclusion.<sup>77</sup> Imagine that a principal or other school administrator in one of these states was to consider what punishment to use in the face of a serious case of bullying. Looking at the potential options in the relevant state disciplinary rules, that administrator would find school exclusion methods as the only identified options for addressing serious student disciplinary issues. It would be reasonable for that administrator to conclude that school exclusion is an appropriate, and perhaps the most appropriate, response to address a serious problem. Given the lack of alternative methods for addressing serious bullying, school exclusion can look like the only option.

Admittedly, in some of these states that call for schools to simply impose “discipline” or “consequences” on the bully, the anti-bullying laws also identify some other interventions that schools could use in addition to punishing the bully.<sup>78</sup> However, all of these interventions are discretionary and do not relieve schools of their responsibility to punish the bully. Furthermore, the additional interventions identified in these nine states’ anti-bullying laws require little of the schools in terms of providing any actual services to students. For example, in New Jersey, schools “may” provide intervention services or order counseling.<sup>79</sup> In California, schools “may refer” the bully or victim for counseling.<sup>80</sup> In Florida, schools need

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without identifying any others, the laws not only follow Goss’s requirements, they also suggest the appropriateness of school exclusion as a response.

77. All states have laws that define the meaning of certain methods of school exclusion. The laws usually define “long-term suspension” and “expulsion,” as well as the process required for excluding a student from school by suspension and expulsion. *See generally* COMPENDIUM, *supra* note 70.

78. The states with those alternatives are Alabama, Arizona, California, Connecticut, Florida, New Hampshire, New Jersey, Pennsylvania, and West Virginia. ALA. CODE § 16-28B-5 (2016); ARIZ. REV. STAT. ANN. § 15-341 (2016); CAL. EDUC. CODE § 48900.9 (West 2016) (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)); CONN. GEN. STAT. ANN. § 10-222d (West 2016); FLA. STAT. ANN. § 1006.147 (West 2016); N.H. REV. STAT. ANN. § 193-F:4 (2016); N.J. STAT. ANN. § 18A:37-15(b)(7) (West 2016); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303.1-A (West 2016); W. VA. CODE ANN. § 18-2C-3 (West 2016). Including Alabama in this list is arguably generous. The Alabama statute requires a graduated set of consequences for bullying, which could include alternatives to school exclusion, but the statute does not explicitly call for or require them. ALA. CODE § 16-28B-5.

79. N.J. STAT. ANN. § 18A:37-15(b)(6).

80. CAL. EDUC. CODE § 48900.9 (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)).

to have a procedure for referring victims of bullying to counseling.<sup>81</sup> Significantly, though, a referral for counseling amounts to little more than providing the student or the student's parents with information. It does not mean that a victim of bullying will receive counseling. Thus, despite language invoking alternative forms of interventions, the anti-bullying laws in those states effectively require little or no direct intervention by the schools other than traditional discipline, often meaning school exclusion, for the bully.

### *2. Anti-Bullying Laws that Identify Alternatives to School Exclusion*

Only a few states' anti-bullying laws specifically identify some alternative consequence for the bully that could serve as a guide for schools and could supplant school exclusion as a disciplinary method.<sup>82</sup> Two additional states require schools to take affirmative steps to protect the victim.<sup>83</sup> In the states that identify alternative forms of discipline in their anti-bullying laws, some single out methods such as the loss of privileges or extracurricular activities as disciplinary methods schools could use to address bullying.<sup>84</sup> Others suggest a broader range of possibilities.<sup>85</sup> Illinois's anti-bullying law suggests schools can respond to bullying by providing social work services, mediation, restorative justice, and skill building and counseling, among other methods.<sup>86</sup> Although not all of these options may be effective, and indeed some are not effective in the bullying context, the laws in these states at least offer alternative—though still bully-focused—approaches for schools to consider other than school exclusion.<sup>87</sup>

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81. FLA. STAT. ANN. § 1006.147(4)(j).

82. COLO. REV. STAT. ANN. § 22-32-109.1 (West 2016); HAW. CODE R. § 8-19-2 (LexisNexis 2016); 105 ILL. COMP. STAT. 5/27-23.7 (West 2016); IND. CODE ANN. § 20-33-8-0.2 (West 2016); LA. REV. STAT. §§ 14:40.7, 17:416 (2016); ME. STAT. tit. 20-A, § 6554 (2016); MASS. GEN. LAWS ch. 71, § 370 (2016); NEV. REV. STAT. ANN. § 388.123 (West 2016); OKLA. STAT. tit. 70, § 24-100.4 (2016); R.I. GEN. LAWS ANN. § 16-21-34 (West 2016).

83. S.C. CODE ANN. § 59-63-425 (Supp. 2013); TEX. EDUC. CODE ANN. § 37.0342 (West 2016).

84. Hawaii, for example, cites a range of potential consequences including loss of privileges and parent conferences. HAW. CODE R. § 8-19-6.

85. Colorado's statute identifies mediation, restorative justice, and counseling as options for responding to bullying. COLO. REV. STAT. ANN. § 22-32-109.1.

86. 105 ILL. COMP. STAT. 5/27-23.7.

87. Some of the alternative methods for addressing bullying in these laws can be counter-productive. *Infra* Part III.A.

In South Carolina and Texas, the anti-bullying laws give victims affirmative rights to an intervention addressing bullying. Specifically, victims in South Carolina and Texas have the right to transfer schools because of bullying.<sup>88</sup> However, in South Carolina, that victim-transfer right only exists if a court orders it.<sup>89</sup> In Texas, the right is not so limited. If a parent of a victim of bullying requests that the victim be transferred to a new school, the law requires the transfer to occur.<sup>90</sup>

The states that offer alternative approaches to discipline in their anti-bullying laws or that require schools to assist the victim represent fewer than a quarter of the states. Of course, the punitive approach to bullying in general, and school exclusion in particular, has its appeal. Certainly there is value in teaching students who bully a lesson by way of discipline. If nothing else, it teaches that the behavior is unacceptable. To the extent that schools punish students who bully through school exclusion, the schools at least theoretically stop the bullying from occurring in the short-term.<sup>91</sup> The point of this discussion is not to deny that the approach in the anti-bullying laws lacks some appeal. Instead, the point is simply to explain that the approach is limited and focused on school exclusion. However, the punitive, school-exclusion focused approach to bullying does have its problems.

## II. STUDENT SPEECH AND SCHOOLS' AUTHORITY TO SUPPRESS IT

Not only are the anti-bullying laws limited in their response to bullying, but the laws also often implicate the First Amendment. Much of the bullying that occurs among students is verbal or written, including electronic writings and postings.<sup>92</sup> That is, most bullying constitutes speech. One study found that verbal bullying occurred more than twice as often as physical bullying.<sup>93</sup> When public schools impose consequences

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88. S.C. CODE ANN. § 59-63-425; TEX. EDUC. CODE ANN. § 25:0342.

89. S.C. CODE ANN. § 59-63-425.

90. TEX. EDUC. CODE ANN. § 25:0342.

91. This effect is more dubious in the case of cyberbullying, which can occur anywhere. Even if a bully is removed from school, the bully can still send bullying messages electronically. If the victim receives those messages at school, then the bullying has at least in part happened at school.

92. Wang et al., *supra* note 25, at 372.

93. *Id.* The same study found that social, or relational, bullying, which includes behaviors such as spreading rumors, also occurs more than twice as frequently as physical bullying. *Id.* In addition, 13.6% reported experiencing cyberbullying, which occurs in electronic written form. *Id.* Of the students surveyed in that study, all of whom were ages six to ten, 53.6% reported

on students who engage in bullying, the schools are often suppressing student speech. Therefore, those consequences and the laws that allow for them implicate the First Amendment.<sup>94</sup> To impose any consequences for bullying that is speech, schools then must satisfy First Amendment constraints.

In assessing the application of the First Amendment in the public school context, the Supreme Court has provided schools more latitude to suppress student speech than other state actors.<sup>95</sup> However, that latitude is not unlimited. Laws calling for the suppression of student speech are still subject to First Amendment limits based on overbreadth and must comply with even the deferential standards for the suppression of student speech.<sup>96</sup> In describing those standards, this Part also explores the rationale for the deference afforded schools and the analytic framework that forms that rationale. That rationale and the framework for it serve not only an important explanatory function, but also as a point for analysis itself.

#### *A. Overly Broad Restrictions on Student Speech*

Statutes giving schools authority to suppress student speech for disciplinary purposes can run afoul of the First Amendment on the basis of overbreadth.<sup>97</sup> A law facially violates the First Amendment because of overbreadth if “there is a ‘likelihood that the statute’s very existence will inhibit free expression’ by ‘inhibiting the speech of third parties who are

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experiencing verbal bullying, and 51.4% reported experiencing social bullying. *Id.* A comparatively small percentage of students, 20.8%, reported physical bullying. *Id.* Although 20% of students reporting physical bullying still represents a large number, and even a small percentage of students experiencing physical bullying is too many, the number pales in comparison to the number of students who report experiencing bullying in verbal, written, or electronic form.

94. At first blush, it may seem disconcerting to think that bullying could be protected speech at all. Certainly a reasonable reaction to speech that is as harmful as bullying is that it cannot possibly be protected under the First Amendment. However, bullying restrictions limit speech on the basis of its content, and the First Amendment requires that content-based restrictions undergo strict scrutiny. *U.S. v. Alvarez*, 132 S.Ct. 2537, 2543–44 (2012); Barry McDonald, *Regulating Student Cyberspeech*, 77 MO. L. REV. 727, 731 (2012).

95. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (holding that school authorities may suppress speech if the speech would reasonably lead them to “forecast substantial disruption of or material interference with school activities”).

96. *Infra* Part II.A–B.

97. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)).

not before the Court.”<sup>98</sup> In addition, “the overbreadth must be ‘not only real but substantial in relation to the statute’s plainly legitimate sweep.’”<sup>99</sup> Before concluding a law is overbroad on these bases, a court must determine first “whether it is susceptible to a reasonable limiting construction” and in so doing “every reasonable construction must be resorted to.”<sup>100</sup>

Using these standards, the Third Circuit assessed an early anti-bullying law in *Saxe v. State College Area School District* and struck down the law prohibiting harassment in schools as overbroad and vague.<sup>101</sup> The law prohibited “verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student’s educational performance or creating an intimidating, hostile or offensive environment.”<sup>102</sup> Students whose Christian beliefs held homosexuality immoral and called for them to speak out about it challenged the law.<sup>103</sup>

The Third Circuit concluded that the law was unconstitutionally overbroad for several reasons. First, it covered unwelcomed conduct or speech based on characteristics not protected by federal law, such as personal characteristics like appearance, regardless of whether that speech was political or religious.<sup>104</sup> Second, it prohibited speech that had the “purpose” of harassing regardless of whether it rose to the level of harassment.<sup>105</sup> As such, it banned what could amount to simple name-calling. Simple name-calling is protected, if “odious,” speech.<sup>106</sup> Third, it banned speech no matter where it occurred, including private speech that simply “happens to occur on the school premises.”<sup>107</sup>

Nonetheless, the court also considered whether the law could be subject to any limiting construction that might save it from being struck down on overbreadth grounds or met the deferential standards applied to school suppression of student speech or could be saved as applied.<sup>108</sup> With

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98. *Id.*

99. *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

100. *Id.* at 215.

101. *Id.* at 201.

102. *Id.* at 202.

103. *Id.* at 215.

104. *Id.*

105. *Id.* at 216–17.

106. *Id.* at 210.

107. *Id.* at 216 (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

108. *Id.* at 215.

respect to overbreadth, the court stated that even under the narrowest construction of the law, it prohibited “(1) verbal or physical conduct (2) that is based on one’s actual or perceived personal characteristics and (3) that has the purpose or effect of either (3a) substantially interfering with a student’s educational performance or (3b) creating an intimidating, hostile, or offensive environment.”<sup>109</sup> Because even this construction still allowed for the suppression of speech unprotected by federal law, irrespective of whether it rose to the level of harassment and wherever it occurred, the court concluded that the law failed on overbreadth grounds. The court also concluded that the law could not be saved as applied because it did not comport with the standards for school suppression of student speech as set forth in *Tinker v. Des Moines Independent School District* or any of the ensuing Supreme Court cases allowing for the suppression of certain kinds of student speech.<sup>110</sup> Therefore, the court struck the law down as unconstitutional.

*B. The Deferential Standards for the Suppression of Student Speech by the Public Schools*

Although the Supreme Court has decided several First Amendment cases in the school context, four of them directly address student-generated speech. Of those four, *Tinker* sets the general standard and courts have treated the rest as exceptions to that standard.<sup>111</sup> As *Saxe* suggests, even laws directing schools to suppress speech can be overbroad, but nonetheless constitutional, if they are saved, at least as applied, by the *Tinker* test or one of its exceptions set forth in its progeny. The review of the cases that follow includes not only an analysis of the deferential standards for the suppression of student speech, but also the bases for that deference because they are inextricably related.

*I. Tinker v. Des Moines Independent Community School District*

In *Tinker v. Des Moines Independent Community School District*, the Supreme Court famously declared that students do not “shed their constitutional rights . . . at the schoolhouse gate.”<sup>112</sup> At the same time, though, the Court made clear that those constitutional rights are not coextensive with constitutional rights in other contexts.<sup>113</sup> The Court’s

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109. *Id.* at 216.

110. *Id.* at 215.

111. *See, e.g., Saxe*, 240 F.3d 200.

112. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969).

113. *Id.*

rationale for finding that students do not enjoy full constitutional protections in schools lies in its understandings of the work of the schools.

The *Tinker* case arose in the midst of the Vietnam War. The students in the case, John and Mary Beth Tinker, then ages 15 and 13, respectively, and a third student, Christopher Eckhardt, then age 16, objected to the war.<sup>114</sup> To demonstrate their objections, the three wore black armbands to school in violation of a school policy prohibiting the wearing of armbands.<sup>115</sup> As a result, the principals of their schools suspended them until they came to school without the armbands.<sup>116</sup> Mary Beth, John, and Christopher appealed their suspensions on First Amendment grounds.<sup>117</sup>

The Supreme Court found that the schools violated the students' First Amendment rights.<sup>118</sup> In so finding, it set forth a standard for when those First Amendment rights could be infringed on by schools. The Court held that schools cannot suppress student speech without "reason to anticipate that [the speech] would substantially interfere with the work of the school or impinge upon the rights of other students."<sup>119</sup> Noting that the school cannot suppress student speech merely on the basis of an "undifferentiated fear or apprehension of disturbance," it found no substantial interference with the schools' work on the facts in *Tinker* and overturned lower court decisions upholding the schools' actions.<sup>120</sup>

That schools can suppress student speech if the schools anticipate that it will cause a substantial disruption or impinge on other students' rights means that the schools have more authority to limit student speech than do other state entities.<sup>121</sup> Outside the school context, the government cannot suppress speech simply because it might be disruptive.<sup>122</sup> However, in schools, the Court has held that students' constitutional rights, and specifically in *Tinker* their First Amendment rights, are "applied in light

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114. *Id.* at 504.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 513–14.

119. *Id.* at 509.

120. *Id.*

121. The Supreme Court is particularly explicit about this point in the subsequent student speech case, *Morse v. Frederick*, where it states the constitutionally suppress-able lewd speech given by a student in that case "outside the school context . . . would have been protected." 551 U.S. 393, 405 (2007).

122. Generally, speech cannot be suppressed unless it falls into a protected category. *See supra* note 94 and accompanying text.

of the special characteristics of the school.”<sup>123</sup> Herein lies the Court’s basis for finding that students do not enjoy the full force of the Constitution’s First Amendment protections in school—the “special characteristics” of school. The public schools, then, effectively have enhanced authority to suppress student speech because of their special characteristics. Schools can use that authority when they have “reason to anticipate that [the speech] would substantially interfere with the work of the school or impinge on the rights of other students.”<sup>124</sup> However, anticipating these events is a trigger for the authority’s use, not its basis. The schools’ special characteristics provide that basis.

The Court also identified in *Tinker* some of what it understands those special characteristics to be. The Court said that schools are “educating the young for citizenship.”<sup>125</sup> It also stated that schools are the “marketplace of ideas” and places where students will participate in a “robust exchange of ideas.”<sup>126</sup> Finally, the Court made clear that this exchange of ideas is not one that is “confined to the supervised and ordained discussion which takes place in the classroom.”<sup>127</sup> Instead, “[t]he principal use to which the schools are dedicated is to accommodate students . . . for the purpose of certain types of activities,” including “personal intercommunication” be that “in the cafeteria, or on the playing field, or on the campus.”<sup>128</sup> Thus, in *Tinker* the Court made clear that it understands schools’ roles to be broader than just academic, and that those roles justify the deference schools have to suppress student speech.

## 2. *The Post-Tinker Cases*

The Supreme Court has decided three student speech cases since *Tinker*.<sup>129</sup> These cases, *Bethel School District v. Fraser*, *Hazelwood*

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123. *Tinker*, 393 U.S. at 506. The Court has also since found that other constitutional rights are not applied with the same force in school, including Fourth Amendment rights. For example, in *New Jersey v. T.L.O.*, the Court concluded that a student’s Fourth Amendment rights protecting them from unreasonable searches are lesser in the school context. 469 U.S. 325, 340–41 (1985).

124. *Tinker*, 393 U.S. at 509.

125. *Id.* at 507 (quoting *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943)).

126. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1937)).

127. *Id.*

128. *Id.* at 512–13.

129. The Court also decided two other First Amendment school case post-*Tinker*, *Ambach v. Norwick* and *Board of Education v. Pico*. However, those cases did not involve the suppression of student speech. *Ambach v. Norwick*, 441 U.S. 68 (1979); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

*School District v. Kuhlmeier*, and *Morse v. Frederick*, depart from *Tinker* in that the cases assess school authority to suppress a particular type or category of speech.<sup>130</sup> In each case, the Court found that schools have the authority to suppress certain types of speech categorically without regard for whether the speech would cause a substantial disruption or be injurious to the rights of others and all for reasons relating to the work that the Court understands schools to do and the type of speech involved.<sup>131</sup>

In *Bethel School District v. Fraser*, the Court upheld the suspension of a student, Matthew Fraser, for giving a lewd speech at school.<sup>132</sup> Fraser challenged his suspension on First Amendment grounds. The district court and the Ninth Circuit found that the suspension violated his First Amendment rights.<sup>133</sup> The Supreme Court overturned the lower courts' decisions. It concluded that schools could suppress lewd student speech as a categorical matter without respect to whether it could cause the schools to anticipate a substantial disruption or be injurious to the rights of others.<sup>134</sup> To the point, the Court stated, "The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission."<sup>135</sup>

In the process, the Court again noted that students' First Amendment rights are different and lesser than individuals' rights outside of school, albeit without specifically referring to schools' special characteristics.<sup>136</sup> Nevertheless, to justify the categorical suppression of student lewd speech, the Court relied on its understanding of the schools' work. The Court said that the purpose of public schools is "the inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."<sup>137</sup> It also identified some of those values as it perceives them. The Court said those values "must, of course, include tolerance of divergent political and religious views," and they "must also take into account consideration of the sensibilities of others."<sup>138</sup> In addition to elaborating on some of the

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130. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 551 U.S. 393 (2007).

131. *Fraser*, 478 U.S. at 685–86 (obscene language); *Hazelwood*, 484 U.S. at 272–73 (school-sponsored speech); *Morse*, 551 U.S. at 396–97 (language reasonably understood to encourage illegal drug use).

