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Don't Say Gay or God: How Federal Law Threatens Student Religious Rights and Fails to Protect LGBTQ Students

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Don't Say Gay or God: How Federal Law Threatens Student Religious Rights and Fails to Protect LGBTQ Students

*Stephen McLoughlin, Esq.**

Federal law requires schools to protect students from discrimination based on their sexual orientation and gender identity. This protection is based on the principle that students must be free to explore their self-identity within the school environment as part of their intellectual development. Thus, schools must eliminate speech that threatens LGBTQ students based on their gender identity or sexual orientation. However, schools must also protect free speech and religious rights. Indeed, the expression of religious beliefs is also crucial to intellectual growth. Thus, schools must develop student speech policies that protect LGBTQ students from harmful speech while protecting controversial religious student speech. Unfortunately, federal law fails to provide clear guidance to help schools find this balance. Instead, federal law requires schools to limit speech that may cause "psychological trauma." This vague requirement causes schools to adopt overly broad speech codes restricting controversial religious speech. These undefined speech codes also fail to target the specific speech that causes harm to LGBTQ students. To help schools find the necessary student speech balance, this Article proposes a new conception of harmful student speech based on social science's insight into the specific features of speech that threaten LGBTQ students. This "Harmful Anti-LGBTQ Student Speech" concept will allow schools to eliminate speech that causes psychological trauma while protecting controversial speech necessary for religious identity development. By utilizing social science, this Harmful Anti-LGBTQ Student Speech conception will enable schools to create an educational environment that supports the intellectual development of all students.

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INTRODUCTION

Should schools eliminate religious student speech that is hostile toward transgender and gay students? Federal law generally requires schools to protect LGBTQ¹ students from harassment and discrimination.² This protection against harassment includes protection against speech that threatens students based on their sexual orientation or gender identity.³ At first blush, this principle may seem uncontroversial. However, it becomes more complex when schools address complicated issues regarding the conflicts between religious beliefs and gender identity and sexual orientation. Beyond harassment, schools must determine how to handle complicated topics such as student sexuality, parental upbringing rights, facility usage, privacy concerns, and athletic participation.⁴ Regardless of how the law or schools address these issues, students will likely have strong opinions, many of which are based on sincerely held religious beliefs.⁵

1. The term LGBTQ is generally defined as “lesbian, gay, bisexual, transgender and queer[.]” although the Q sometimes stands for “questioning” to represent people who are in the process of figuring out their sexual orientation or gender identity. Alia E. Dastagir, *LGBTQ Definitions Every Ally Should Know for Pride Month (and All Year Long)*, USA TODAY (June 2, 2022), <https://www.usatoday.com/story/news/nation/2022/06/02/lgbtq-glossary-ally-learn-language/7469059001>. See also Kathleen Conn, *Salvaging and Separating the 2020 Title IX Regulations*, 386 EDUC. L. REP. 557, 580 (2021).

2. See Kelsey Henderson, Ida Adibi, Emma D’Arpino, Lillian Tianyi Pang, Sophie Rebeil, Arielle Schechtman & Elan Wilkenfeld, *Athletics & Title IX of the 1972 Education Amendments*, 23 GEO. J. GENDER & L. 135, 157 (2022) (discussing the federal regulations that require schools to protect students against discrimination based on sexual orientation and gender identity).

3. See Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool to Stop Bullying of LGBT Students*, 125 YALE L.J. 2006, 2015 (2016). See also Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1613 (1995).

4. For a discussion of general issues that schools face related to sexual orientation and gender identity, see Michael J. Ritter, *Teaching Tolerance: A Harvey Milk Day Would Do a Student Body Good*, 19 TEX. J. WOMEN & L. 59, 78 (2009); Tommy Ou, *Sex Education in Schools*, 9 GEO. J. GENDER & L. 795, 799 (2008); and Kelly E. Mannion, *Steubenville and Beyond: The Constitutional Case for Comprehensive Sex Education*, 20 CARDOZO J. L. & GENDER 307, 335 (2014).

