THE BALLENGER-GREEN DIVERSITY PAPER

The Ballenger-Green Memorial Diversity Paper was established in 2001 by the *Vermont Law Review* to commemorate the lives of Vermont Law School students Chandra Ballenger '02 and Orlando Green '01. The Ballenger-Green Paper is an opportunity for any student to address issues of human diversity through legal scholarship. Each year a paper is selected from open submissions that best reflects the commitment to excellence Orlando and Chandra demonstrated in their burgeoning legal careers. The *Vermont Law Review* is pleased to present the 2003 Ballenger-Green Paper.

"YOU'RE SO GAY!": ANTI-GAY HARASSMENT IN VERMONT PUBLIC SCHOOLS

> [A]trocity is a characteristic of some of the great crimes: it refers to the number of natural or positive, divine or human laws that they attack, to the scandalous openness or, on the contrary, to the secret cunning with which they have been committed, to the rank and status of those who are their authors and victims, to the disorder that they presuppose or bring with them, to the horror they arouse. In so far as it must bring the crime before everyone's eyes, in all its severity, the punishment must take responsibility for this atrocity . . . .
>
> Michel Foucault[1]

> "[c]learly I remember . . . picking on the boy . . . seemed a harmless little fuck . . ."
>
> Pearl Jam[2]

INTRODUCTION

Recently, I sat down with members of the U-32 Junior/Senior High School Gay–Straight Alliance to talk about sexual orientation issues in Vermont public schools. Because U-32 holds a high reputation in the eyes of many state educators, I expected their comments would be extremely positive, and they were. One of my questions, however, spawned an interesting and unexpected response. The question was, "Did student interest in the organization increase after the Civil Unions law passed?" The two members immediately said no.[3] They explained that the Civil Unions law[4]

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1. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 56 (1975) (Alan Sheridan trans., Vintage Books 1st ed. 1979).

2. Pearl Jam, *Jeremy*, *on* TEN (Epic Records 1991).

3. The group has 15 female members. The demographics of this group are dealt with in Part IV. Only two members were present because the other members were either at practice, rehearsal, or

actually provoked a hostile debate amongst their classmates. Later, their faculty advisor Maggie Desch told me that many students were "venomous" about gay marriage legislation occurring in their state. Ms. Desch said, if anything, civil unions made sexual orientation issues a point of divisiveness in the high school.

As a law student, surrounded by people in their mid-twenties and beyond, I often forget how politically aware teenagers can be, and how this awareness is often shaded by their immaturity. Teenagers, while aware, are more likely to be overly idealistic or totalitarian in their belief structure. With an issue like civil unions, one that involves homosexuality, religion, and their state, a teenager will almost certainly pick a side and fight for it.

Along with being extremely aware of such issues, some teenagers have a tendency to tease, bully, and harass those students whom they feel exist at a lower social level than themselves. In other words, the tenacious arguments that Ms. Desch and her students witnessed did not always take the form of constructive debates. Anyone who attended a public high school needs little description to imagine what students will say and do when they read about gay marriage on the front page of their newspaper every morning. Some students will use it as a topic for enlightened discussion. Other students will use it as a weapon against their peers.

The above paragraphs are not meant in any way to suggest that anti-gay harassment is limited to situations where there is a contentious political and social hot point. Anti-gay harassment and sentiment occurs constantly in Vermont schools.[5] According to Robert Appel, the director of the Vermont Human Rights Commission, "Over the past seven years, school harassment complaints constitute nearly one-third of all public accommodation complaints filed with the Commission."[6] The state's response to this issue comes in the form of a statutorily enforced policy to affirmatively reduce harassing

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taking a physics examination. Thankfully, I met with one of the groups's founding members. Also, this smaller group was much easier to talk to for a green interviewer like myself.

4. VT. STAT. ANN. tit. 15, §§ 1201–07 (2001).

5. *Honorable Bernard Sanders, Extension of Remarks, Issues Facing Young People Today*, 144 CONG. REC. E1374 (daily ed. July 21, 1998) (Statement of Isaac Evans-Frantz & Alina Lyons). "93 percent of Vermont educators reported that homophobic name-calling takes place with great frequency and intensity in their schools." *Id.* A Gay Lesbian and Straight Education Network (GLSEN) survey taken cumulatively in Vermont, Massachusetts, and Seattle finds that gay students are "from 1.75 to over 4 times more likely to have been threatened or injured with a weapon at school . . . ." GLSEN, *Are Schools Safe for All of Our Children?*, *at* http://www.glsenco.org/General%20resources/CSSC/safe_schools.htm (last visited May 11, 2003). This increased rate of harassment makes gay students skip school 2 to 4.5 times more than their straight peers. *Id.*

6. Robert Appel, *Reflections of Becoming Director of the Vermont Human Rights Commission*, OUT IN THE MOUNTAINS, Jan. 11, 2002, *available at* http://www.mountainpridemedia.org/oitm/issues/2002/01JAN2002.htm (last visited May 11, 2003).

behavior in Vermont Schools.[7] While this policy is widely regarded as superior to that of most states,[8] it may have legal and functional weaknesses that negate its beneficial intent.[9]

The following Paper examines anti-gay harassment in Vermont public schools from a personal, legal, and creative perspective. Part One addresses actual incidents of anti-gay harassment, two of which occurred in Vermont public schools and one culled from my own school years in Connecticut. The latter, although beyond the geographic scope of Vermont, typifies the trauma gay or perceived-gay students receive on a daily basis. The design of this section is to familiarize the reader with actual incidents of abuse. Part Two views the problem of harassment through the eyes of Vermont state legislators and school administrators. It not only outlines the statutes and school policies, but also examines their flaws and inconsistencies. Part Three explores the problem from a litigious perspective, investigating how student plaintiffs fare when bringing actions based on incidents of harassment in Vermont state courts. Lastly, Part Four attempts to offer alternatives and supplements to the programs currently used in Vermont. Although many elements of Vermont's policy are effective, the policy needs to be implemented more uniformly amongst Vermont school districts and more clarity in delineating precisely what conduct it forbids. This section also addresses the utility of groups like Gay–Straight Alliances (GSAs) as promoters of tolerance within a school's population. Holistically, this Paper argues that anti-gay harassment is a social,

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7. *See* VT. STAT. ANN. tit. 16, § 565(a) (Supp. 2002) (stating Vermont's policy that educational institutions will not tolerate harassment in any form); *see also* Press Release, State of Vermont, Department of Education Names Diversity Expert as Safe Schools Coordinator (Apr. 4, 2000) (on file with author) (announcing Vermont's hiring of a "national expert in diversity issues . . . to address the serious issue of harassment"); *Sanders*, *supra* note 5 (noting how in March of 1998 Governor Dean "wrote a letter to Vermont School principals urging them to stop the harassment of gay and lesbian students").

8. *See* GLSEN & LAMBDA, A GUIDE TO EFFECTIVE STATEWIDE LAWS/POLICIES: PREVENTING DISCRIMINATION AGAINST LGBT STUDENTS IN K–12 SCHOOLS 5, *at* http://www.Lambdalegal.org/binary-data/LAMBDA_PDF/pdf/61.pdf (last visited May 11, 2003) (discussing Vermont's statutory policy).

9. *See generally* Saxe v. State College Area School Dist., 240 F.3d 200, 202, 217 (3rd Cir. 2001) (holding that a harassment policy nearly identical to 16 V.S.A § 565 violated the first amendment due to its overbreadth); *see also* Memorandum from Vermont Commissioner of Education David S. Wolk, to Superintendents, Headmasters of Independent Schools (July 9, 2001) [hereinafter Memorandum] (on file with author) (recognizing the dangerous significance of *Saxe* by issuing a new model policy under 16 V.S.A. § 565); VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, RACIAL HARASSMENT IN VERMONT PUBLIC SCHOOLS ch. 4, *at* http://www.usccr.gov/pubs/sac/vt0299/main.htm (last visited May 11, 2003) (concluding that "[s]tate law is deficient in addressing the problem of racial harassment" because the Department of Education does not have direct oversight with regard to harassment issues and the law does not impose penalties).

psychological, and legal problem with specific relevance in Vermont because of the state's generous stance on same-sex relationships.

I. CUTS AND BRUISES

Part I consists of three narratives which convey separate incidents of anti-gay harassment occurring in public schools. The first narrative comes from my own memory. I believe this personal reflection emotionally binds my experience to this legal issue, while also refreshing the reader's memory of such incidents so as to enhance an interest in preventative statutes and policies. The second and third narratives, along with also being emotive vehicles, beneficially supplement my own narrative with differing perspectives. The second narrative comes from an interview with Maggie Desch, a science teacher and Gay Straight Alliance faculty advisor at U-32 Junior/Senior High School in East Montpelier, Vermont. A teacher's perspective infuses this Paper with a dose of day-to-day reality, as well as with a sense of urgency. Harassment occurs with a constancy that makes its absolute cessation impossible, its persistent monitoring difficult, and its lasting effects devastating. The third narrative comes from a complaint recently filed by a student against the St. Johnsbury School District, also in Vermont. This narrative works as a transition and discussion piece for subsequent Parts of the Paper.

A. The Shower

My junior high locker room bred hate and violence. Unlike the film bullies who use towels and cunning pranks to lash away at their victim's self-esteem, the bullies that I knew used fists and slurs. I once saw our student council president call the only African-American in our gym class a "nigger" after the two had bloodied each other's faces. On another day, our class jointly destroyed an unpopular student's books and clothes in a concerted effort to leave him emotionally and physically naked. Home-grown kids picked on the students with accents. We commonly used the words "faggot" and "pussy" to address boys too uncoordinated to play badminton. Repeatedly and methodically, we punched away at the relative simplicities of our earlier years without realizing or minding the all too apparent emotional effects. But as I sit here, trounced with regrets, trying to conjure the caustic odor of fear and sweat, only one such instance of hate stands disturbingly distinct and separate from the rest.

Scott M. had sad gray eyes, an outdated wardrobe, and a mullet. His skin was thin and white. I remember being disgusted by the visible dark

veins on his temples and arms. I remember Scott reminding me of a dead fish, with his thick lips and giant, sunken face. I remember how frail his body looked as he stripped down to his briefs in the locker room. Scott wasn't athletic, he wasn't bright, and he definitely wasn't cool. He was poor and his family had a reputation in our rich suburban town. The girls laughed at him while his teachers ignored him. He was Scott M., and our hate for him served as a bond of friendship. If I wanted to impress the kids in a superior clique, I would make fun of Scott to steal attention for myself.