132. *Fraser*, 478 U.S. 675.

133. *Id.* at 676.

134. *Id.* at 687.

135. *Id.* at 685.

136. *Id.*

137. *Id.* at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979)).

138. *Id.*

specific values schools “must” be teaching, the Court also identified other teaching functions of schools.<sup>139</sup> It stated that society has an interest in having students learn “the boundaries of socially appropriate behavior” because “a democratic society requires consideration for the personal sensibilities . . . of other[s].”<sup>140</sup>

Two years later, in *Hazelwood School District v. Kuhlmeier*, a school principal deleted two stories from a school newspaper, one about student pregnancy and the other about divorce.<sup>141</sup> Three student newspaper staff members challenged the deletion of the stories, arguing the action violated their First Amendment rights.<sup>142</sup> In upholding the actions of the principal against the First Amendment challenge, the Court relied on a distinction between when the First Amendment requires schools to tolerate student speech and when it requires schools to promote or endorse it.<sup>143</sup> In the case of the latter category of speech, the Court concluded that schools have even more authority under the First Amendment to suppress student speech than when the school is merely tolerating student speech.<sup>144</sup> As long as the suppression of speech in school-sponsored expressive activities is “reasonably related to legitimate pedagogical concerns,” it does not offend the First Amendment.<sup>145</sup> Finding that the deletion of the articles in the school newspaper met that standard, the Court held the principal’s actions constitutional.<sup>146</sup> Here too, the Court asserted the notion that “the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings,’ and must be ‘applied in light of the special characteristics of the school environment.’”<sup>147</sup> *Kuhlmeier* thus reflects the significance of this rationale regarding the characteristics and work of the public schools on the Court’s jurisprudence regarding school authority to suppress student speech.

The Court’s most recent student speech case, *Morse v. Frederick*, is perhaps more famously known as the “bong hits for Jesus” case because the student in the case, Joseph Frederick, held up a banner that said “BONG HiTS 4 JESUS” while attending the Olympic torch relay with his

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139. *Id.*

140. *Id.*

141. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263–65 (1988).

142. *Id.* at 264.

143. *Id.* at 271–73.

144. *Id.*

145. *Id.* at 273.

146. *Id.* at 275–76.

147. *Id.* at 266 (quoting *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

classmates during the school day.<sup>148</sup> When the principal, Deborah Morse, told Frederick to take the banner down, he refused and was suspended.<sup>149</sup> Frederick appealed the suspension, arguing it violated his First Amendment rights.<sup>150</sup> The Supreme Court ultimately disagreed, though its holding was narrow.<sup>151</sup> The Court determined that schools are allowed under the First Amendment “to restrict student expression that they reasonably regard as promoting illegal drug use.”<sup>152</sup>

In *Morse*, the Court was explicit about the nature of schools’ work and its relationship to the deference the schools receive to categorically suppress a particular type of student speech—student drug-promoting speech.<sup>153</sup> The Court stated that the school’s role and “governmental interest in stopping student drug abuse” more specifically allows schools to prohibit speech like Frederick’s.<sup>154</sup> The Court noted that both Congress and “thousands of school boards throughout the country—including [Frederick’s]—have adopted policies aimed at” educating students about the dangers of drug use.<sup>155</sup> Those policies coupled with strong evidence of the reality and seriousness of student drug abuse led the Court to view schools as having a role in preventing drug use and in “working to protect those entrusted to their care from the dangers of drug abuse.”<sup>156</sup> Thus, while the holding and rationale are limited, the Court still indicated that when a danger, like drug abuse, is real and pervasive, and when local and federal governments have adopted strong policies aimed at addressing the problem, it understands schools as having a legitimate role in working to address the problem and therefore can suppress student speech as a means of fulfilling it.

*C. Deconstructing Deference: The Relationship Between the Supreme Court’s Understanding of Schools’ Work and Public Schools’ Deference to Suppress Student Speech*

*Morse*, similar to *Fraser* and *Tinker* before it, demonstrates that the Supreme Court’s understanding of schools’ work is a critical component of its rationale for affording schools deference in suppressing student

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148. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

149. *Id.* at 398.

150. *Id.* at 399.

151. *Id.* at 409.

152. *Id.* at 408.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

speech.<sup>157</sup> However, the schools' role is not the only piece of the analysis that gives rise to this deference. These student speech cases, with the possible exception of *Kuhlmeier*, follow a particular analytic framework that involves not just a reliance on a particular understanding of schools' work, but also an analysis of the schools' role with respect to a general or a particular category of speech. That relationship provides the justification for the amount of deference that schools receive to suppress the speech.<sup>158</sup>

Thus, in *Tinker*, the Court analyzed student speech that expressed a viewpoint—any viewpoint—and schools' role, as the Court understood it, with respect to students' expression of views. The Court said that schools' roles generally involved educating students for participation as citizens in the democratic political system.<sup>159</sup> To this end, the Court noted that classrooms serve as a marketplace for ideas—places where students can exchange ideas and express views just as citizens debate politics.<sup>160</sup> In *Tinker*, the Court acknowledged that to carry out this teaching schools also

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157. This analysis regarding the Court's basis for giving deference to schools builds upon other work analyzing deference more generally. Paul Horwitz, in his piece providing, among other things, a taxonomy of deference, notes that the Supreme Court has justified deference to schools on the basis of the "expertise of educators." Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1088 (2008) (arguing for the need to fully understand deference and how it is used in order to recognize how it has been misused). See also Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 455–58 (1999). The analysis here further deconstructs the basis for the deference given to schools and argues that the general expertise of educators alone does not justify it, but their expertise as related to particular work the Court understands them to do.

158. In this context, the Court has consistently found that schools are, as James Ryan has put it, unique and thus the need latitude to suppress student speech. James E. Ryan, *The Supreme Court and Schools*, 86 VA. L. REV., 1335, 1342–43 (2000). In so identifying the Court's conception of schools, Ryan also analyzes how and why it is not always the case that the Court treats schools as unique. That is, in some contexts the Court does not give schools deference to suppress student rights. Ryan cites Establishment Clause cases as an example of when student rights are as protected in school than they would be outside of school. *Id.* at 1380. Ryan argues the Court has distinguished between schools' academic and social functions and contends the Court gives schools more authority to carry out their academic functions. *Id.* at 1384–85. When they are carrying out social functions, Ryan argues that the Court allows schools no added authority. *Id.*

159. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507, 512 (first quoting *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943); and then quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (quoting *Ambach v. Norwich*, 441 U.S. 68, 76–77 (1979)).

160. See *Tinker*, 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603).

need to maintain order.<sup>161</sup> Thus, the Court balanced two of the schools' roles—their role in maintaining order in school and their role in teaching students to participate as citizens in the democracy—with the type of speech—generally expressive speech. Given the type of speech and the Court's understanding of the schools' role in relation to it, the Court allowed schools to suppress student speech only if schools could anticipate that it would substantially disrupt their work or be injurious to the rights of others. *Tinker* also provided the general standard for the suppression of student speech because the case did not analyze a particular type of speech or expression. Rather, it simply addressed student expression in general. Thus, courts have applied the *Tinker* standard as the general standard in student speech cases.<sup>162</sup> The Court's subsequent student speech cases, which assess school suppression of particular types of speech, serve as exceptions to the *Tinker* standard.<sup>163</sup>

In *Fraser*, the Court described two specific school functions as they related to a particular category of speech, lewd student speech, and used that relationship as a basis for giving schools a certain amount of deference, categorical deference, to suppress that lewd speech. First, the Court explained that schools provide instruction in “fundamental values of ‘habits and manners of civility.’”<sup>164</sup> It went further to state specifically that the values schools must teach are “tolerance of divergent political and religious views” and “consideration of the sensibilities of others.”<sup>165</sup> Second, the Court also said that society has an interest in schools teaching students “the boundaries of socially appropriate behavior.”<sup>166</sup> Consequently, the Court concluded that schools have the authority to suppress all lewd speech by students.<sup>167</sup> The nature and necessity of teaching these values and skills in addition to the role of schools, given the type of speech, justifies the deference to suppress the student speech as a categorical matter, irrespective of whether it is disruptive or injurious.

Similarly, in *Morse*, the Court identified a particular role for schools as it relates to a particular category of speech—drug-promoting speech—that justified deference to schools to suppress it categorically.<sup>168</sup> In the context of the problem of illegal drug use, the Court identified schools as having

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161. *Id.*

162. *Infra* note 234 and accompanying text.

163. *Supra* Part II.B.2.

164. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Morse v. Frederick*, 551 U.S. 393, 396–97 (2007).

a protective role over students.<sup>169</sup> It stated that schools have this role because of three factors, one involving the nature of the drug problem and two involving the policy response to it.<sup>170</sup> First, the drug problem was widespread.<sup>171</sup> Second, the federal government had policies placing responsibility for combatting the drug problem on schools.<sup>172</sup> Third, local school districts had also all developed policies to combat the drug problem.<sup>173</sup> As schools have this protective function in the context of the problem of illegal drug use, the Court concluded that schools are to be given the deference to categorically suppress a particular type of speech—drug-promoting speech—without regard for whether it might cause a disruption in school or injure another’s rights.

Thus, a strong relationship exists between the Court’s understanding of schools’ work vis-à-vis the type of student speech and the deference it gives schools to suppress that student speech. Although the Court has never prescribed any particular role for the schools, and arguably can never do so, the Court’s understanding of schools’ roles as they relate to general or specific types of student speech provides the basis for the amount of deference schools receive to suppress that speech. Therefore, in these student speech cases, the Court not only adopts this framework in which the deference afforded the schools to suppress speech depends on the type of speech and the schools’ relationship to it, but in doing so the Court also reflects its conceptions about the work of schools, which can itself serve as a point for analyzing laws allowing or calling for the suppression of student speech.<sup>174</sup>

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169. *Id.* at 408.