5. See Victoria S. Kolakowski, *The Role of Religious Objections to Transgender and Nonbinary Inclusion and Equality and/or Gender Identity Protection*, A.B.A. (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-role-of-religious-objections-to-transgender-and-nonbinary-inclusion-and-equality. See also Thomas G. Plante, *The Role of*

While schools must limit speech that creates a “hostile environment” for LGBTQ students, schools must also recognize that students retain free speech and religious rights within the school walls.⁶ Thus, schools must balance eliminating harmful speech that threatens LGBTQ students and protecting “controversial speech” to uphold religious and free speech rights.⁷

Current federal law does not provide clear guidance to enable schools to address religious-based student speech concerning LGBTQ issues or “religious LGBTQ student speech.” This “religious LGBTQ student speech” includes any students speech that addresses LGBTQ issues from a religious perspective. For example, students may express their opinions regarding the validity of “gay marriage” from a religious perspective or discuss their religious beliefs about homosexuality. Instead, the prevailing federal court cases suggest that schools must eliminate religious LGBTQ student speech if it harms the right of other students “to be let alone” by creating “psychological injury.”⁸

These undefined standards provide little guidance to enable schools to find the balance needed to protect LGBTQ students while upholding student religious and free speech rights. Indeed, the law and society create a toxic brew of influences that de-emphasize the importance of student speech and falsely suggest religious beliefs are uniformly hostile toward LGBTQ students.⁹ As a result, schools are encouraged to adopt various vague speech codes that eliminate

Religion in Sexual Orientation Change Efforts and Gender Identity Change Efforts, in THE CASE AGAINST CONVERSION “THERAPY”: EVIDENCE, ETHICS, AND ALTERNATIVES 109-24 (Douglas Haldeman ed., 2022).

6. *Kennedy v. Bremerton Sch. Dist.*, 213 L. Ed. 2d 755, 142 S. Ct. 2407, 2425 (2022). See also Jesse Ryan Loffler, *God Is Not the Lunch-Lady: Accommodation of Religious Dietary Practices in Public Schools*, 2010 CARDOZO L. REV. DE NOVO 430, 436 (2010).

7. For a general discussion of student speech, see Nancy Murray, *Striking a Balance: Students, Educators, and the Courts: School Safety: Are We on the Right Track?*, 34 NEW ENG. L. REV. 635, 640-43 (2000).

8. See *infra* Part II.A.2. See Michael Kent Curtis, *Be Careful What You Wish For: Gays, Deuling High School T-Shirts, and the Perils of Suppression*, 44 WAKE FOREST L. REV. 431, 462-63 (2009).

9. See *infra* Part II.C. See also Rucha Modi, Guthrie Graves-Fitzsimmons, Maggie Siddiqi & Rasheed Malik, *How Religion and LGBTQ Rights Intersect in Media Coverage*, AMERICAN PROGRESS (Dec. 21, 2020), <https://www.americanprogress.org/article/religion-lgbtq-rights-intersect-media-coverage-4.pdf>.

any form of speech that appears hostile toward LGBTQ people.¹⁰ These unclear speech codes threaten to eliminate student religious speech and the general expression of religious beliefs.¹¹ In response, multiple states have adopted regulations, such as Florida's "Don't Say Gay Law" that overcompensate by limiting LGBTQ student expression.¹² Texas has attempted to pass a vague law to generally protect religious discourse, but the law has been subject to constitutional challenges.¹³

The current landscape has forgotten the goal of education, which is to protect and promote the development and growth of all students.¹⁴ Instead of encouraging the exchange of ideas necessary for a vibrant educational environment, student speech codes threaten religious identity development and create an artificial environment in which complex LGBTQ issues are ignored out of fear of violating the law.¹⁵ This result harms all students because it prevents them from having the open and honest discussion necessary to develop their personal belief system by robbing them of the ability to experience and face differing opinions.

This Article proposes that the law refocus on the education system's primary goal of supporting and promoting the self-identity development and intellectual growth of all students.

10. See Kara Carnley Murrhee, *Squelching Student Speech in Florida?: Cyberbullying and the First Amendment*, 21 U. FLA. J.L. & PUB. POL'Y 307, 324 (2010); Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 727, 745 (2007); § 2:7. Vagueness, Overbreadth, and Prior Restraint, 1 Education Law § 2:7. See also Brett Sokolow, Daniel Kast & Timothy Dunn, *The Intersection of Free Speech and Harassment Rules*, 38 HUM. RTS. 19, 19-20 (2011).