While I admit hating Scott, others hated him to death. Jevon P. and Adam G. were tough, athletic kids, and I truly believe that they wanted to kill Scott. Jevon and Adam were the type of kids that could beat any one of us in a footrace or a fight, but they were too undisciplined to join any school team. They spent their time either in detention or hitting on the leather-jacketed girls who smoked cigarettes. Lacking in both sensitivity and a hobby, and perhaps to push away the cruelty of their own troubled lives, they began to stalk Scott. They started their game by befriending the lonely, pale boy.

This friendship was a ridiculous façade that only someone as singular as Scott could fall for. Adam would see Scott in the hallway and smack a stack of books out of his skinny arms. They sat next to him in the bleachers during gym, pinching at his legs and nipples. They treated him wickedly, but Scott never seemed to care. In fact, the rest of us stopped teasing Scott for a while, terrified that Jevon and Adam might turn their eyes toward our own little flaws. By befriending Scott, the tougher boys claimed him as their property. Scott's inevitable and bloody fate would be theirs to construct, theirs to devise. The mechanical certainty of Scott's demise began with a rumor.

At the beginning of eighth grade, a story circulated that Scott gave an older boy oral sex in the woods surrounding the town pool. I don't know who started the rumor, but I doubt if that mattered. The rumor just added fuel to the inferno surrounding Scott. Now that the whole school identified Scott as gay, Jevon and Adam no longer pretended to be his friends. They openly hated him, replacing the name Scott with the word "faggot." Their hatred became so intense and perpetual that the rest of us distanced ourselves from it. Their world became a world of three: two against one. That's how it was that day in the shower of our junior high locker room: two against one.

It began with a sudden encircling. Jevon approached Scott after class. Scott, pulling his clothes over his meager frame, saw Jevon coming and knew. His body immediately cringed into a painful pose, as if Jevon had already struck a blow to his stomach. Scott begged, but Jevon ignored him.

The bully's voice was low and guttural. It contained no decency or happiness. It spoke: "You're a fucking faggot."

Adam seemed less hateful than Jevon, but perhaps Adam's attitude reflected more culpability. He laughed as he helped Jevon push Scott into the isolated shower room. I remember how gently they pushed him, how Scott tried to resist only with words rather than strength, and how the attackers kept calling him a faggot, over and over. In the shower they beat him, and we watched. I know by doing nothing I was a coward, and there is no justification that I can concoct which will relieve me of this shame. I and about twenty of my classmates witnessed a gay bashing and no one went for help. Some even egged it on with cheers. I did not do that, but I watched and I listened. Someone, though, must have been brave enough to run and get our gym teacher, Ed Lownes. He broke it up after about three or four minutes, shouting, "Get off him you goddamn idiots!" I felt relief as Coach Lownes, a good man, separated Jevon and Adam from Scott. But my relief is really irrelevant, or maybe even selfish.

I saw a gay bashing in eighth grade, and even if Scott wasn't actually gay, hatred of homosexuals catalyzed and invigorated the beating he received at the hands of his classmates. I begin with this confession because as a society we reduce the moral evil of harassment in public schools to mere childish tomfoolery when we know from our own experiences that harassment is much more. In sympathy we resort to the axiom, "Kids can be cruel," and we, through our government and our courts, create rules and regulations mildly aimed at reducing this cruelty. When I hear that phrase, however, I am forced by my regrets to a reply that yes, kids can be cruel, kids can be prejudiced, and kids can be hateful, but other kids, kids like Scott, kids like the ones in the following narratives, can be beaten and exiled. This is true even for a state with as liberal and commendable policies as Vermont.

B. Words Unspoken

The following narrative comes from an interview with Maggie Desch, a science teacher from U-32 Junior and Senior High School.[10] Although it does not deal with overt harassment, it acutely portrays a teacher's difficulties in protecting a student from the daily onslaught of mental abuse taking place in a public high school. This narrative shows that this is especially difficult when a teacher may be dealing with a student who has

10. Interview with Maggie Desch, Science Teacher and GSA Faculty Advisor, U-32 High School, in East Montpelier, Vt. (Mar. 10, 2002) (on file with author).

issues with his or her sexual orientation.[11] The relevance of this narrative to the overall topic of harassment is to show just how isolated and fragile a troubled student can become. No question preceded this statement, but it stood there in the middle of our conversation demanding importance.

> Ten years ago there was this student that I had taught in middle school. He was a very quiet, introverted kid. He was one of those kids who would always carry his backpack around with him. Very quiet, very withdrawn, and didn't interact with anybody. In high school, I would occasionally check up on him, and he would often be having severe emotional problems. When it came time for his class to graduate, I saw him, and he looked *terrible*. I talked to his teacher's aide and learned he wasn't going to graduate because he has missed so much school as a result of his severe depression. I think at one point he may have been committed to a hospital for being suicidal. The following year he came back because he really wanted to graduate from U-32 and on one of the first days of school that year he dropped by, and we had this long talk. I asked him how things were going. Things weren't going well. One of the things I always thought was that he may have been struggling with his sexuality. Whether or not he knew it, or I would ever feel comfortable broaching that with him, that never came up, but I kept trying to emphasize that I'd be more than happy to talk with him and that I really cared about him. A couple weeks after our conversation, I asked his teacher's aide how things were going and she said, "He's going to have to drop out again because he's just missed too much school." The next day, I found him in an empty classroom. When I approached him, it took every thing he could do to just not fall apart. He was so, so upset. The only thing I could do was ask if there was anything I could do. And that was the last I ever saw

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11. While Ms. Desch describes her difficulty in broaching the issue of sexual orientation with a student for fear of alienating a distressed student even further, one recent study recognizes three other possibilities why teachers have trouble identifying or stopping anti-gay harassment.

> First, the teachers had not been provided with an adequate education regarding what constitutes impermissible student-on-student harassment. Second, the teachers' own feelings of homophobia prevented them from knowing how to handle the issue. The third and most common reason for the teachers' reluctance was their fear that their colleagues would think they were gay or lesbian if they helped a gay victim of peer harassment, which might compromise their reputation and future employment.

Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN'S L.J. 125, 150 (2000) (citing KAREN M. HARBECK, GAY AND LESBIAN EDUCATORS: PERSONAL FREEDOMS, PUBLIC CONSTRAINTS 9 (1997)).

> of him. As soon as I saw him that day I ran down to guidance and talked to his counselors. I was a basket case. I told the counselor, "Here I am with this kid who I think might be struggling with his sexuality, but I don't have the nerve to ask him." Whether or not he was gay, that is not even the issue. It's the fact that it could not even be brought up, and I myself didn't feel comfortable bringing it up because of my own issues and societal issues in general. It's okay to ask a kid who they are dating, but I think the question of sexuality would be considered as so offensive to most kids.[12]

While Ms. Desch did not witness her student being harassed, it is fair to say that she witnessed its desolating after-effects. And as exhibited by Ms. Desch's narrative, these after-effects can not only make a child depressed, but can also negatively influence his or her education. This negative influence requires teachers, principles, and guidance counselors to take harassment as seriously as other education hurdles, such as substance abuse and learning disabilities.

C. NS

NS is not a real name but an alias created to protect the identity of the young plaintiff in a lawsuit filed against the St. Johnsbury School District and a number of its administrators.[13] Before NS became a plaintiff, he was a student at St. Johnsbury Middle School, albeit an unhappy and brutalized one.[14] In addition to enduring severe asthma and migraines, NS became a receptacle for his classmates' immature and homophobic hostilities. There were not just a couple of mean kids picking on NS in the school yard. NS alleges that some fifteen or twenty of his fellow classmates joined in the taunting.[15] Every day for nearly three years, this large mob of students transformed NS from a person into a "faggot," a "queer," a "brownie," and a "bitch."[16] They silenced him by "telling him to shut up repeatedly."[17] They physically and sexually assaulted him by pushing him, hitting him, throwing things at him, and grabbing his buttocks.[18] In one instance, his

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12. Interview with Maggie Desch, *supra* note 10.

13. Plaintiff's Complaint at 1, NS v. St. Johnsbury School Dist., Deborah Levin, Kerry Keenan and David Baker (Caledonia County Sup. Ct. Nov. 23, 1999) (No. 301-11-99) [hereinafter Complaint].

14. *Id.* at 2.

15. *Id.*

16. *Id.* at 2–3.

17. *Id.* at 2.

18. *Id.* at 2–3.

assaulters cornered NS in a stairwell and then "grabbed his crotch from behind . . . ."[19] They wanted to know whether NS was a boy or a girl.[20]

The three years of abuse suffered by NS pollutes his current life. Towards the end of this painful period, NS "began experiencing symptoms of Tourette's Syndrome, obsessive compulsive disorder, and depression."[21] While a latter portion of this Paper will explore NS's legal claims, this section is devoted to NS's story.[22] There is no way to describe the effect that three years of personal degradation has on a young person's life. Like Jevon and Adam, NS's classmates equated the word "gay" with the word "target." But, perhaps even more disturbingly, no Coach Lownes or Maggie Desch stepped into the fray to protect NS's rights or to ask him if he was alright. According to the complaint, St. Johnsbury school administrators allowed the violence to continue, allegedly apportioning at least part of the blame on NS's purported femininity.[23] At one particular meeting with school officials, the school principal regrettably uttered the cliché, "boys will be boys."[24] NS not only suffered from harassment but also from administrative neglect.

D. Conclusion to Part I

The above narratives illustrate the physical, emotional, and logistical problem of anti-gay harassment in public schools. Homophobic students revoke the rights of the students they perceive as gay. Teachers struggle to deal with harassment's isolating and malignant effects but fear increasing the student's alienation by broaching the issue of sexual orientation. Administrators, overburdened by everyday problems, become passive participants in a cycle of violence and abuse so severe that it can sometimes ruin its victims' educations and mental health. The following section addresses the statutory devices that the Vermont Legislature has enacted to stop this reproachable behavior.

II. FIRST AID

This section will explore Vermont statutes and policies that mandate harassment prevention in the state's public schools. The first subsection summarizes the legislation, its history, and the school policies it requires.

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19. *Id.*
20. *Id.*
21. *Id.* at 2.
22. *See infra* Part III.B–C.
23. *See* Complaint, *supra* note 13, at 4–5.
24. *Id.*

The second subsection explores weaknesses in the Vermont harassment statute. One weakness is a possibly severe constitutional restriction. The other weakness arises from the lack of compliance and uniformity amongst the varying school districts.