170. *Id.* at 407–08.

171. *Id.* at 407.

172. *Id.* at 408.

173. *Id.*

174. This analysis would be different, of course, if the Court had only indicated what the First Amendment permits schools to do, but said nothing about what schools do. In some instances, even in the cases in which the Court makes unambiguous statements about the role of schools, the Court also uses equivocal language about the work of schools. In *Fraser*, for example, the Court concludes that the First Amendment “does not prevent school officials from determining that to permit a vulgar and lewd speech . . . would undermine the school’s basic educational mission” and thus the schools can prohibit it, but the Court does not frame doing so as a function it understands to be an elemental piece of schools’ work. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986). Elsewhere in *Fraser*, though, the Court does not equivocate and thus ties its understanding of schools’ work with their categorical deference to suppress lewd student speech. *Id.* at 678, 681.

### III. EXPOSING THE FLAWS: ANALYZING THE ANTI-BULLYING LAWS IN LIGHT OF THE FIRST AMENDMENT

Analyzing the anti-bullying laws in light of the First Amendment proscriptions on overbreadth, the deferential standards for school suppression of student speech, and the rationale underlying that deference reveals the laws are at times arguably unconstitutional or problematic on all fronts. At least some of the laws give way to an argument that they are unconstitutionally overbroad. In some instances, if applied to bullying, they would be unconstitutional as applied under even the deferential *Tinker* standard. Almost none, if any, align with the Court's understanding of the schools' work that underlies that deference with their limited, almost total, focus on school exclusion.

#### *A. Anti-Bullying Laws that are Arguably Unconstitutionally Overbroad on Their Face*

Many of the anti-bullying laws define bullying by capturing the forms it can take and the effect it has.<sup>175</sup> In what is likely an effort to cover the maximum amount of bullying and despite an effort to recognize the strictures of harassment law, at least some of the anti-bullying laws resemble very closely the law found unconstitutionally overbroad in *Saxe*.<sup>176</sup> For example, Rhode Island's anti-bullying law prohibits any "written, verbal, or electronic expression or physical act or gesture . . . that causes physical or emotional harm to the student."<sup>177</sup> The law goes on to state that "the expression, physical act or gesture may include, but is not limited to, an incident or incidents that may be reasonably perceived as being motivated by . . . any . . . distinguishing characteristic."<sup>178</sup> Thus, in Rhode Island, as with the Pennsylvania law in *Saxe*, the law arguably prohibits mere name-calling about characteristics that are not protected by federal law because calling someone a name like "ugly" is an expression and arguably about a distinguishing characteristic.<sup>179</sup> Although, as the

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175. *See supra* Part I.

176. For example, Kansas's anti-bullying law states "any intentional gesture or any intentional written, verbal, electronic or physical act or threat either by any student . . . [h]arming a student or staff member, whether physically or mentally." KAN. STAT. ANN. § 72-8256(a)(1) (West 2016).

177. 16 R.I. GEN. LAWS ANN. § 16-21-33 (West 2016).

178. *Id.*

179. *Compare Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202–03 (3d Cir. 2001) (finding a school harassment policy unconstitutional because there is no categorical First Amendment exception for harassment or odious speech), *with*

Third Circuit noted in *Saxe*, these sorts of expression may be “odious,” that does not make them suppressible.<sup>180</sup> The law also prohibits that speech regardless of whether it rises to the level of harassment or any particular level of harm.<sup>181</sup> As the law only requires the expression to cause emotional harm, without identifying that the expression even amounts to any particular degree of harm, the law also does not protect against harassment or expression that would deprive the object of any educational benefits.<sup>182</sup> Because it prohibits the expression anywhere on school premises,<sup>183</sup> the law also prohibits even private expression in the hallways between classes. As such, the law meets the criteria set forth in *Saxe* for finding that Pennsylvania law overbroad. Further, the law is not saved by any limiting construction because on its face, the law allows for the suppression of “any” expression causing any amount of harm wherever it occurs.

Similarly, Minnesota’s anti-bullying law prohibits any “harming” conduct, including electronic written expression, that is directed at a student based on a characteristic of that student.<sup>184</sup> Thus, it also prohibits expression that is not protected by federal law, that does not rise to the level of harassment or deprive a student of educational benefit, and that is privately conducted in places such as outside of class and in the hallways. In other words, the law also prohibits name-calling, such as calling another student “ugly.” As such, both Minnesota’s and Rhode Island’s anti-bullying laws could arguably be said to be unconstitutional on their face in light of the analysis applied to a similar law in Pennsylvania. Minnesota’s law is also not rendered constitutional by any limiting construction because no reading of the law avoids the suppression of “any” harming conduct no matter how harmful or where it occurs. Although *Saxe* is one of the few cases analyzing a harassment or anti-bullying law for overbreadth and thus its reasoning might not be applied across the circuits, it nonetheless supports the argument that some of the anti-bullying laws arguably violate the First Amendment.<sup>185</sup>

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16 R.I. GEN. LAWS ANN. § 16-21-33 (prohibiting in its anti-bullying law “a written, verbal or electronic expression . . . directed at a student that causes physical or emotional harm to the student”).

180. *Saxe*, 240 F.3d at 206.

181. 16 R.I. GEN. LAWS ANN. § 16-21-33.

182. *Id.*

183. *Id.*

184. MINN. STAT. ANN. § 121A.031 (West 2016).

185. *See also* *Smith v. Mt. Pleasant Pub. Sch.*, 285 F. Supp. 2d 987 (E.D. Mich. 2003) (concluding a policy prohibiting “verbal” assaults in school violates the First Amendment on the grounds of overbreadth and vagueness).

*B. Anti-Bullying Laws that Could Violate the Tinker Standard as Applied*

Some of the anti-bullying laws might be, as *Saxe* suggests, saved by *Tinker*. If in the application the anti-bullying laws prohibited expression that could reasonably be said to have caused a school to anticipate a substantial disruption or injury to the rights of others, then the First Amendment might be satisfied.<sup>186</sup> Yet, another flaw in the laws is exposed, which could, in conjunction with the limitations on what the laws call for schools to do, explain how the anti-bullying law in place in Nevada when Hailee Lamberth was bullied did not protect her. The *Tinker* standard does not allow schools to punish all bullying.

Recall that in the case of Hailee Lamberth the bullying involved individual and repeated incidences of name-calling, including “fat” and “ugly.”<sup>187</sup> Students called her these names at one time and then again at another time and repeated this behavior over a period of time. No single incident of calling Hailee fat or ugly likely rose to the level of causing a substantial disruption to the work of the school or was injurious to Hailee’s rights. The bullying that Hailee experienced consisted of micro-aggressions, none of which, if individually suppressed by the school, could meet the *Tinker* standard. It simply strains credulity to argue that any one instance of these micro-aggressions caused a substantial disruption in school. Calling Hailee “ugly” one time might have upset her, but it is hard to make the case that such a one-time instance substantially disrupted the work of the school. Only in the aggregate did that name-calling substantially disrupt Hailee’s education by causing her suicide and therefore the work of the school. Similarly, neither could those individual instances of name-calling be said to have injured Hailee’s rights. First, that standard is vague, as it does not make clear whether the rights injured must be recognized legal rights or some other measure of rights. Whatever those rights were, any one-time instance of calling Hailee a name, while hurtful to her feelings, can hardly be said to have hurt her rights, however those rights might be defined.<sup>188</sup> Yet, for the school to have intervened to protect Hailee when she was called “fat” at any one time, it would have had to meet one of those standards for the intervention to be constitutional. As such, the school probably could not have disciplined any one instance of a student calling Hailee an expletive and met the *Tinker* standard. Thus, Hailee’s school could not have

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186. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969).

187. Milliard, *supra* note 10; see also discussion *supra* Introduction; Part III.B.

188. For a thoughtful analysis of the problems with the injurious to the rights of other standard and potential ways to resolve them see generally McDonald, *supra* note 94.

intervened after any one instance of bullying without offending the First Amendment.

However, that has not stopped the lower courts from applying the *Tinker* standard in the bullying context to the opposite conclusion.<sup>189</sup> When they have done so, the effort is, as one commentator has pointed out, at least sometimes forced.<sup>190</sup> The lower courts' decisions about whether the bullying speech should have been suppressed seems to rest on the courts' views about whether the behavior should have been punished as opposed to whether the speech gave schools reason to anticipate a substantial disruption in school or injury to the rights of others.<sup>191</sup> These kinds of reaches of logic should not give solace to schools hoping to address bullying without violating the First Amendment. That the courts have at times engaged in these logical leaps to find schools' suppressions of student speech constitutional should not suggest that the courts have satisfied the Constitution; rather, these results only provide evidence showing that the schools have found a court willing to so conclude on scant evidence or reasoning.

### *C. Anti-Bullying Laws that Stand in Tension with Deference Rationales*

The anti-bullying laws are problematic on still another level. The laws do not align with any of the work the Court understands schools to do and that serve as the justification, in conjunction with the type of speech, for any level of deference the schools receive to suppress student speech.<sup>192</sup> By focusing heavily on school exclusion either implicitly or explicitly, the work that anti-bullying laws call for schools to do, viewed in light of relevant, decades-long social science research, does not teach students to participate as citizens in the democracy, educate them on behavioral norms, or protect them. At times, the work of school exclusion does the

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189. See *infra* note 229 and accompanying text. Although many bullying–First Amendment cases involve student speech off-campus, not all do. And not all find that the *Tinker* standard is satisfied. For example, in *Glowacki v. Howell Public School District*, a federal district court in Michigan considered whether a one-time, in-class instance of student speech disparaging gay people was bullying and whether it was protected under the First Amendment. No. 2:11-cv-15481, 2013 U.S. Dist. LEXIS 85960 (E.D. Mich. 2013). It concluded that the speech was subject to First Amendment protection. *Id.* at \*27.

190. McDonald, *supra* note 94, at 751–52.

191. *Id.* at 752.

192. It is worth noting here that schools and school administrators have long struggled with trying to find alternatives to school exclusion. The issue for schools, students, and policy makers is, to put it mildly a hard one. See, e.g., Christopher J. Ferguson, *Does Suspension Work?*, TIME (Dec. 5, 2012), <http://ideas.time.com/2012/12/05/does-suspending-students-work/> [<https://perma.cc/E769-V33Z>].

opposite, making the bullying worse.<sup>193</sup> As such, even when the laws arguably do not violate the Constitution, they allow schools deference to suppress student speech to no end or the end of exacerbating bullying.<sup>194</sup> Although the Court has tied varying levels of deference to the schools' role as it relates to the type of speech—sometimes allowing for the categorical suppression of speech and other times not—the work the anti-bullying laws call for schools to do stands in tension with all these roles.<sup>195</sup>

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193. A superficial assessment of the anti-bullying laws might lead to the conclusion that they do comport with the functions embodied in the Supreme Court's conception of schools even though they primarily call for the limited response of school exclusion. Removing the bully from school and from interaction with the victim in school might seem to prevent bullying from happening and thus protect the victim. That allows the schools to teach the other students who remain in school to learn to become citizens who participate in the democracy and the values and behavioral norms attendant to that role. What this analysis fails to recognize is that the bully is learning nothing while out of school and then generally comes back to school. Even expulsions, the form of school exclusion that removes students from school for the longest period of time, allow for students to return to schools. To take just one example of how a statute contemplates a student returning to school, North Carolina, where after 180 days of a 365-day suspension or expulsion, students can request readmission. N.C. GEN. STAT. ANN. § 115C-390.12 (West 2016). It also fails to consider that cyberbullying happens everywhere. Thus a bully excluded from school may very well not stop bullying the victim even while the victim is in school. Something more than a cursory assessment is required to determine whether the bullying laws, with their focus on punishment in general and school exclusion in particular, comport with the Supreme Court's conception of the proper role of schools.

194. This situation is particularly troubling given the increased authority many schools have under the anti-bullying laws, for example, to monitor students online and their electronic activity whenever and wherever they are. This problem was addressed more fully in Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63 (2014) (calling for limits on school surveillance of students' online and electronic activity).

195. While the discussion that follows about the nature of the anti-bullying interventions largely called for by the anti-bullying laws could at least theoretically apply to the use of school exclusion generally, the use of school exclusion does not always or even mostly implicate the First Amendment in the way it does in the context of bullying. Further, although the Supreme Court has tolerated, even condoned, the use of school exclusion even in First Amendment cases, it has done so based on the idea that the suppression of speech by way of school exclusion allows schools to achieve the work it understands the to do. For example, in *Fraser*, the Court found the suspension of a student for giving a lewd speech appropriate because, among other things, suspending a student for a lewd speech, according to the Court, helped teach the boundaries of socially appropriate

*1. School Exclusion: Denying Participation, Teaching Intolerance and Inappropriate Behaviors, and Exposing Victims to Harm*

The nature of school exclusion by way of suspensions and expulsions stands in tension with the Supreme Court's understanding of schools' work. By nature, school exclusion by suspension, expulsion, and grouping students removes students from the learning environment largely or entirely.<sup>196</sup> As such, schools cannot teach students anything while they are so excluded, let alone teach students how to participate in the democracy or the value of tolerance. Although excluding the bully from school may allow the victims to learn their role as citizens temporarily without being bullied in school, the bully, as noted above, eventually returns to school. Even this temporary bully-free learning is questionable, as a bully can continue to torment a victim using electronic means throughout a period of suspension or expulsion.

Excluding a student from school because of bullying does send the message that the behavior is not acceptable. However, communicating that bullying is unacceptable by way of school exclusion teaches only that the particular bullying behavior is inappropriate. It does not teach any concomitant appropriate behavior. As such, school exclusion by suspension

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behavior, among other things. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). When school exclusion means grouping students who misbehave together—either in an in-school suspension setting or in an alternative school setting—social science research has shown that students reinforce each other's negative behaviors or learn new negative behaviors. Catherine P. Bradshaw, *Preventing Bullying through Positive Behavioral Interventions and Supports (PBIS): A Multitiered Approach to Prevention and Integration*, 52 *THEORY INTO PRACTICE* 288, 293 (2013). *See also infra* note 197 and accompanying text. Other research has also shown that for students to learn socially appropriate behavior, they need the support of school. *See also* Mary Gifford-Smith et al., *Peer Influence in Children and Adolescents: Crossing the Bridge from Developmental to Intervention Science*, 33 *J. ABNORMAL CHILD PSYCHOLOGY* 255, 265 (2005); Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 *AM. SOC. REV.* 1067, 1070 (2014).

196. Grouping students who bully together might happen in a couple of different ways. It could happen when a school sends students who bully to in-school suspension ("ISS") where they sit in a segregated classroom with other students who are being disciplined, some of whom may also have engaged in bullying. Another way students who bully might be grouped together could be when a school sends them to an alternative school as a punishment for bullying. In such a setting they also would be educated exclusively alongside other students who have been disciplined. Gifford-Smith et al., *supra* note 195, at 260.

or expulsion does not teach students who bully behavioral norms or the line between socially appropriate and inappropriate behavior.

Similarly, the effects of school exclusion in the bullying context stand in tension with the Court's conception of the work of the schools. Social scientists have studied the use of suspensions or expulsions as a method for addressing bullying and found that its effects are counterproductive.<sup>197</sup> This research reveals that suspending or expelling students who bully from school actually aggravates bullying<sup>198</sup> and can result in increased recidivism.<sup>199</sup> Social science research also shows that the effects of grouping students who bully together are counterproductive to preventing and addressing bullying and thus to work of the schools as the Supreme Court understands it.<sup>200</sup> When students who bully are grouped together in these ways, they reinforce each other's negative behaviors, and they learn new negative behaviors from each other.<sup>201</sup> Recidivism is also associated with this form of school exclusion. Thus, the effect of grouping students is to facilitate the learning of intolerance and new socially inappropriate behaviors as well as to further subject victims to harm.<sup>202</sup> Therefore, this intervention method also does not protect victims or in any way address the harmful effects of bullying.

Using methods that could potentially result in more bullying allows, or even encourages, students to engage in behaviors that are antithetical to participation as citizens in the democracy, teaching students the value of tolerance and protecting them. Students who bully do not participate; they

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197. See Bradshaw, *supra* note 195. This article summarizes the literature and research on some bullying interventions. Citing at least three research articles, it makes the point that "there is limited evidence that [mandatory suspensions] are effective in curbing aggressive or bullying behavior." *Id.*; Susan P. Limber, *Implementation of the Olweus Bullying Prevention Program in American Schools: Lessons Learned from the Field*, in *BULLYING IN AMERICAN SCHOOLS* 351, 362 (Dorothy L. Espelage & Susan M. Swearer eds., 2004). This article also summarizes the research on bullying interventions and, citing still different articles, comes to the same conclusion regarding school exclusion as does Bradshaw. School exclusion generally—by suspension, expulsion, placement in an alternative setting, or otherwise—has been found to aggravate behavioral problems in children. Gifford-Smith et al., *supra* note 195, at 260.

198. See Bradshaw, *supra* note 195, at 293; Limber, *supra* note 197, at 362.

199. Perry & Morris, *supra* note 5. Thus, while social science research does not preclude the use of suspensions and expulsions entirely, it cautions that its use should be rare. Limber, *supra* note 197, at 362.

200. Bradshaw, *supra* note 195, at 292.

201. *Id.*

202. *Id.*

dominate.<sup>203</sup> School exclusion at best allows and at worst encourages the intolerance that is elemental to allowing bullying to continue by permitting students to learn new, negative, and arguably intolerant behaviors. Finally, school exclusion instead exposes the victim to more harm because it has been shown to increase recidivism and worsen the bullying.

*2. Peer-to-Peer Interventions: Exposing the Victims to Harm Without Teaching Tolerance or the Line Between Appropriate and Inappropriate Behavior*

Even when the anti-bullying laws deviate from their focus on various methods of school exclusion and identify alternative methods of intervention, some of the alternative methods do not align with the Supreme Court's understanding of schools' work. Specifically, peer-to-peer interventions, which are identified as alternative interventions in some states' anti-bullying laws, are by their nature and effects antithetical to the Court's view of schools.<sup>204</sup> The nature of these interventions is to bring together the bully and victim in mediation or to engage in restorative justice. In doing so, these methods fail to consider the power differential at issue in bullying.<sup>205</sup> As previously discussed, bullying is distinguishable from teasing, even mean teasing, and other kinds of negative or hurtful behaviors by power.<sup>206</sup> A bully has power that he or she uses against the victim.<sup>207</sup> Peer-to-peer interventions, such as mediation and restorative justice, assume the lack of such a power differential.<sup>208</sup> As a result, these methods can be counterproductive, causing additional victimization of the student who has been or is being bullied.<sup>209</sup> Therefore, peer-to-peer

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203. In the case of bully-victims, the students both dominate at times and at others do not. *Internalizing Problems*, *supra* note 42, at 65–66; Cook, *supra* note 45, at 76–80.

204. For example, Illinois's anti-bullying law, while laudable in its effort to identify and thereby guide schools to use alternative forms of intervention to address bullying, includes the use of some of these peer-to-peer methods. *Supra* notes 86 and accompanying text.

205. Bradshaw, *supra* note 195, at 292–93.

206. Cornell et al., *supra* note 31, at 138; Jimerson et al., *supra* note 31, at 11.

207. Cornell et al., *supra* note 31, at 138; Jimerson et al., *supra* note 31, at 11.

208. See Bradshaw, *supra* note 195, at 292–93; see also Maria M. Ttofi & David P. Farrington, *Effectiveness of School-Based Programs to Reduce Bullying: A Systematic and Meta-Analytic Review*, 7 J. EXPERIMENTAL CRIMINOLOGY 27, 43 (2010).