A. The Statutes

Vermont's "Harassment and Hazing Prevention Policies" statute begins with strong and absolute language:

> It is the policy of the state of Vermont that all Vermont educational institutions provide safe, orderly, civil and positive learning environments. Harassment, hazing and bullying have no place and will not be tolerated in Vermont schools. No Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school.[25]

This laudatory policy deserves even more accolades because its definition of harassment expressly forbids, "verbal or physical conduct based on a student's . . . sexual orientation . . . which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[26] Specifically, the statute requires local school boards to design their own harassment policies that must "be at least as stringent as model policies developed by the [statewide] commissioner."[27]

Each local plan must include six elements in order to comply with the state law.[28] The six essential elements of the harassment prevention policy are:

> (A) A statement [written by the local school board] prohibiting harassment of a student.
> (B) The definition of harassment pursuant to [the definition shown above].
> (C) Consequences and appropriate remedial action for staff or students who commit harassment.
> (D) A procedure that directs students and staff how to report violations and file complaints.

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25. VT. STAT. ANN. tit. 16, § 565(a) (Supp. 2002).

26. *Id.* § 11(26). The statute also forbids identical conduct directed at a student's "race, creed, color, national origin, marital status, sex . . . or disability," as well as sexual harassment. *Id.*

27. *Id.* § 565(b); *see* GLSEN & LAMBDA, *supra* note 8, at 5 (citing section 565(b)).

28. VT. STAT. ANN. tit. 16, §565 (b)(1)(A)–(F) (Supp. 2002).

> (E) A procedure for investigating reports of violations and complaints.
> (F) A description of how the board will ensure that teachers and other staff members receive training in preventing, recognizing and responding to harassment.[29]

According to a nationwide survey of anti-harassment statutes done by the Lambda Legal Defense Fund and the Gay, Lesbian, and Straight Education Network (GLSEN), Vermont's statute ranks among the best because the statute "add[s] affirmative steps that must be taken."[30]

The Vermont legislature passed the anti-harassment statute's first version during its 1993–94 session.[31] The original act contained an express prohibition of sexual orientation harassment, but the legislature did not intend the statute to "impose additional or higher standards than as expressed" in the public accommodation laws.[32] Besides this restriction, the original statute seemed to require local school boards to affirmatively develop strict harassment policies.

Despite the statute's strong language, however, an embarrassing 1999 report released by the Vermont Advisory Committee to the United States Commission of Civil Rights criticized state lawmakers and educators for not taking enough steps to eliminate racial harassment.[33] The report found that:

> Racial harassment appears pervasive in and around the State's public schools. The elimination of this harassment is not a priority among school administrators, school boards, elected officials, and State agencies charged with civil rights enforcement. In some instances, administrators and government leaders have denied the existence of the problem and do not acknowledge

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29. *Id.*

30. GLSEN & LAMDA, *supra* note 8, at 5. This report separates anti-gay school harassment laws into three categories. The first category is states (*e.g.*, Minnesota, New Jersey) that have general civil rights statutes prohibiting anti-gay harassment in public schools. *Id.* at 4. These statutes also protect gay individuals in housing and employment. *Id.* The second category named in the report is made up of states (California, Connecticut, Massachusetts, Vermont, Wisconsin) that have statutes specifically aimed at school harassment. *Id.* at 5. Within this sub-category, the report uses Vermont as the model policy. *Id.* The third category is states (Rhode Island, Pennsylvania) that do not have statutes, but rather "regulations or statements of policy by the agency that oversees the state's public education [system]." *Id.*

31. S. 313, 62d Gen. Assem., Adj. Sess. (Vt. 1994).

32. 1 JOURNAL OF THE SENATE OF THE STATE OF VERMONT 400 (Apr. 5, 1994).

33. *See* VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 9, at ch. 4 (asserting that state law is ineffective at addressing racial harassment on a system-wide basis, and various school boards have not adopted harassment policies).

> the need for improvements in overall race relations within the State. As the numbers of minority students increase, there will be a concurrent rise in the number of racial harassment incidents that will not be adequately dealt with by school administrators and State civil rights enforcement agencies.[34]

The report also criticized the Vermont harassment statute as illusory because, while the statute required schools to develop their own harassment policies, "the statute neither requires individual school districts to submit harassment policies or procedures for review by State officials, nor offers penalty provisions for failure to adopt or implement anti-harassment policies."[35] The report's blunt statement proves that even if diversity and tolerance are present in Vermont's statutes, they are not present in Vermont schools.

The Legislature immediately responded to the report's criticisms by issuing a joint resolution condemning racism in Vermont public schools.[36] Then, in January of 2000, the Senate proposed *An Act Relating to the Crime of Hazing*.[37] Surprisingly, the original Senate proposal did not even contain the word "harassment," despite abundant indications that local school boards were not implementing the original harassment statute.[38] The House

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34. *Id.* at Letter of Transmittal. The increase in sexual orientation harassment is not mentioned at all within this report, despite indications that there was such an increase during this period of time. GLSEN, *supra* note 5 (noting an increase in harassment activities).

35. *See Legislative Activity* (March 25, 2000), *at* http://www.hrc.state.vt.us/legislative_activity.htm (last visited, May 11, 2003); *see also* VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 9, at ch. 4. The committee's recommendations actually far exceeded the scope of the current law. In general, the Committee recommended: (1) focused community involvement; (2) elimination of harassment as a statewide legislative priority; (3) statewide training to develop comprehensive school-based responses to incidents of racial harassment; (4) a revision of all state laws addressing harassment in schools; (5) an increase in the number of staff in the Vermont Department of Education; (6) the cessation of any racially biased curriculum; (7) enhanced assessment and recordation of harassment incidents; and (8) increasing the budget of the Vermont Human Rights Commission. *Id.*

36. S.J. Res. 58, 1999 Leg., Reg. Sess. (Vt. 1999).

37. S.76, 65th Gen. Assem., Adj. Sess. (Vt. 2000). The definition of hazing is:

> any act committed by a person, whether individually or in concert with others, against a student in connection with pledging, being initiated into, affiliating with, holding office in, or maintaining membership in any organization which is affiliated with an educational institution; and which is intended to have the effect of, or should reasonably be expected to have the effect of, humiliating, intimidating or demeaning the student or endangering the mental or physical health of a student. Hazing also includes soliciting, directing, aiding, or otherwise participating actively or passively in the above acts.

Id.

38. *See id.* (using the term "hazing" rather than "harassment").

sought to remedy this omission by supplementing the hazing bill with various provisions relating specifically to harassment.[39]

The House, although passing numerous provisions designed to strengthen the harassment statute, rejected perhaps the most radical and necessary of the proposed amendments. Representative Jordan of Middlesex proposed an amendment that stated:

> It is a violation of section (a) of this section for a school district which is on notice of the harassment of a student to:
> (1) fail to follow the school harassment policies and procedures adopted or imposed under 16 V.S.A. § 565, or
> (2) fail to take prompt and appropriate action reasonably calculated to end the harassment, to eliminate any hostile environment created by the harassment, and to prevent the harassment from recurring.[40]

Representative Jordan's amendment endorsed the Vermont Advisory Committee's recommendation to penalize school boards until they comply with the anti-harassment statute.[41] The rejected amendment's second clause also created a potential cause of action for a harassment victim.[42] The Legislature's rejection of greater legal liability for local school boards demonstrated its intent to maintain the general effect of the 1994 version, which mandated the creation of anti-harassment policy, but not the supplementation of existing legal rights.[43]

The final version that the Legislature chose to enact increased the mandated components of a legitimate local anti-harassment policy.[44] It added greater specificity as to what procedures a local school board must provide for students filing harassment complaints. Although such changes do not seem to remedy all the statutory interstices criticized by the Vermont Advisory Committee, the weightiness of this issue on the minds of the Vermont government is evident through the concurrent actions of the Vermont Department of Education.

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39. *Id.* (proposed House Amendment).

40. 2 JOURNAL OF THE HOUSE OF THE STATE OF VERMONT 1515 (May 4, 2000).

41. *Compare id.*, *with* VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 9, at ch. 4 (stating that state law is deficient in addressing the problem of racial harassment partly because there are no penalty provisions).

42. 2 JOURNAL OF THE HOUSE OF THE STATE OF VERMONT 1515 (May 4, 2000).

43. *See* S. 313, 62nd Gen. Assem., Adj. Sess. (Vt. 1994) (stating that the legislature did not intend the statute to "impose additional or higher standards than those expressed" in the public accommodation laws).

44. VT. STAT. ANN. tit. 16, § 565(b)(1)(A)–(F) (Supp. 2002).

On April 4 of 2000, the Vermont Department of Education hired Dr. Charles E. Johnson as its Safe Schools Coordinator, a position created to "to promote diversity and to ensure safe and civil learning environments in Vermont schools."[45] The Department of Education charged Dr. Johnson with helping schools develop anti-harassment policies, working with local school districts to ensure their compliance with state and federal law, and educating staff and school administrators about school harassment issues.[46] The Department also helped to establish the coalition Leadership for Equity, Anti-Racism, and Diversity in Schools (LEADS).[47] "Vermont LEADS . . . is a coalition of education, human services and civil rights organizations" that the Department of Education helped develop to run a public media campaign against harassment, train teachers in harassment prevention, inform administrators of their legal obligations in preventing harassment, reach out to local communities, sponsor student activities, and keep track of "school climates."[48] By hiring Dr. Johnson as diversity coordinator and promoting a coalition like LEADS, the Vermont Department of Education at least appears to follow the strong and prohibitive statement that begins 16 V.S.A. §565.[49] The true test, however, is in how well individual schools actually interpret this mandated policy.

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45. Press Release, Vermont Department of Education, Department of Education Names Diversity Expert as Safe Schools Coordinator (Apr. 4, 2000).

> Dr. Johnson served as Secretary of Education in Massachusetts from 1978 to 1980. He created and implemented the Vermont School Civility Project. He has worked with public and private clients as a management consultant since 1981, offering innovative approaches for overcoming barriers to organizational change, including remedies to heal racism. He has held a number of positions including chairman, International Institute for the Healing of Racism against Children; member United States commission on Civil Rights, Vermont State Advisory Committee; and vice president for metropolitan affairs at the University of Cincinnati. He was a senior consultant with Arthur D. Little, Inc., from 1974 to 1978.

Id.

46. *Id.; see also* Press Release, Department of Education, Vermont Leads (Apr. 4, 2000) [hereinafter Vermont Leads] (describing programs created by the Department of Education to help promote diversity and prevent racism in schools).