209. See *supra* Part III.B.

methods do not protect the victim. Rather, they give the bully a way to harm the victim further.<sup>210</sup>

#### IV. A FIRST AMENDMENT DEFERENCE APPROACH TO REFORM

Although anti-bullying laws can at times violate the First Amendment on multiple fronts, that does not mean that no anti-bullying law can pass constitutional muster. Indeed, the foregoing analysis of the anti-bullying laws in light of the Supreme Court's understanding of schools' work serves as a way forward. If schools better aligned their work with the work the Court understands schools to do by, at the very least, eliminating school exclusion as a response to bullying except in rare circumstances, then an argument exists that schools should have more deference to suppress student speech reasonably deemed bullying speech. Under such a framework, schools should have categorical deference to suppress student-bullying speech. Having such deference would avoid the pitfalls attendant to the use of the *Tinker* standard. Tying that deference specifically to speech that is bullying, meaning speech that involves the exploitation of a power differential between students, would work to avoid facial challenges based on overly broad speech restrictions in the anti-bullying laws. For, as the Third Circuit indicated in *Saxe*, satisfying the deferential school speech standards can insulate even overly broad laws

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210. That anti-bullying laws almost all stand in tension with the work that the Court understands schools to do and that understanding justifies the deference schools receive to suppress. This point could support an argument that at least in the context of suppressing bullying speech, schools may not be not entitled to deference. That is, that the suppression of student-bullying speech by school exclusion should be treated with no more deference than any other state actor would receive in suppressing speech outside the school context because the rationale supporting that deference does not apply. This argument might have some merit at least with respect to the actions of an individual school, if it could be shown that the school's actions so defied the rationale for deference that the deference was not warranted. To succeed, though, this argument would have to survive political pressures attendant to what might be considered effectively limiting schools' authority to suppress student-bullying speech. Although political in nature, that argument might sway courts, particularly those that the Court already strains to find in favor of schools' suppression of student speech. See Bradshaw, *supra* note 195, at 292; see also Ttofi & Farrington, *supra* note 208, at 43. Setting those arguments aside, recognizing and resolving this tension between the Supreme Court's understanding of schools' work and the work the anti-bullying laws call for schools to do offers a way to also resolve the potential First Amendment problems with the anti-bullying laws.

from being found unconstitutional as applied.<sup>211</sup> The starting point, though, would involve amending the anti-bullying laws so that the laws better aligned with the work the Court conceives of schools as doing, which in turn raises the questions of whether such interventions exist and what they are.

*A. Bullying Interventions that Align with the Supreme Court's Understanding of Schools' Work in its Student Speech Cases*

Just as social science research offers insights into the ways that some bullying interventions are counterproductive, it also offers insight regarding interventions that are effective. Understanding how these methods work to address bullying reveals how anti-bullying laws could better align, in varying ways, with the Court's conception of schools.

Chief among these methods are graduated interventions that involve the family and community, as well as the school. For example, social science researchers have studied the Positive Behavioral Interventions and Supports ("PBIS") method. PBIS is a non-curricular, three-tiered, and school-wide system of interventions designed to "achieve behavior change in schools."<sup>212</sup> Tier One is universal, meaning the interventions apply to all students.<sup>213</sup> Tier Two involves selective interventions for smaller groups of students who either have behavioral problems despite Tier One interventions or who have suffered as victims of bullying and thus need more specialized interventions.<sup>214</sup> In the bullying context, this might involve "social skills training for . . . children at risk for becoming involved in bullying" or counseling for the victim.<sup>215</sup> Tier Three interventions are individual and more intensive interventions directed at students identified as a bully or victim.<sup>216</sup> PBIS when applied generally has been found to reduce behavioral problems in school and thus has been recommended by social scientists as an intervention for bullying.<sup>217</sup> Other similarly tiered responses have also resulted in significant reductions in bullying in schools.<sup>218</sup> The tiered Olweus method developed by Professor

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211. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 216 (3d Cir. 2001).

212. Bradshaw, *supra* note 195, at 289. PBIS is also called Schoolwide Positive Behavioral Interventions and Supports ("SWPBIS"). *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 290.

216. *Id.*

217. *Id.* at 289.

218. Limber, *supra* note 197, at 354. Discipline is not left out as a possible effective method for intervention in the social science research. Ttofi & Farrington,

Dan Olweus, a psychologist who has studied bullying for decades, has also resulted in significant reductions in bullying.<sup>219</sup> The social–ecological method, which calls for multi-level approaches to bullying, including involvement of others outside the school, such as family, has also led to reductions in bullying.<sup>220</sup>

If these methods are reducing behavioral problems in schools, the methods are teaching students behavioral norms and tolerance of others. The methods are also preventing students from being excluded from school because they are behaving better and so can learn to participate in school and in the democracy. If less bullying is taking place, then fewer students are being victimized. Not only do they protect students, the methods also offer ways to intervene to address the negative effects of bullying when it does happen. In all of these ways, these methods would have schools approach bullying interventions in ways that align with the Supreme Court’s view of schools’ roles and address more fully the complicated effects of bullying than the anti-bullying laws do now. Despite their benefits, though, researchers have acknowledged that the methods can be challenging to implement because of their comprehensive, multi-level nature.<sup>221</sup>

Fortunately, social science research has also found that less intensive methods of addressing bullying also work. Foremost among these methods is increasing supervision in areas where students are typically unsupervised.<sup>222</sup> Students often feel the least safe from bullying in these areas, including bathrooms, hallways, and playgrounds.<sup>223</sup> Increasing the supervision in these areas can be an effective method for reducing

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*supra* note 208, at 45. The type of discipline matters. Social scientists call for discipline to come in a range of options, such as serious talks, a trip to the principal’s office on the lower end of the range, or loss of privileges on the higher end of the range. *See id.* Although social science research indicates that schools can and should have these kinds of disciplinary methods at their disposal, they still pointedly find that school exclusion should at best rarely be used as one of those methods. Limber, *supra* note 197, at 362.

219. Limber, *supra* note 197, at 354.

220. Jun Sung Hong & Dorothy L. Espelage, *A Review of Research on Bullying and Peer Victimization in School: An Ecological System Analysis*, 17 *AGGRESSION & VIOLENT BEHAV.* 311, 318 (2012); *What Can Be Done About Bullying?*, *supra* note 33, at 42.

221. *See* Bradshaw, *supra* note 195, at 293–94.

222. Tracy Vaillancourt, et al., *Places to Avoid: Population-Based Study of Student Reports of Unsafe and High Bullying Areas at School*, 25 *CAN. J. PSYCHOL.* 40, 49–50 (2010).

223. *Id.* at 50.

bullying.<sup>224</sup> It also opens new avenues and opportunities for teachers to address bullying as it is about to happen and teach students tolerance of others and how to behave appropriately in the context of school. It offers a way for schools to embody the role the Court understands them to play by giving them a way to protect students from bullying.

Social science researchers have also found that teaching parents about bullying and how to address it is an effective part of bullying programs.<sup>225</sup> Training teachers and staff at schools on recognizing bullying and methods for effectively addressing bullying also helps to combat the problem.<sup>226</sup> This recognition is a necessary precursor to teaching students the line between inappropriate and appropriate behavior, specifically that bullying is inappropriate behavior that conflicts with the value of tolerance. It is also a necessary precursor to protecting victims, as a school cannot protect a victim from something it does not recognize is happening.

However, the bullying laws, with rare exceptions, do not identify these methods for intervening in bullying.<sup>227</sup> By preventing bullying before it happens, schools help to teach students the line between appropriate and inappropriate behavior. By not excluding or segregating students who bully and instead using other methods for addressing bullying, schools teach tolerance and allow students to learn to participate as citizens. By working better to end bullying and address its negative effects, schools help protect the victim and offer a more comprehensive approach to the complicated problem of bullying. Instead, the anti-bullying laws focus on school exclusion.<sup>228</sup> If the laws did use some method other than school exclusion or other interventions found to be ineffective by social science literature, they would go a long way to avoiding the tension that now exists between the Supreme Court's view of schools' role and the role the bullying laws have schools play.

*B. Amending the Bullying Laws to Align Deference Rationales and the Supreme Court's Understanding of Schools' Work*

Legislatures should take heed of the Court's understanding of schools' roles and use that understanding and social science research as a guide for amending anti-bullying laws to better address bullying. Legislatures should

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224. *Id.*; Ttofi & Farrington, *supra* note 208, at 45.

225. Dorothy L. Espelage et al., *Teacher and Staff Perceptions of School Environment as Predictors of Student Aggression, Victimization, and Willingness to Intervene in Bullying Situations*, 29 SCH. PSYCHOL. Q. 287, 301 (2014).

226. *Id.*

227. *See supra* Part I.B.2.

228. *Supra* Part I.B.

do so not only because such guidance offers a chance to meaningfully address bullying, but also because aligning the laws with the role the Court has envisioned for schools offers a way to address and resolve the First Amendment problems with the anti-bullying laws. Perhaps most importantly, better aligning the anti-bullying laws with the Supreme Court's view of schools' role would more adequately serve students. It would better honor the call of Hailee Lamberth's final note.

First, legislatures should largely or totally eliminate the use of school exclusion as a method for intervening to address bullying. Social science literature has shown the problems associated with school exclusion in the context of bullying. It simply, with rare possible exceptions, does not address the problem. From there, legislatures could choose from a variety of other methods of intervention to address bullying.

As there are multiple effective methods of addressing bullying other than school exclusion, states need only pick from among them and amend their laws to include those effective approaches. Although passing legislation is no simple process, each year for the last several years, at least one or two states have amended their anti-bullying laws.<sup>229</sup> It is certainly possible, even likely, that states will continue in the coming years to amend their anti-bullying laws. When states do, they should amend their anti-bullying laws to include a requirement that schools use methods that social science has found effective for addressing bullying.