47. Press Release, *supra* note 45.

48. Vermont Leads, *supra* note 46.

49. *See* VT. STAT. ANN. tit. 16, § 565 (Supp. 2002) (stating that "[h]arassment, hazing and bullying have no place and will not be tolerated in Vermont schools"). An important caveat to the assertion that the Vermont Department of Education is affirmatively championing diversity in schools is that its promotion of sexual orientation diversity has been rife with controversy and politicized decisions. In 2001, the Department of Education severed ties with Outright Vermont, a group that it had been depending on to run workshops in schools about sexual orientation issues. While the Department claimed to have severed these ties because it wanted to run the workshops itself, the decision seemed to come at a time when the controversy over gay education was growing around the state. *See* Barbara Dozetos, *State Pulls Outright from In-School Presentations*, OUT IN THE MOUNTAINS (2001), *at*

The Burlington High School Harassment policy is a detailed and logical document that goes further than the letter of the statute.[50] First, it recognizes in its opening statement that harassment is illegal under state and federal law.[51] Second, it broadly defines conduct and situations that can constitute harassment.[52] Third, and very importantly, the policy breaks harassment down into conduct that any average high school or junior high school student could recognize: "Harassment is verbal, written or physical conduct, including, but not limited to, demeaning comments or behaviors, slurs, teasing, mimicking, jokes, gestures, name calling, graffiti, and stalking."[53] Then, to even further specify its policy, the School Board defines conduct that constitutes particular forms of harassment (e.g. racial, sexual, or anti-gay).[54] For example, the policy defines sexual orientation harassment as, "[c]onduct on the basis of a person's sexual orientation such as negative name calling and imitating mannerisms."[55] In addition to helpful definitions, the policy gives a clear roadmap of the formal procedures for filing a harassment complaint.[56] The policy ends by implementing a two-tiered punishment structure, demanding counseling for first time offenders and discipline for repeat offenders "up [to] and including expulsion."[57] The Burlington School Board certainly deserves praise for placing so much importance on eliminating harassment in its jurisdiction.

This subsection should end on a positive note because it shows the potential of the Vermont harassment policy when school officials are aware of and sympathetic to current legal mandates. Part II's second subsection examines the threats, both local and national, which could strip the Vermont policy of these potential benefits.

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http://www.mountainpridemedia.org/oitm/issues/2001/jan2001/news01_outright.htm (last visited May 11, 2003) (suggesting that the Vermont Department of Education's break with Outright was the result of political backlash following the Civil Union legislation).

50. *See* BURLINGTON HIGH SCHOOL, BURLINGTON HIGH SCHOOL HARASSMENT POLICY (2001), *at* http://www.bsdvt.org/schools/bhs/information/Student%20Handbook%20FY01.htm (last visited May 11, 2003) (providing a more detailed and in-depth description of harassment).

51. *Id.*

52. *Id.* For instance, one paragraph states:

> Harassment is any conduct, whether spoken or written, directed at a person's . . . sexual orientation where: . . . [s]uch conduct unreasonably interferes with the student's educational performance or the protected person's work performance or creates an intimidating, hostile, or offensive educational or work environment.

Id.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

B. Threats

The goal of this subsection is to reveal potential legal threats to the Vermont harassment statute, which indirectly, are threats to Vermont students. These young individuals depend on their schools and their government to provide them with a safe environment for discourse and maturation. The current Vermont anti-harassment statute can provide this safety and at the same time ensure academic freedom. If this safety net were to diminish or dissipate, many gay or perceived-gay students could fall into a painful realm of social isolation.

1. The Threat of *Saxe v. State College Area School District*

On July 9, 2001, Vermont Commissioner of Education David S. Wolk issued his department's model harassment policy in accordance with 16 V.S.A. § 565. The model policy came, however, with a caveat from Commissioner Wolk. He warned that:

> The enclosed model policy reflects what appears to be a developing trend on the part of courts to apply anti-harassment laws somewhat narrowly, especially when the conduct in question presents a tension between the right of free expression and the right to be free of harassing behavior in schools. In particular, we have tried to make this policy consistent with the February 14, 2001 decision of the United States Court of Appeals for the Third Circuit in the case of *Saxe v. State College Area School District.*[58]

The state's concern over the "tension between the rights of free expression and the right to be free of harassing behavior" limited its model policy to "conduct [having] a *substantial impact* on the learning environment of the school, or on a student's educational performance or access to the school's resources and activities."[59] The Commissioner's statement and model policy expressly omitted the statutory phrase "intimidating, hostile or offensive environment" because it was this phrase that prompted the *Saxe* decision. Although this may seem like overly finicky administrative nit picking, the Commissioner's omission fundamentally alters the potency of the Vermont anti-harassment statute by lowering the bar to which all

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58. Memorandum, *supra* note 9 (citation omitted).

59. *Id.* (emphasis added). Although the Commissioner did suggest that schools may create stricter harassment policies under their own disciplinary rubrics, these stricter school policies will not have the force of a state law. *Id.*

Vermont schools must measure up. And, as discussed below, this is only one of the waves *Saxe* could cause in Vermont's politically charged school system.

The State College Area School District policy at issue in *Saxe* began with language very similar to that of the Vermont statute condemning harassment as a violation of the school's philosophical purpose.[60] It then provided a definition for unlawful harassment essentially identical to the Vermont definition. The State College Area policy defined harassment as:

> 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.[61]

The sole difference between the Vermont statute and this prohibitive definition is that the State College Area policy protected more groups of people from discriminatory harassment.[62] Their second clauses, the part of the definition most at issue in *Saxe*, are carbon copies.

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60. *See* Saxe v. State College Area Sch. Dist., 230 F.3d 200, app. 218 (3rd Cir. 2001). The State College Area School District is committed to providing all students with a safe, secure, and nurturing school environment. Members of the school community are expected to treat each other with mutual respect. Disrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual.

Id.

61. *Compare Id.*, *with* VT. STAT. ANN. tit. 16, § 11(26) (Supp. 2002).

62. While the State College Area definition is broader than the Vermont definition, it is not much broader than the Burlington High School policy discussed in Part II.A. The Burlington Policy is valid under the Vermont statute because the statute allows local policies to be stricter than the state's policy. *Id.* § 565(b).

Penn State professor and conservative activist Dr. David Warren Saxe[63] brought suit against the State College Area policy on the behalf of two minor students. Professor Saxe, who involved himself in local education issues after the school attempted to show a film that taught teachers how to better deal with gay students, alleged that the plaintiffs' religious upbringing forced them to admonish homosexuality as a sin.[64] Saxe insisted that "they have a right to speak out about the sinful nature and harmful effects of homosexuality," even if such speech personally stigmatized gay classmates.[65] He challenged the school's harassment policy as overbroad and "facially unconstitutional under the First Amendment's free speech clause."[66]

The Third Circuit's opinion first criticized the sheer scope of the policy, which banned everything from racial slurs to off-color comments about another student's clothing. The court then focused its overbreadth

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63. David Warren Saxe portrays himself as a first amendment advocate, but his support of the first amendment is highly selective. As indicated in the above text, Mr. Saxe began his crusade against the harassment policy when the school attempted to show teachers a film that taught understanding in regards to openly gay student members. *See Anti-Harassment Policy Struck Down*, PENNSYLVANIA CITIZEN, May, 2001, at 4. Professor Saxe has repeatedly attacked diversity policies as threats to free speech. In a letter published in a Penn State school newspaper, Professor Saxe offered his own conception of harassment:

> But what is criminal harassment? If you look it up in PA law I think you will find that it has nothing to do with a Christian telling a gay man that homosexuality is a sin. I think you will find that criminal harassment has nothing to do with you voicing your opinion on the ability of blacks to swim or whites to play basketball. If you look it up, I think you will find that criminal harassment has nothing to do with you telling a woman that she ought to stick to cooking, not calculus or more seriously, that no woman has the right to murder an unborn child.
>
> Granted, the homosexual will not like being told that his "choice" of "lifestyle" is wrong; blacks will not enjoy the stereo-typing on being poor swimmers; and some women will not appreciate being told to stay in the kitchen or not have abortions, but NONE of this can be raised to the level of criminal harassment unless the speaker continues to say these things over and over and over again after being told over and over and over again to STOP. In sum, criminal harassment is not simply being offended, belittled, or even denigrated by the speech of another. Criminal harassment is such speech that is continuous and torturously delivered. In all candor, besides the attorney involved, just as we should hope no one will "defend" rape and murder, just who is going to defend criminal harassment?

David Warren Saxe, *A Response*, *at* http://www.clubs.psu.edu/psyaf/articles (last visited May 11, 2003). While I substantially agree with Dr. Saxe's conception of the first amendment in relation to adults, his definition of harassment could place many gay or perceived-gay children in physical or emotional danger. Is there really any political or ideological benefit in allowing an eighth grade bully to call his or her classmate a sinner? There should be context limitations to this type of prohibition, but there should not be an overarching invalidation of an anti-harassment policy's beneficial educational effect.

64. *Saxe*, 230 F.3d at 202–03; *see also Anti-Harassment Policy Struck Down*, *supra* note 63, at 4 (noting the origins of the lawsuit).

65. *Saxe*, 230 F.3d at 203.

66. *Id.*

analysis on the phrase, "creat[ing] an intimidating, hostile or offensive environment."[67] While the court agreed that the policy could "prohibit[] speech that would 'substantially interefer[e] with a student's educational performance,'" it ruled that the second prong was too broad because it did not "require any threshold showing of severity or pervasiveness."[68] The Court envisioned the policy infringing upon "'core' political and religious speech . . . [that] is within a student's First Amendment rights."[69] Therefore, the policy facially violated the constitution's free speech clause.

Reaction to *Saxe* was almost uniformly supportive, even garnering unexpected praise from staunch advocates of anti-gay harassment policies. Kevin Jennings, the executive director of GLSEN, publicly agreed with the decision, stating: "No one is well-served by policies that place an unreasonable restriction on free speech, that are indeed overly broad."[70] Mr. Jennings's organization even issued a press release claiming *Saxe* as a victory.[71] Despite receiving such praise, the *Saxe* decision threatens the Vermont anti-harassment statute in three specific ways.

First, *Saxe* is a legally sound foothold for conservative advocates to assail local Vermont anti-gay harassment policies. *Saxe* has been accepted as a jurisprudentially sound decision, well reasoned in both its logic and its use of current First Amendment law.[72] *Saxe* is, therefore, a politically useful decision for conservatives who oppose the supposed "homosexual agenda" in Vermont public schools.[73] Because anti-gay conservatives have

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67. *Id.* at 217.

68. *Id.*

69. *Id.*

70. Lisa Fine, *District's Anti-Harassment Policy Too Broad, Court Rules*, EDUCATION WEEK Feb. 28, 2001, *at* http://www.edweek.org/ew/ewstory.cfm?slug=24speech.h20 (last visited May 11, 2003).

71. GLSEN, *The Good News About the Saxe Decision* (Mar. 26, 2001), *available at* http://www.glsen.org/templates/resources/record.html?section=14&record=637 (last visited May 11, 2003). The press release states that in addition to forcing local school districts to tailor their policies more carefully, the *Saxe* decision affirmed the cessation of school harassment as a compelling interest for school administrators. *Id.*; *see Saxe*, 230 F.3d at 209 (stating that "preventing discrimination in the workplace —and in the schools—is not only legitimate, but a compelling, government interest").