A possible critique to this approach, though, is cost. Implementing PBIS or another similar school-wide program could be costly, not to mention time consuming.<sup>230</sup> Yet, if schools and states truly want to address bullying, it

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229. For example, in 2015, Nevada amended its anti-bullying law, and Montana passed its first anti-bullying law. NEV. REV. STAT. ANN. § 388.1351-1355 (West 2016). Cherub, *supra* note 49. In 2014, Illinois amended its bullying as did Massachusetts. See John Byrne, *Quinn to Sign Anti-Bullying Bill*, CHI. TRIB. (June 26, 2014, 9:26 AM), <http://www.chicagotribune.com/news/local/breaking/chi-quinn-to-sign-antibullying-bill-20140626-story.html> [https://perma.cc/Y9H7-MAS2]; see also Sebastian Alamo, *Patrick Signs Bullying Bill for LGBTQ Students*, DAILY FREE PRESS (Apr. 27, 2014, 9:43 PM), <http://dailyfreepress.com/2014/04/27/patrick-signs-bullying-bill-for-lgbtq-students/> [https://perma.cc/8JST-YA68]. In 2013, Indiana amended its bullying law. Carmen McCollum, *Schools Comply with New Indiana Bullying Law*, TIMES NORTHWESTERN IND. (Mar. 18, 2014), [http://www.nwitimes.com/news/local/schools-comply-with-new-indiana-bullying-law/article\\_f5cab9d9-38f2-5f25-b439-5fadad187f6b.html](http://www.nwitimes.com/news/local/schools-comply-with-new-indiana-bullying-law/article_f5cab9d9-38f2-5f25-b439-5fadad187f6b.html) [https://perma.cc/A5BG-GB5S].

230. This fact has been acknowledged by social science researchers. See generally Bruce A. Blonigen et al., *Application of Economic Analysis to*

makes little sense to do so in an ineffective way. The cost may be unavoidable, as at least some states have already begun to recognize. In response to Hailee Lamberth's suicide, Nevada revised its anti-bullying statute in the spring of 2015 to make it more effective.<sup>231</sup> Among other things, the newly revised law allocates \$16 million to schools to hire social workers specifically to address bullying.<sup>232</sup> With enough political will, the cost concern can be overcome.

All said, lower-cost, non-school-wide methods have, as noted above, also been found to work. For example, schools can do much to help combat bullying simply by increasing supervision in traditionally unsupervised areas, such as hallways and bathrooms, where students feel least safe and bullying is most likely to happen.<sup>233</sup> Adopting this approach would require little or no additional cost to schools because schools' current staff could be deployed to provide this supervision. Thus, although there are higher-cost means of addressing bullying, schools can adopt effective anti-bullying approaches with minimal costs.

### *C. A First Amendment Deference Argument*

Of course, legislatures need not follow any guidance from the Supreme Court in developing local school policy. If they did, such that schools' available responses to bullying better aligned with the work the Court understands schools to do—at the very least by eliminating school exclusion as a response to bullying except in rare circumstances—then a First Amendment argument exists that schools should have more deference when they act to suppress student-bullying speech. That is, there is an argument that schools should have the deference to suppress student-bullying speech as a categorical matter, meaning the deference to suppress any speech that could reasonably be deemed bullying speech. This argument would involve adding a layer to the analytic framework for determining schools' deference to suppress student speech. Instead of the schools' deference to suppress student speech being dependent on the type of speech and the schools' role in relation to it, in the bullying context this argument calls for a framework in which the means schools use are considered. In

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*Schoolwide Positive Behavioral Interventions and Supports (SWPBS) Programs*, 10 J. POSITIVE BEHAVIORAL SUPPORTS 5 (2008); Linda M. Bambara et al., *Perceived Barriers and Enablers to Implementing Individualized Positive Behavioral Interventions and Supports in School Settings*, 25 J. POSITIVE BEHAVIORAL SUPPORTS 1 (2012).

231. NEV. REV. STAT. ANN. § 388.1325; Cherub, *supra* note 49.

232. *Id.*

233. See Vaillancourt et al., *supra* note 222, at 50.

this proposed framework, if the means were aligned with effectuating the Court's understanding of schools' role, then that would justify more deference for the suppression of student-bullying speech.

The support for that deference argument is three-fold. First, better aligning the work the schools do in the bullying context to the work the Court understands schools to do by at least eliminating methods like school exclusion that do not address bullying would essentially have a tailoring effect justifying increased deference. The work that the Court understands schools to do, though usually conceptualized by the Court as schools' roles or functions, are also state interests.<sup>234</sup> In identifying those roles to justify giving schools deference to suppress student speech, the Court is acknowledging the legitimacy of state interests. Better aligning schools' responses to bullying to that work, or those interests, then, justifies increased, categorical First Amendment deference in the bullying context because it better ensures the work is being done or, put another way, the state interests are being achieved. Moreover, the Court has already allowed schools this kind of categorical deference in the case of lewd and drug-promoting speech.<sup>235</sup> Although the Court has not tied that categorical deference to how well tailored the schools' means are in effectuating those roles, in the case of bullying where much is known about what works, and perhaps more importantly, that the previous standard methods of school exclusion do not work, it should require better tailoring to justify the deference.<sup>236</sup>

Second, increasing school deference based on legislation that better aligns schools' anti-bullying efforts with the Court's conception of schools would avoid the problems involved in applying the *Tinker* standard and thus would save the application of the laws from violating the First

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234. Indeed, in *Morse*, the Court found schools' role in protecting student drug abuse justified in part because of the "important—indeed, perhaps compelling" interest in deterring drug use by children. *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (quoting *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995)).

235. *Supra* notes 148–56.

236. One could argue that the tension with the anti-bullying laws, the schools' means for addressing bullying, and the work the Court understands schools to do only becomes clear after the fact of intervention, which of course would make narrow tailoring challenging. However, the social science has been so clear on the fact that school exclusion, the primary mechanism called for in the anti-bullying laws, does not work and can be counter-productive in the bullying context, that the tension cannot be said to reveal itself only after the fact of its use. The social science is clear enough on the problems with school exclusion as a method for addressing bullying that it is predictable that it will not work to accomplish the work of the schools as understood by the Supreme Court. *Supra* notes 196–202.

Amendment at all, as *Saxe* suggests can be done despite overbreadth. That standard is sometimes rather unworkable in the bullying context, but is nonetheless the standard the lower courts have thus far applied to bullying cases.<sup>237</sup> Giving schools more deference to suppress student-bullying speech categorically would circumvent these problems because it would allow schools to suppress any speech that could reasonably be deemed bullying speech—if anti-bullying laws called for schools to use methods other than school exclusion to address bullying—irrespective of whether it could be said to cause the school to anticipate a substantial disruption. It would allow them to intervene to address the kind of bullying speech Hailee endured.

Third, affording schools this deference would better protect student rights. Although it might seem counterintuitive to argue that suppressing student speech better protects student rights, in this context the argument is strong. As things currently stand, schools have a significant amount of deference to suppress student speech regardless of its effect in the bullying context—sometimes to no end and sometimes to the end of exacerbating the bullying. Although the approach discussed here would increase schools’ deference, or authority, to suppress student speech, it would only do so if the anti-bullying laws changed to better align with the work the Court understands schools to do. Such change would also mean better addressing the complicated causes and effects of bullying and thereby would better protect and assist both victims and students who bully. Imagine, then, a law that called for schools to intervene in bullying and thus suppress bullying speech by not using school exclusion and instead using PBIS or increased counseling, which have been used to good effect in the bullying context and

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237. Many of these cases involve student-bullying speech that occurs off-campus. Some target other students, and some target teachers or school administrators. All apply the *Tinker* standard. See *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (applying the *Tinker* standard to determine that a student’s discipline for an off-campus rap song targeting two coaches in its lyrics did not violate the First Amendment); see also *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 773–78 (8th Cir. 2012) (vacating a preliminary injunction lifting suspensions of students for creating website with blog containing variety of offensive, racist, and sexist comments about school and classmates); see also *Layschock ex rel. Layschock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (using the *Tinker* standard to conclude a student’s First Amendment rights had been violated when he was sent to an alternative school for creating a website parodying a principal); see also *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007) (applying the *Tinker* standard in the context of a First Amendment challenge by a student who was disciplined for sending an instant message with a picture of a gun and referencing a teacher).

so align with the work the Court understands schools to do, for the bully or the victim. Those schools would have deference to suppress student speech that could reasonably be deemed bullying speech by requiring PBIS interventions or counseling. That deference and the suppression of student-bullying speech would be used to better address bullying and its complicated effects on the victim and the bully.

One criticism of this argument, though, might be that schools should not be afforded deference to suppress student-bullying speech given the increased authority they have under the anti-bullying laws, including to do things like broadly monitor students' online and electronic activity.<sup>238</sup> This critique first ignores the fact that schools now have a significant amount of deference to do just that kind of surveillance to no end or to the end of exacerbating the bullying problem. Second, in a previous article, the author called for limits on that authority, and does not abandon those proposals here.<sup>239</sup> Indeed, they work in conjunction with the arguments set forth here.<sup>240</sup> Those limits on school surveillance authority, coupled with basing any increased deference to suppress student-bullying speech on laws that better tailor schools' available responses to the work the Court understands schools to do, should still protect student rights by ensuring the deference is only given when the schools' responses work to effectively limit bullying and address its complicated effects.

However, an argument exists that increased deference is not needed because the reasoning of *Fraser* and *Morse* applies in the context of bullying without any attendant means analysis. As the Court gave schools deference to suppress student drug-promoting speech as a categorical matter in those cases, then schools should get the same level of deference with respect to bullying speech. That argument fails to recognize that at least one lower court has extended the reasoning of *Morse* to the bullying context, but then applied the *Tinker* standard. In *Kowalski v. Berkeley County Schools*, the Fourth Circuit considered a student's First Amendment claim in the context of cyberbullying.<sup>241</sup> The student had been suspended from school for creating a website that targeted another student by calling her names.<sup>242</sup> Referencing the schools' protective role identified in *Morse*, the court stated that "[j]ust as schools have a responsibility to provide a safe environment for students free from messages advocating illegal drug use . . . schools have a duty to protect their students from

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238. *Supra* Part I.B.

239. Suski, *supra* note 194.

240. *Id.*

241. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

242. *Id.*

harassment and bullying in the school environment.<sup>243</sup> Despite using this *Morse* rationale, the court did not conclude that bullying speech could be categorically suppressed as the Supreme Court concluded with respect to drug-promoting speech in *Morse*.<sup>244</sup> The Fourth Circuit instead applied the less deferential *Tinker* standard, which requires that the school anticipated that the speech would cause a substantial disruption or be injurious to the rights of others.<sup>245</sup> Thus at least one lower court has not found that bullying justifies any more deference to suppress student speech beyond that afforded them in *Tinker* even when it extended the rationale of *Morse* to the bullying context.

Of course an argument could be made that the Fourth Circuit simply reached the wrong result in *Kowalski*, and it should have given the school deference to suppress bullying speech as a categorical matter based on the reasoning in *Morse*. Such an argument would allow for the suppression of student speech and the infringement on important student rights often to no end. That result is simply untenable for both the bully, whose rights would be suppressed, and the victim, who would not be protected.

Another possible critique of this argument is that it would require courts to assess the methodology of schools in order to determine whether they should get added deference to suppress bullying speech. The Court has repeatedly stated that lower courts should not inquire into the daily workings of schools.<sup>246</sup> That critique, though, misunderstands the nature of the argument. The argument does not call for an inquiry into the precise nature of any particular method of addressing bullying or an assessment of how well schools are implementing the means called for by the legislatures.<sup>247</sup> Instead, it simply argues that if legislatures call for or require schools to take some meaningful steps, which precludes, largely or totally, school exclusion, to align with the Court's understanding of schools' role and address bullying in ways that do not cause more bullying, then the courts should give them deference to suppress all speech that can reasonably be construed as bullying speech. No examination of the school's day-to-day

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243. *Id.* at 572.

244. *Id.*

245. *Id.* at 572–73.

246. *See Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 507 (1969); *see also Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (quoting *Tinker*, 393 U.S. at 507).

247. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (rejecting the use of *Lochner* principles and stating the Court does not “sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions”).

work or methodology other than whether the legislature has called for such steps need occur.

A related criticism to this argument is that it leaves the determination of constitutional deference up to social science. However, this ignores the distinction between the means framework for analysis, which calls for an assessment of the means by which schools address bullying and would give deference if they at least use methods other than those that clearly do not work, and the substance of the actual methods themselves. The deference would not depend on the use of any particular method. The deference would depend on the use of some methods that do something to address bullying and thereby align with the Court's conception of schools. That can rarely, if ever, include school exclusion. Even though the alignment may not be a perfect alignment, it will at least not be the near-total misalignment that is school exclusion in relation to the bullying problem.<sup>248</sup>

Finally, one could criticize this argument by suggesting that better aligning the work the anti-bullying laws call for schools to do with the work the Court understands schools to do, would too tightly constrain the schools. It would too greatly limit their ability to exclude students from school. However, at least one state and some school districts are so limiting school exclusion by suspension and expulsion on their own. Illinois has recently passed a law that makes school exclusion the disciplinary option of last resort.<sup>249</sup> Similarly, the Miami Dade County Schools and the Seattle School Board have also moved to limit suspensions and expulsions.<sup>250</sup> That states and school districts are limiting

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248. This sort of analysis would be akin to the analysis called for in determining whether schools violate Title IX or other anti-harassment laws by allowing student-on-student violence. In those cases, schools are not required to intervene to address harassment in any particular way. They just must intervene in ways that are clearly not unreasonable. *See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649 (1999).

249. Evie Blad, *New Illinois Law to Prompt Changes in Discipline Policies*, EDUC. WK. (Sept. 8, 2015), <http://www.edweek.org/ew/articles/2015/09/09/new-illinois-law-to-prompt-changes-in.html> [<https://perma.cc/8QG4-E47N>]. California has also passed legislation to limit suspensions and expulsions for students in kindergarten, first, second, and third grades. CAL. EDUC. CODE § 48900 (West 2016) (amended by 2016 Cal. Legis. Serv. 95 (West) (effective Jan. 1, 2017)).

250. Paige Cornwell, *Seattle School Board Halts Suspensions for Elementary Students*, SEATTLE TIMES (Sept. 23, 2015), [http://www.seattletimes.com/seattle-news/education/seattle-school-board-halts-suspensions-for-elementary-students/?utm\\_source=email&utm\\_medium=email&utm\\_campaign=article\\_left](http://www.seattletimes.com/seattle-news/education/seattle-school-board-halts-suspensions-for-elementary-students/?utm_source=email&utm_medium=email&utm_campaign=article_left) [<https://perma.cc/6FKF-LWKR>]; Blad, *supra* note 249; John O'Connor, *Miami-Dade Schools Eliminating Out-of-School Suspensions*, NPR (July 29, 2015, 3:37 PM), <https://stateimpact.npr.org/florida/2015/07/29/miami-dade-schools-eliminating-out-of-school->

school exclusion more generally suggests that the constraints on school exclusion in the bullying context would not too greatly constrain schools' ability to respond to bullying, particularly if the anti-bullying laws provided schools with guidance on alternative responses to bullying that better align with the work the Court understands schools to do, which in turn better address bullying.

#### *D. Student Implications*

Perhaps the most compelling reason for considering whether the anti-bullying laws should better align with the Court's conceptions of schools' roles is that doing so would make schools better equipped to protect victims of bullying. It bears repeating that bullying is an enormous and consequential problem. When Nevada revised its bullying law in the spring of 2015, reports stated that there were over 4,000 incidences of bullying the previous year alone in Nevada schools.<sup>251</sup> Those bullying events occurred even though Nevada had an anti-bullying law in place.<sup>252</sup> The anti-bullying laws, well-meaning though they may be, seek to address the problem with traditional punitive methods that simply do not work except in rare circumstances.<sup>253</sup> To truly address the problem, the laws have to do more than rely on traditionally punitive methods of addressing bullying with their focus on school exclusion. The laws must embrace the role of schools as the Supreme Court has conceived it. To do that, the anti-bullying laws and schools should adopt methods of addressing bullying that prevent the bullying from happening, whether by increasing supervision or providing counseling to the bully to address the problems that lead to the bullying behavior.<sup>254</sup> They should also more effectively address the effects of bullying. Again, following Nevada's lead could go a long way toward achieving this end. By doing so, they would be teaching students to participate in school and therefore eventually in the democracy. They would also be teaching students the value of tolerance and behavioral norms. They would also be protecting actual or potential bullying victims. By putting more social workers in schools devoted to addressing bullying, schools provide students with skilled professionals who can help them with the depression, anxiety, suicidal ideation, and the other effects of bullying for both the bully and the victim. These kinds of approaches

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suspensions/ [<https://perma.cc/VVP2-B3ZZ>].

251. Cherub, *supra* note 49.

252. NEV. REV. STAT. ANN. § 388.123 (West 2016).

253. Vaillancourt et al., *supra* note 222, at 50.

254. Note that while interventions like counseling occur after-the-fact, they also can prevent reoccurrence. *Supra* notes 212–18 and accompanying text.

would not only better align the schools' efforts with the Supreme Court jurisprudence, they would also help students and prevent bullying and better address its complicated effects when it does happen.<sup>255</sup>

#### CONCLUSION

This Article has focused on the Supreme Court's First Amendment jurisprudence and a deconstruction of its deference rationales in the student speech context to evaluate the limited, punitive approach the anti-bullying laws have schools take to address bullying. Its focus is on the Court's student speech cases because so much of bullying is speech. The Court's student speech cases reveal that the Court has a particular understanding of the roles of schools as they relate to certain categories of speech and that relationship justifies the degree of deference they receive to suppress student speech. Analyzing the anti-bullying laws in light of the First Amendment reveals both that the anti-bullying laws raise First Amendment concerns and also are problematic in their focus on discipline and school exclusion. However, First Amendment jurisprudence also offers a way forward. If anti-bullying laws called for schools to better align with the work the Court understands schools do by, at the very least, largely eliminating the use of school exclusion as a means to respond to bullying, then there is an argument that schools should receive more deference to suppress student-bullying speech. Perhaps most importantly, better responding to bullying by not using school exclusion and thus having more deference to so respond would better protect students, like Hailee Lamberth, who are looking to schools to help address the problem of bullying.

Of course not all bullying is speech, and to the extent schools have to address physical or other forms of bullying that do not constitute speech, the Court's First Amendment jurisprudence is, in a sense, of no moment. But if states and schools take heed of the Court's understanding of schools' role in its student speech cases and better align their anti-bullying efforts

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255. In a previous article, the author examined the authority given schools in a subset of the bullying laws, cyberbullying laws, and argued, among other things, for students to have more rights under them. Suski, *supra* note 194, at 116–18. Specifically, the author called for amendments to the laws to include a cause of action for students so that when schools exceed their surveillance authority under the laws and cause harm, they have recourse. *Id.* The author does not abandon those arguments or related arguments here. Instead, the author adds to those arguments about how the bullying laws can be made to better align with the Supreme Court's view of schools' work, which would have the benefit of making the laws more effective at addressing and preventing bullying and potentially obviating the need for schools to use their surveillance authority in the first place.

with that role and jettison the use of school exclusion in the bullying context, the impact can be broader. It can have the effect of not just better preventing and addressing bullying when it takes the form of speech, but it can better address all bullying.