72. *See* Recent Case, *Third Circuit Finds School District's Antiharassment Policy Unconstitutionally Overbroad*, 115 HARV. L. REV. 907, 911 (2001) (noting analytically sound aspects of the *Saxe* decision).

73. *See* Tracy Schmaler, *Debate Resumes on Gay Agenda Bill*, RUTLAND HERALD Apr. 5, 2001, *available at* http://www.rutlandheartld.com/vtruling/debateresumes.html (last visited May 11, 2003). For example, Representative Nancy Sheltra (R-Derby) recently proposed a bill that "would prohibit school employees from encouraging or promoting homosexual conduct." *Id.* After her bill failed, Representative Sheltra took her show on the road, aggressively attempting to get towns to endorse her agenda during their yearly meetings. Pat Robinson, *Sheltra Bid to Muzzle Schools Absent from Town Meeting Agendas* (2002) (describing Sheltra's attempts to force her anti-gay agenda at town meetings), *at* http://www.mountainpridemedia.org/oitm/issues/2002/03MAR2002/news05_sheltra.htm

turned their sights on Vermont schools as a way to undermine the historic Civil Unions bill and because Vermont's harassment statute is very similar to the one invalidated in *Saxe*, a constitutional challenge is likely if not imminent. The shadow of litigation led Commissioner Wolk to weaken the strength of 16 V.S.A. § 565 in his 2001 model policy.

The second way *Saxe* threatens the functionality of Vermont anti-harassment statutes is through the conduit of administrative fear. The Commissioner's model policy has the force of state law, as it serves as the prototype to which all schools must comply. Commissioner Wolk's press release will allow local school boards to dilute their harassment policies or feel trepidation about using them. School boards developing or revising their policies will most likely ignore the statute's "intimidating, hostile or offensive environment"[74] language and model their policies after Commissioner Wolk's instead. This would not be the first time that a federal case influenced the way states implement their harassment policies. After the *Nabozny* decision, a number of states enacted stricter harassment policies as a means of avoiding litigation.[75] Commissioner Wolk's press release suggests that *Saxe* may have a similar ripple effect, except that it will chill school administrators to the idea of enacting strict harassment guidelines.

The third way that *Saxe* threatens the beneficial effects of Vermont's anti-harassment law is by making it harder for teachers and students to identify conduct that constitutes unlawful harassment. The *Saxe* court's acceptance of the "substantial disruption" prong suggests that a school can restrict harassment based on its quantity and not necessarily on its quality.[76] This could effect how a school community identifies unlawful harassment. For instance, Burlington's policy, like State College Area's policy, contains enumerated examples of harassing conduct, thereby making it easier for the school community to monitor harassment.[77] As discussed in Part II.A.,such an enumeration allows students and teachers to react to specific instances of harassment with less speculation. If a teacher notices students emulating

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(last visited May 11, 2003).

74. VT. STAT. ANN. tit. 16, § 565(a) (Supp. 2002).

75. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996); Peter Sansom & Frank Kemerer, *It's All About Rules*, 166 Educ. L. Rep. (West) 395, 405 (Aug. 29, 2002).

76. Saxe v. State College Area Sch. Dist., 240 F.3d 200, 217 (3rd Cir. 2001). The court partially bases its decision on the fact that the policy exceeded the standard delineated in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999). "[T]he Policy extends to speech that merely has the 'purpose' of harassing another. This formulation, by focusing on the speaker's motive rather than the effect of speech on the learning environment, appears to sweep in those 'simple acts of teasing and name-calling' that the *Davis* Court explicitly held were insufficient for liability." *Id.* at 210–11.

77. BURLINGTON HIGH SCHOOL HARASSMENT POLICY, *supra* note 50.

stereotypical gay conduct to tease another student, he can reference the Burlington School District's policy and read that the policy expressly proscribes repeated "name calling and imitating mannerisms."[78] The *Saxe* decision, however, requires malicious conduct to occur repeatedly before administrators or teachers may authoritatively intervene.[79] What the *Saxe* decision fails to recognize is that harassing conduct is not so easily quantifiable, especially when reality confounds its monitoring with factors like age, grade, and context. The specific enumerations of harassing conduct allow a school community to confidently identify and respond to discriminatory harassment before it grows out of control. They add to the policy's overall effectiveness by giving a teacher an objective benchmark for assessing types of conduct that could eventually become unlawful harassment.

Before leaving this discussion, two points deserve clarification. Firstly, academic freedom is an essential element to a valuable education at any age. If the plaintiffs in *Saxe* wanted to espouse their beliefs during a class discussion of homosexuality, such views are pertinent to a well-rounded discussion because other students would have the opportunity to engage them in a dialogue. The *Saxe* court even suggested that a context element might have saved the invalidated policy.[80]

The second point requiring clarification is that the Vermont policy could very well be constitutional. Vermont is not located in the Third Circuit, Vermont's state policy is narrower than the one in *Saxe*, and there may be an argument that could distinguish Vermont from the school district in *Saxe*. To emphasize the last point, the Third Circuit noted that an exception to the free speech clause exists "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech . . . ."[81] This exception stems from the Tenth Circuit's decision in *West v. Derby Unified School District No. 260*, which upheld the suspension of a middle school student who drew a confederate flag while in Math class.[82] The Tenth Circuit stated that the school's racially charged past allowed it to "believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone."[83] The Vermont Advisory

78. *Id.*

79. *See Saxe*, 240 F.3d at 212 (indicating that mere discomfort or unpleasantness is not enough to justify restricting student speech, but a well-founded expectation of disruption based on past incidents might).

80. *Id.* at 216.

81. *Id.* at 212.

82. West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1358 (10th Cir. 2000).

83. *Id.* at 1366.

Committee's Report on Racial Harassment indicates a similar history of disruption in Vermont schools.[84] There also seems to be comprehensive evidence indicating a poor record on anti-gay harassment.[85] Furthermore, Vermont is a battleground for gay rights with one side protecting same-sex marriage rights and the other side wanting to "Take Back Vermont."[86] Such a context could perhaps validate a more restrictive school harassment policy. The *Derby* decision could give school attorneys enough ammunition to ward off a claim brought under *Saxe*.

2. The Threat of Noncompliance

Both the Vermont Advisory Committee to the United States Commission of Civil Rights report and the Lambda Legal Defense Fund report cite local noncompliance as a critical weakness in the Vermont anti-harassment statute.[87] The Vermont Advisory Committee warns that, because the State Department of Education does not have the authority to force local school boards to comply, "[it] makes it highly difficult for the department to monitor individual school districts for their compliance with the Anti-Harassment in Education law."[88] And the Lambda Report, despite lauding the substance of Vermont's statute, acknowledges that local authorities could avoid the statute's policies unless the state aggressively forces local politicians to comply.[89] Some Vermont schools currently disregard the state statute.[90] So, while a gay Burlington High School student benefits from the state's anti-harassment statute, her counterparts in

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84. VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 9, at ch.1.

85. S.R. & Lance v. Montpelier Sch. Dist., No. 503-99, slip op. at 5 (Washington County Sup. Ct. Feb. 1, 2001); Plaintiff's Complaint, *supra* note 13, at 4–5; *see supra* Part I.B–C.

86. Take Back Vermont is a conservative movement that has attracted the support of ultra-conservative pundits such as Pat Buchanan. One of their major agendas is to repeal the Civil Unions law. *Elections All About Civil Unions Law*, RUTLAND HEARLD, Sept. 17, 2000, *available at* http://www.rutlandhearld.nybor.com/Archives/ArticlesArticle/12848 (last visited May 11, 2003).

87. VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 9; *see* GLSEN & LAMBDA, *supra* note 8, at 6 (discussing the importance of enforcement and implementation of the statute).

88. VT. ADVISORY COMM. TO THE UNITED STATES COMM'N ON CIVIL RIGHTS, *supra* note 9, at ch. 3.

89. GLSEN & LAMBDA, *supra* note 8, at 6.

90. *See, e.g.*, CAMEL'S HUMP MIDDLE SCHOOL, STUDENT/PARENT HANDBOOK (2003) [hereinafter CAMEL'S HUMP MIDDLE SCHOOL], *available at* http://www.chms.k12.vt.us/handbook.htm (last visited May 11, 2003). When this Paper was originally written in the spring of 2002, a number of other schools were not complying with this law. Finally, though, these schools enacted anti-harassment policies during the current academic year.

other Vermont towns whose schools do not comply with the statute, sadly, do not.

The anti-harassment statute requires local school districts to adopt harassment policies "which shall be at least as stringent as model policies developed by the commissioner."[91] Thus, all policies must contain a detailed definition of harassment and formal procedures for filing a harassment complaint. The policies implemented by some Vermont schools contain neither component. Some general disciplinary policies are quite Draconian, separating conduct into categories of major and minor infractions, and mandating the most traditional punishments (e.g. detention, suspension, and expulsion).[92] Harassment is, admittedly, included on the list of major infractions, but some policies do not define or distinguish harassment from the other major infractions as state law requires.[93] They do not adopt a definition of harassment as the statute also requires. Additionally, these policies do not contain formal procedures for filing a discriminatory harassment complaint. This noncompliance could not only perpetuate harassment's malicious effects, but could also deny the students at these schools the opportunity to defend themselves against it.

Of course, a school with a brilliant harassment policy (like Burlington High School's policy) can also suffer from noncompliance if teachers, administrators, and students are apathetic to overt harassment. In a 2000 interview, Keith Elston, the Executive Director of Outright Vermont, asserted that school officials would aggressively respond if they overheard racial harassment but would be less proactive if they heard students being called "fags" or "dykes."[94] U-32 teacher Maggie Densch confirmed Mr. Elston's concerns by suggesting that racial harassment takes precedence over sexual orientation harassment.[95] Thus, if these laudatory policies are not implemented or enforced in the hallways, anti-gay harassment will undoubtedly continue unabated.

C. Conclusion to Part II

This section examined how Vermont attempts, through law, to prevent incidents of harassment in its schools. As revealed by Part II.B.2, these

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91. VT. STAT. ANN. tit. 16, § 565(b) (Supp. 2002).

92. *See* CAMEL'S HUMP MIDDLE SCHOOL, *supra* note 90 (containing a sexual harassment policy but not one explicitly drafted at discriminatory harassment).

93. *Id.*

94. Sandy Cooch, *Outright Director Explains School Programs*, THE HERALD (Randolph, Vt.), Aug. 24, 2000, *available at* http://www.ourherald.com/News/2000/0824/Front_Page/f09.html (last visited May 11, 2003).

95. Interview with Maggie Desch, *supra* note 10.

preventative tactics do not fully protect Vermont students from harassing behavior. When the safety net fails, students can either fall to the wayside or they can land in a courtroom. While legal battles chronologically occur after an unmitigated incident of harassment, their outcomes will shape how seriously schools view harassment for the future. The policies discussed within the preceding section must have the support of the state's judicial system in order to truly defeat harassment's malignancies.

III. BEYOND THE PRINCIPAL'S OFFICE

Part II included various references to anti-gay harassment, but its scope was more general because it dealt with a general statutory policy. This Part refocuses on specific instances of antigay harassment. It differs from Part I in that the battles described here occur inside in a courtroom, and not in a locker room. The first subsection analyzes the legal options for a victim of anti-gay school harassment. The second subsection reviews the standard that Vermont state courts have adopted in determining liability for school harassment. This subsection will also criticize this standard and argue that in light of Vermont's history and statutes, a stricter standard is required. The third subsection offers a case study of a suit recently resolved by a Vermont trial court. The overall intent of Part III is to determine the legal weight of anti-gay harassment in Vermont courts.

A. Plaintiff's Options

The following section is essentially a short list of possible legal options available to a victim of anti-gay harassment.

1. The Federal Constitution

A victim of anti-gay harassment can bring an action against his school and the school's administrators under the federal Constitution's Equal Protection clause. Ten years ago such a statement would have sounded untenable, but this option is certainly viable after the Seventh Circuit's landmark decision in *Nabozny v. Podlesny*.[96] A student must file a *Nabozny* action under 42 U.S.C. § 1983, which establishes civil liability for a deprivation of constitutional rights.[97] From there, the student plaintiff must assert a dual deprivation of Constitutional equality: the first deprivation

96. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (ruling that a "student could maintain equal protection claims alleging discrimination based on both gender and sexual orientation").

97. *See* 42 U.S.C. § 1983 (2000) (providing civil remedies for constitutional rights violations).

stemming from his gender, and the second deprivation stemming from his sexuality. To win under either the gender or sexual orientation claims, the plaintiff "must show that the defendants acted either intentionally or with deliberate indifference."[98] The school officials are not liable if they negligently overlook the harassment.[99]

To win under the gender claim the plaintiff must present evidence that the defendant school officials did not "give male and female students equivalent levels of protection . . . ."[100] If the plaintiff successfully establishes this, the burden shifts to the school to show that it forwarded an important government interest through its inaction. If it cannot, and if the harassment was severe enough, the school will face liability.

To win under the sexual orientation claim, the plaintiff must prove that he is a member of a "definable minority" and that the school's intentional discrimination stemmed from this membership.[101] If the plaintiff establishes this, the burden shifts to the school to prove that it had a rational basis for treating the student differently. If it cannot, and if the court employs a hard rational basis test, the school will face liability.

Nabozny created a legal avenue for gay students victimized by harassment, but this avenue is certainly an uphill street. First, without delving too deep into case's oft cited facts, Jamie Nabozny fell victim to severe harassment, including physical beatings, a mock rape, and an instance where another student urinated on him.[102] The court seemed nauseated by these attacks and by the school principal's caustic and audacious responses to them. I speculate, therefore, that courts examining this case in the future will likely limit its effect to other extreme instances. Second, and most importantly, establishing "intent" or "deliberate indifference" under an equal protection claim is a very hard task for a plaintiff, even when their claim alleges highly scrutinized racial discrimination.[103] It requires intense documentation of overtly malicious acts on the part of school officials. In other words, the evidentiary burden for the plaintiff is mountainous. To succeed, there almost certainly must be a statement by school officials that links their actions to the student's gender or sexual orientation.

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98. *Nabozny*, 92 F.3d at 454.

99. *Id.*

100. *Id.* at 456.

101. *Id.* at 457. The court determined that homosexuality is a definable minority in Wisconsin because of that state's public accommodations statute. *Id.* Since Vermont also includes sexual orientation in its public accommodations statute, a *Nabozny* sexual orientation action could proceed here.

102. *Id.* at 451–52.

103. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (setting forth the rubric for proving intentional discrimination).

2. Title IX

Title IX, a federal anti-discrimination statute, states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[104] In *Davis v. Monroe County Board of Education*, the Supreme Court concluded that

> a private damages action may lie [under Title IX] against the school board in cases of student-on-student harassment. . . . but only where the [school board] acts with deliberate indifference to known acts of harassment in its programs or activities. . . . [and] that [the] . . . harassment . . . is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.[105]

This ruling, stemming from a case involving heterosexual sexual harassment, produced speculation among some authors as to whether Title IX protection could extend to anti-gay harassment. Although a Title IX action will not cover abuse directed solely at a student's homosexuality,[106] courts do uphold Title IX claims where the harassment arises "from the perpetrators' sex-based stereotypes of masculinity."[107]

Title IX may be a very good option for a perceived or closeted gay student who receives discrimination on the basis of his nonconformance to traditional gender stereotypes. An openly gay student, however, may have trouble convincing the court that the abuse stemmed from gender stereotypes if the abuse consists largely of anti-gay slurs. Furthermore, Title IX contains the *Davis* decision's high "deliberate indifference" standard, which makes it difficult for any plaintiff to win a claim.[108] Another weakness is that an action couched under Title IX will not allow a gay plaintiff to openly assert that he or she was discriminated against on the basis of their sexuality since, if he or she does, she will almost certainly lose. This legal muzzle may dissuade the principled plaintiff who wants to

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104. 20 U.S.C. § 1681(a) (2000).

105. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

106. Title IX actions are analogous to Title VII actions for workplace harassment. Numerous Title VII cases have withheld relief when the victim alleged he was harassed because of his sexuality and not his gender.

107. Snelling v. Fall Mountain Reg'l Sch. Dist., 2001 WL 276975, at *4 (D.N.H. Mar. 21, 2001).

108. *Davis*, 526 U.S. at 633.

castigate her abusers because of their homophobia and not their use of gender stereotypes.

3. The Vermont Public Accommodations Statute

Vermont's public accommodations law creates a private right of action for those groups enumerated within the statute. The statute is functionally similar to Title IX, but it covers a broader ranger of groups. As applied to sexual orientation, the statute reads:

> An owner or operator of a place of public accommodation or an agent or employee of such owner or operator shall not, because of . . . sexual orientation of any person, refuse, withhold from or deny to that person any of the accommodations, advantages, facilities and privileges of the place of public accommodation.[109]

The statute includes schools in its definition of public accommodations.[110] The public accommodations law is "essentially an anti-discrimination law," and requires a showing of intentional discrimination or revocation of benefits based on the plaintiff's specified characteristic.[111] Because the next subsection discusses in detail how Vermont courts interpret this statute in the school context, its legal scope will not earn a discussion here.[112] Instead, this section will briefly explain how a plaintiff can file a public accommodation complaint in a nonjudicial setting.

Plaintiffs may avoid a courtroom but still attain a resolution of sorts by filing their complaint with the Vermont Human Rights Commission. The Commission has jurisdiction to investigate alleged violations of the public accommodation statute.[113] The Commission impartially investigates public accommodation complaints, encourages the two parties to settle their dispute through a mediator provided by the Commission, compiles a comprehensive report judging whether unlawful discrimination actually occurred, and offers both the parties a right to orally respond to the report's determination.[114] After this hearing, the Commission comes to a final

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109. VT. STAT. ANN. tit. 9, § 4502(a) (1993).

110. *Id.* § 4501(1).

111. S.R. & Lance v. Montpelier Sch. Dist., No. 503-99, slip op. at 5 (Washington County Sup. Ct. Feb. 1, 2001).

112. *See infra* Part III.B.

113. *See* Vt. Human Rights Comm'n, *Filing a Complaint*, *at* http://www.hrc.state.vt.us/file_complaint.htm (Mar. 24, 2000) (describing the procedure by which the Commission investigates a claim under the public accommodation statute).

114. *Id.*

determination based on all the available evidence.[115] Regardless of the Commission's final determination, "a Charging Party may still have the right to file a lawsuit."[116] Furthermore, the Commission can, in its discretion, file its own action against the offending party.[117] This administrative option reduces the costly effects of litigation and allows the charging party to use alternative dispute resolution while still notifying a state actor of their complaint.

4. Traditional Tort Actions

If a victim wishes to vindicate his legal rights by suing the perpetrator, he may do so by utilizing claims such as common law battery and intentional infliction of emotional distress. These claims focus on the actual harm suffered by the plaintiff and not on his or her sexual identity. Actions in tort are certainly viable for a plaintiff who received medical treatment for physical or emotional damage.

B. SR and Lance v. Montpelier School District*: Public Accommodations Law in the Context of Vermont Schools*

Part III A.3 discussed the use of Vermont public accommodations law as a legal claim against a school district that fails to intervene in instances of peer sexual orientation harassment. This section examines a recent case brought against the Montpelier School District for its failure to provide adequate protection to a student who fell victim to an onslaught of anti-gay harassment. The trial court's decision, if affirmed on appeal, could dramatically proscribe Vermont student rights under the public accommodation law. The following section argues that such a proscription is untenable in light of Vermont's recent history of school harassment, and the legislature's intent to eradicate Vermont schools of harassment. Put more bluntly, if this decision is affirmed, victims of harassment will have a difficult, if not impossible, road to vindication in their own state's courts.

1. The Court's Ruling

SR was in sixth grade when the abuse began. It was the typical slurs, the typical anti-gay sentiment. SR became, in his classmates' eyes, a

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115. *Id.*
116. *Id.*
117. *Id.*

"faggot," a "gay," and a "lesbian."[118] After SR and his parents complained to the school's superintendent and principal, a fellow student retaliated against SR by pinching his scrotum hard enough to leave a bruise. SR's mother continuously pleaded to Montpelier school officials to stop her son's victimization, but their disciplinary measures did not satisfy her.[119] She filed a lawsuit in state court, alleging the school violated Vermont's public accommodations law.[120]

The trial judge did not have an easy job on his hands. For one, while the abuse of SR was severe, the actions taken by the school were not wholly unreasonable. The school did not expel or suspend SR's abusers, but they did take some affirmative action to remedy the situation.[121] Secondly, a complete absence of state precedent on how the public accommodations law applies to schools forced the trial court to craft its own standard of liability.[122] It adopted, without much analysis, the extremely high "deliberate indifference" standard crafted by the Supreme Court in *Davis*.[123] The trial court reasoned that, since the Vermont Supreme Court had in the past used the Federal Fair Housing Act to interpret the Public Accommodations Act,[124] federal law "is persuasive in interpreting and applying Vermont's Public Accommodations law."[125] The court, notably, made no mention of Vermont's own school anti-harassment statute.

The plaintiff's attorney, obviously upset with the high burden imposed by the trial judge, immediately filed a Request for Reconsideration with that same court.[126] In response, the trial judge issued a second opinion and applied the deliberate indifference standard, which delineated conduct that would constitute unlawful discrimination under the public accommodations law: "a school may do a shabby investigation; ignore complaints; decide not to impose consequences on harassers; and fail to check and see if the harassment continues."[127] After this clarification, the issue became whether the intervening acts taken by the Montpelier school officials qualified as deliberate indifference, or whether those intervening acts, although unhelp-

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118. S.R. & Lance v. Montpelier Sch. Dist., No. 503-99, slip op. at 1 (Washington County Sup. Ct. Feb. 1, 2001).

119. *Id.*

120. *Id.*

121. *Id.* at 3.

122. *See id.* at 4–5 (asserting that since there are no appellate decisions interpreting sexual harassment in Vermont schools, the court would look at cases interpreting analogous federal laws).

123. *See supra* Part III.A.2.

124. *S.R. & Lance*, No. 503-99, slip op. at 5.

125. *Id.*

126. *See* S.R. v. Montpelier Sch. Dist., Request for Reconsideration, No. 503-99 (Washington County Sup. Ct. Aug. 24, 2001) (filed just months later).

127. *Id.* at 1–2.

ful in remedying SR's situation, were sufficient to satisfy the public accommodations law.

The court framed the issue as one of deference to the actions taken by school officials stating, "[c]ourts should not second guess the disciplinary decisions that school administrators make."[128] Even though none of SR's harassers received discipline from school officials, the court found that the school did at least investigate SR's complaint and sent letters home to the perpetrators' parents.[129] Since a finding of deliberate indifference depends heavily on the facts of a given case, the court's decision leaves open the question that, if the conduct in this case does not constitute deliberate indifference, what conduct satisfies the standard?

The trial court's answer to this question, at least implicitly, is that the disputed events did not last long enough to constitute deliberate indifference. Twice in its opinion, the court notes that only three months passed from the time when SR first reported the harassment to the time of his withdrawal from Montpelier School, and during that time school officials held various meetings and took various actions regarding the incidents.[130] As the next section will argue, however, a test like deliberate indifference, which quantifies the severity of harassment with factors like the temporal length of the incidents, disregards the strong intent of the Vermont State Legislature to rid the state's schools of discriminatory harassment. In Vermont, the test should not revolve around the amount of harassment the school officials intentionally ignored, but on the affirmative actions the school took to address the incident.

2. Justification for a Stricter Test

The legislative history accompanying the Vermont school anti-harassment statute, discussed in Part II.B, explicitly states that the statute does not "impose additional or higher standards than as expressed" in the public accommodations law.[131] Thus, SR could not base his complaint directly upon that statute. The fact that the legislature did not intend its anti-harassment to impose a higher standard, however, does not mean that courts should not use this statute when interpreting the Vermont public accommodations law. Both statutes proscribe identical types of discrimination in identical facilities. Also, the anti-harassment statute's history directly refers to the public accommodations law. Furthermore, the

128. *Id.* at 2.
129. *Id.*
130. *Id.*
131. 1 JOURNAL OF THE SENATE OF THE STATE OF VERMONT 400 (Apr. 5, 1994).

Vermont anti-harassment statute specifically addresses Vermont schools. It would therefore seem that it would serve as a better guide to interpreting the public accommodations law than the ambiguous deliberate indifference standard.

The first justification for a more comprehensive standard of liability in public accommodations suits brought against schools is the opening language of the anti-harassment statute, which reads, "hazing and bullying have no place and will not be tolerated in Vermont schools."[132] Although this phrase is at least partially precatory, the language does imply a sort of zero tolerance policy towards harassing conduct. Subsequent parts of the statute charge the local school districts with carrying this high burden.[133] Courts should actively use this strong statement in the context of public accommodation suits. These suits symbolize a failure in adequately implementing the school anti-harassment statute. Unless a court incorporates this strong policy into the standard of liability it imposes on a school, the anti-harassment statute and the public accommodations law are essentially in tension with one another. The tension arises because, while a school is ordered by one statute to ensure that "[n]o Vermont student should feel threatened or be discriminated against while enrolled in a Vermont school," the courts allow them to passively regulate offensive conduct under the high deliberate indifference standard.[134]

The second way a court should use the anti-harassment statute to interpret the public accommodations law is by exploring whether the defendant school board adopted its anti-harassment policy as required by the statute.[135] This will allow the court to follow an objective standard when it examines the actions taken by the defendant school board. Therefore, the court should begin its analysis by examining the school's actions in light of the procedures outlined under its own model harassment policy (or if no such policy exists, against the state's model policy). Using the Burlington plan as an example, after a student files a harassment complaint, the plan demands that the school "promptly take action to end any harassing behavior which is occurring."[136] From this point on, the measures that school officials must take are clear and concise. There is an outlined methodology on how to investigate a complaint and how to remedy the problem.[137] This is not to imply that the policy does not leave room for

132. VT. STAT. ANN. tit. 16, § 565(a) (Supp. 2002).

133. *Id.* § 565(b).

134. *Id.* § 565(a).

135. *See id.* §565(b)(1) (setting out the minimum criteria that a harassment prevention policy must include).

136. BURLINGTON HIGH SCHOOL HARASSMENT POLICY, *supra* note 50.

137. *Id.* For example, upon first receiving the complaint, the school administrator must classify

discretionary tactics, which parents of the harassed may disagree with. The punitive measures taken by school officials may be quite minor for a first offense. But the issue here is not the quality of the policy, but how the courts may use these policies to intelligently shape the school administrator's sphere of discretion rather than just to imply a sphere of discretion from the facts of a given case. Phrased differently, by using the Vermont anti-harassment statute instead of the broad and ambivalent federal standard of deliberate indifference, a court can objectively determine whether a school is taking each incident of harassment seriously or whether a school is ignoring certain instances of discriminatory conduct.

By blending the absolutist language of the Vermont harassment statute with the specific procedures it requires, the court will be able to objectively weigh whether a school acted properly in response to a harassment complaint. While the court may want to incorporate a lesser form of deliberate indifference after making these initial findings, the Vermont harassment statute should at least serve as a basis by which to judge defendant school districts. The next section compares an analysis under deliberate indifference with an analysis using the Vermont harassment statute. The context of this comparison will be the facts introduced in Part I.C.

C. *Applying the Stricter Test to the Facts in* N.S. v. St. Johnsbury School District

Part I.C. introduced NS, a young man who as a result of constant abuse from his classmates currently suffers from a variety of mental illnesses. NS's suffering became a lawsuit against his former school's administrators. These administrators allegedly ignored this abuse for three entire years. NS's suit, like SR's, is based on Vermont's public accommodations law. The goal here is to analyze these facts under the deliberate indifference standard, and then under the standard enunciated in Part III.B.3. Such a comparison will show that, although the two outcomes may be similar, the Part III.B.3 standard better reflects Vermont policies towards sexual orientation-based harassment and discrimination than the federal deliberate indifference standard.[138] As shown in Part I, the abuse NS received from 1995 to 1997 took numerous forms, including physical attacks. During this time period, NS's mother, "repeatedly reported to appropriate officials . . .

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the complaint as formal or informal. There are different methods the school investigator will take in contacting the students and compiling his or her report. *Id.*

138. Because St. Johnsbury's antiharassment policy is not available, the analysis will take place under the state's model anti-harassment policy.

that NS was being harassed and that it was unwelcome and asked the defendant's to take appropriate action to end it."[139] The only action school officials took over this two year period was to send letters home to some of the twenty students.[140] This did not stop the harassment. In fact, the interaction with school officials caused NS and his family more dismay.[141] "At one meeting, the guidance counselor told NS's mother that 'NS's femininity' was at the core of his problems, as if NS himself were responsible for the harassment."[142] And "[o]n several occasions, the principal . . . shrugged off [the mother's] concerns, saying 'boys will be boys,' as if that justified the harassment."[143] According to the complaint, even the school's superintendent admitted that school officials were not taking the actions necessary to stop the abuse, but he at no time attempted to force his subordinates to comply.[144] The school's mishandling of the problem and ignorance of sexual orientation discrimination is evident through the following incident, which demonstrates a poor attempt to remedy the problem:

> At one point, the defendants told a few students to apologize to NS for calling him names. When told to do so, the students wrote, "I'm sorry for calling you a faggot," and then read that statement to NS. They were not instructed about the nature of discrimination or the damage it does to individuals. The continued repetition of the harassing word and the forced apology was embarrassing and upsetting to NS and caused the students to harass him further for having gotten them in trouble.[145]

After nearly three years of such administrative bungles, the school finally got serious and began suspending students who harassed NS. The word "fag" became synonymous with suspension. The harassment slowly stopped, but the damage to NS's psyche was complete.

The first question is whether school officials are liable to NS under the deliberate indifference standard. Since the court's analysis in *SR v. School District of Montpelier* only summarily adopted the *Davis* test, the following discussion will rely mostly on that latter case. The *Davis* standard bars

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139. Complaint, *supra* note 13, at 3.

140. *Id.*

141. *See id.* at 3–4 (explaining that NS's harassment continued throughout the next year and that school officials were often insensitive, blaming the harassment on "NS' femininity").

142. *Id.* at 4.

143. *Id.*

144. *Id.*

145. *Id.* at 4–5.

discriminatory harassment "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[146] The Supreme Court attempted to clarify how this standard would apply to particular instances of harassment, stating that it '"depends on a constellation of surrounding circumstances, expectations, and relationships,' including, but not limited to, the ages of the harasser and the victim and the number of individuals involved."[147] The court then diluted this standard by explaining that, since the school environment is saturated with "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students," simple acts of harassment would not place the school under any legal duty to intervene.[148]

The *Davis* standard is undoubtedly broad and dependent on the subjective opinions of the trial judge and jury. The facts in *NS v. St. Johnsbury*, though heartbreaking outside the courtroom, may be deemed as "simple" acts of teasing under this standard's high level of liability. There is certainly some hope for the plaintiff under this standard if the trial court uses those factors elucidated by the Supreme Court as indicative of deliberate indifference. The harassment involved fifteen to twenty students and persisted for more than two years after the initial complaint to school officials. The harassment was consistently discriminatory and anti-gay. The harassment severely affected NS's ability to learn and function as a normal student. But, because of the *Davis* standard's broadness, the school will be able to rebut this evidence by showing that it had numerous meetings with the plaintiff and the plaintiff's parents, that it forced harassers to apologize to the plaintiff, and that it eventually suspended the harassers when the harassment became more extreme. They can also argue that the harassing statements and actions are typical of middle school students, and not, therefore, "objectively offensive."[149]

The *Davis* standard wrongfully focuses on the abuse received by the victim. It allows school officials to show that the harassment was never actually that bad and that they never felt the need to more aggressively intervene. It distorts the issue by making the trial about the student instead of about the school. Yet, the Vermont anti-harassment statute requires schools to affirmatively intervene when they receive a harassment

146. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999).

147. *Id.* (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 82 (1998)).

148. *Id.* at 651–52.

149. *Id.* at 651. For instance, the complaint states that students "threw snowballs at [NS]," called him "a loser," and swore at him. Complaint, *supra* note 13, at 2.

complaint. If the school does not affirmatively act, a plaintiff like NS should be able to use the school's non-compliance as evidence establishing their liability. Furthermore, the Vermont anti-harassment statute would rightfully shift the factual focus from horror stories of harassment onto how much the school actually did to alleviate an incident of harassment.

When viewing NS's case from under the lens of the Vermont anti-harassment statute, the court would first want to reference the state model anti-harassment policy.[150] Under that policy, school officials must act affirmatively to remedy the harassment through either formal or informal procedures.[151] Whether a school utilizes formal or informal procedures, according to the state's model policy, should be under the plaintiff's discretion.[152] The St. Johnsbury School District did not give NS or his mother this choice when they were first notified of the harassment. In fact, they never even sat down with NS and his harassers until at least a year and half after the initial complaints.[153] More so, when the harassment continued, they did not initiate more formal procedures, despite the plaintiffs obvious desire for them to do so.[154] Finally, despite the numerous complaints made by NS and his mother, the school never instituted a formal investigation where findings are made by a third party and then submitted to the principal.[155]

By focusing on this lack of procedural compliance, NS could argue that the rights promised him under the public accommodations statute were withheld by school administrators. The school would not be able to use NS's harassment against him as a defense to their nonintervention. Instead, the school should have to show why they did not follow the guidelines set forth in the Vermont harassment statute. Infusing the public accommodations standard with the Vermont harassment statute allows the court to judge Vermont school districts with Vermont state law. Vermont state law forces these school officials to deal with discriminatory harassment in a certain way. If they do not deal with harassment in this certain way, a court should force them to explain their deviation.

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150. VERMONT DEPARTMENT OF EDUCATION, MODEL STUDENT HARASSMENT PREVENTION POLICY (2001), *available at* http://www.state.vt.us/educ/new/pdfdoc/laws/model_harass_07_01.pdf (last visited May 11, 2003).

151. *Id.*

152. *Id.* However, in the instance that an harassment compliant is filed against a school employee, the school must utilize formal procedures. *Id.*

153. Complaint, *supra* note 13, at 3.

154. *Id.*

155. *Id.* at 2–6.

D. Conclusion to Part III

NS's real name is Nicholas Spaziani. It was revealed in a newspaper article that announced his defeat by a Caledonia Superior Court jury. There was no initial word whether Nicholas would appeal the verdict, but his attorney, Eileen Blackwood, was also the attorney in the *SR* case, and she is appealing that ruling. As for Nicholas, I hope the rest of his life is easier than the first part of it. Even though the jury did not think his pain was legally significant, Nicholas's pain spawned this paper, and helped to open its author's eyes.

IV. CREATIVE LEARNING

This section focuses on three non-legal tools that schools can use to reduce harassment. The first tool is the implementation of Gay/Straight Alliances in schools. These groups can not only provide a safe place for students to talk about sexual orientation issues, but can be vehicles of tolerance and understanding within the school community. The second tool is the stigmatization of gay slurs. Instead of banning these terms outright, teachers should educate unassuming students on their malicious and immoral meanings. Finally, teachers should infuse gay history into their curriculum. Discussing the gay movement in the context of the civil rights movement may change some students' perceptions that being gay is "weird." These three tools are by no means the only ways that teachers and students can fight harassment in their daily lives, but I think they are three of the best ways.

A. Gay/Straight Alliances

Gay/straight Alliances (GSAs) are collectives of high school students "organized to end anti-gay bias and homophobia in schools and create positive change by making schools welcoming, supportive and safe places for all students, regardless of sexual orientation or gender identity."[156] GSAs began forming in 1989 and have since found homes in over 800 schools in forty-six states.[157] There are over thirty GSAs in Vermont, and over the years these young groups have successfully fought a number of tough local issues.[158] Palmer Legare, founder of Cabot High School GSA,

156. GLSEN, *About Gay-Straight Alliances*, *at* http://gl;sen.org/templates/student/record.html?section=48&record=145 (last visited May 11, 2003).

157. *Id.*

158. OUTRIGHT VERMONT, VERMONT GSAS, *at* http://www.outrightvt.org/resources/vtgsa.html

met repeatedly with Governor Howard Dean and Representative Bernie Sanders during his high school career.[159] Mr. Legare also writes for GLSEN's online newsletter on how to successfully implement GSAs.[160] Also, students in a Rutland GSA fought the school board for the inclusion of a gay speaker on the school's diversity day. Governor Dean himself recommended GSAs as an effective tool for promoting tolerance and diversity.[161] A few months ago, I visited U-32 High School in East Montpelier to get a first hand look at what these student groups actually do during their weekly meetings.

The first thing I learned about the members of the U-32 GSA was their candor. They loved to talk about all aspects of their group, both its successes and its shortcomings. As for its successes, the group meets almost every week, has fifteen regular members, and is recognized as a safe place to vent and express personal feelings. It has been in existence for over four years. Although the U-32 GSA is not very political, its members seem to really get a lot out of their weekly discussions.

The groups shortcomings do not come in the form of some hellish PTA trying to shut them down, or a hostile school climate for group members. The groups shortcomings are more a sign of the group's high school context. Kids are busy in high school. They play sports, perform theater, and are always trying to find ways to increase their desirability to colleges. In this jarring mix, a GSA can become just another extra-curricular activity for some students. A corollary to this logistical issue is the fact that the group loses its senior members every year. For a sports team or honor society, this loss causes little problems. These activities have become institutionalized. For a new and somewhat controversial group like the GSA, its membership will really depend on the bravery of future classes, and therefore its numbers tend to oscillate from year to year.

Another of the group's shortcomings is that U-32 GSA has no male members. All fifteen regulars are female. This is a surprising figure at first, but perhaps, in reality, it should be expected. Teenage women are more tolerant than teenage men for social and psychological reasons far

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(last visited May 11, 2003).

159. *See Honorable Bernard Sanders, Extension of Remarks, Students' Views of Issues Facing Youth*, 144 CONG. REC. E1527 (daily ed. Aug. 3, 1998) (statement of Palmer Legare); *see also* Lisa Rathke, *Senate and House Judiciary Committees Hear Testimony on Amendments*, AP NEWS, Feb. 19, 1999, *at* http://www.youth.org/loco/PERSONProject/Alerts/States/Vermont/testimony2.html (last visited May 11, 2003) (delineating the potential effects of an amendment to the Vermont hate crime law).

160. Palmer Legare, *Maintaining and Strengthening GSAs*, *at* http://www.glsen.org/templates/student/record.html?section=45&record=543 (last visited May 11, 2003).

161. *Sanders*, *supra* note 159.

beyond the scope of this paper. The feminization of the GSA might further intimidate boys from joining in the discussion. I remember when I was in high school, there was a student group called Students Advocating Gender Equality (SAGE). Despite the important message of the group, few if any males thought of joining it because it was socially categorized as a "girly" activity. I think the U-32 GSA might experience similar problems if it does not try to outreach to male students.[162]

Despite these minor setbacks, the U-32 GSA is a success. For one, a GSA does not have to be political or vocal to combat harassment. Its presence in a small school student body will engender a sense of openness and liberality amongst the community. Also just having a GSA, regardless of its size or activeness, gives a harassed student an outlet to express his fears and concerns to his peers. The other GSA members can help him by either speaking with the harasser or convincing the student to file a complaint with school officials. GSAs are a must if schools intend to reduce sexual orientation harassment amongst its student body. GSAs show that students stand resolutely alongside their school's anti-harassment policies and do not tolerate such behavior amongst their peers.

B. Teacher Influence

Another non-legal tool that Vermont teachers can use to alleviate anti-gay harassment is a firm policy on gay slurs. Any good teacher would not tolerate the use of the word "nigger" amongst students. This word has an almost ethereal affect on the American psyche. It causes immediate revulsion and discomfort among most people. The words "faggot," "queer," and "homo" should be treated the same way by teachers. Many times students will use these words because they don't think that they are as wrong or as bad as racial slurs. Cursing is such a large part of growing up in America, and students see "faggot" as an equivalent to a silly swear word like "shit." Teachers should make an effort to distinguish gay slurs from words like "asshole." They should explain that gay slurs are invidious discrimination directed towards a historically oppressed group. They should attach immorality to gay slurs. This will, of course, not work with students who harbor real hate and hostility towards gay people, but it may help those students who just don't understand what they are saying.

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162. For other factors that can weaken a GSA, see Legare, *supra* note 160.

C. Gay History

The film *Before Stonewall* was the first time I ever really learned anything about gay history. The average teenager does not even realize that gays, like blacks, women, and Europeans, have a history. Public schools don't teach about *Stonewall* or the subsequent gay rights movement. This silence robs gay people of their past and of a chance to be recognized and respected by younger generations. It also contributes to the misconception that being homosexual is not normal and is something that is modern and not constant through the scope of human history. Vermont school teachers have a great deal of freedom over their curriculum, much more so than adjoining states. One of the standards they must fulfill is human rights lessons. They should use this freedom to incorporate the substantive history of gay people, and not just a lesson about how diversity is a good thing. Students need to know the facts before they can understand the essential roles gay people play and have played in our society.

CONCLUSION

Since I began this paper, Scott M.'s beating runs through my head on a daily basis. Though I eventually will take on another topic and lose this violent incident from my immediate memory once again, the image of its brutality will surely return. It will return when I overhear boys on the street calling each other "faggots." It will return when I see a little kid walking home alone from school. It will return when I send my first child off on the school bus. And while I will need a reminder to relive this brutality, others will never have the opportunity to escape it. Somewhere in Vermont, there's a fourteen year-old boy fearing his trip to school tomorrow. He's too embarrassed to tell his mom and dad why he's afraid. He just stays silent and keeps making the trip anyway.

Vermont has started down the right road, but it must enforce its own policies. It must realize their importance in alleviating greater societal discrimination. Only when every Vermont school has an active anti-harassment policy can the Legislature's dream of a harassment free Vermont truly begin. From there, it will take a cooperative approach between students, teachers, and administrators to remove fear and hate as tenets in a gay adolescence.

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