11. See *infra* notes 191-92 and accompanying text. See also Jennifer Lavarias, *A Reexamination of the Tinker Standard: Freedom of Speech in Public Schools*, 35 HASTINGS CONST. L.Q. 575, 594 (2008).

12. Madeline Carlisle, *What Florida's 'Don't Say Gay' Bill Could Mean for LGBTQ Kids*, TIME (Feb. 9, 2022), <https://time.com/6146664/dont-say-gay-bill-florida-impact> ("Critics argue the bill would effectively silence students from discussing LGBTQ family members, friends, or neighbors – and prevent LGBTQ students from speaking about their very existence.").

13. See Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127, 135 (2013) (discussing Texas's Religious Viewpoint Antidiscrimination Act (RVAA) which was intended to protect student expression of religious viewpoints in schools).

14. John E. Taylor, *Tinker and Viewpoint Discrimination*, 77 UMKC L. Rev. 569, 630 (2009) ("The difficulties are especially great where the controversial student speech is religiously motivated, as much controversial speech in the schools surely is.").

15. Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 204 (2004).

Indeed, social science demonstrates that self-identity development involves both sexual identity development and spiritual or religious belief development.¹⁶ While the law generally requires schools to pursue these goals, it provides little guidance regarding how these goals apply to religious speech and LGBTQ issues. However, social science offers insight that can help schools pursue both goals simultaneously.¹⁷ First, social science identifies the features of speech that harm self-identity development, specifically sexual orientation and gender identity development. Second, social science identifies speech that may be controversial but is necessary to allow students to express their religious beliefs. This controversial speech also contributes to the exchange of ideas needed for the development of all students.

This Article utilizes this social science insight to propose a concept of “Harmful Anti-LGBTQ Student Speech” that will allow schools to target the speech that causes psychological injury to LGBTQ students while protecting religious speech necessary for religious identity development and, therefore, overall student development. Instead of calling for a complete revision to current law, this Harmful Anti-LGBTQ Student Speech fits within the existing law by targeting the “psychological injury” element that the courts have attempted but failed to address.

To develop this concept of Harmful Anti-LGBTQ Student Speech, Part I of this Article summarizes the current law regarding student speech and its application to LGBTQ religious speech. This section confirms the general goal of ensuring speech in schools promotes intellectual growth by protecting self-identity development. However, it also demonstrates that the law has failed to define a precise balance between eliminating speech harmful to sexual identity development and protecting religious identity development. As a result, the law encourages schools to create vague speech codes that fail to foster effective self-identity development.

16. Steven Hitlin, *Values as the Core of Personal Identity: Drawing Links Between Two Theories of Self*, 66 SOC. PSYCH. Q. 118, 120 (2003). See also Rebecca Schlegel, Joshua Hicks, Jaime Arndt & Laura King, *Thine Own Self: True Self-Concept Accessibility and Meaning in Life*, 92. J PERS. SOC. PSYCHOL. 473, 475 (2009).

17. Cf. Joseph Russomanno, *Cause and Effect: The Free Speech Transformation as Scientific Revolution*, 20 Comm. L. & Pol’y 213, 219 (2015) (discussing the history of social science’s influence on Free Speech jurisprudence).

Part II of this Article reviews the social science research into self-identity development. This research supports the idea that self-identity development is a critical component of intellectual growth in children and, therefore, should be supported through school speech rules. This research also establishes that both sexual identity and religious beliefs are vital to the self-identity development of students and, therefore, must be supported through clear speech codes that identify harmful speech and separate controversial speech necessary for self-identity development and expression. This Part also reviews social science research into speech and self-identity development, demonstrating that harmful and beneficial speech can be identified through certain key features.

Part III proposes the Harmful Anti-LGBTQ Student Speech concept by infusing social science research into the current legal standards to assess student religious LGBTQ speech. As demonstrated in this section, this Harmful Anti-LGBTQ Student Speech conception will enable schools to evaluate speech based on its overall effect on self-identity development. Specifically, this conception will allow schools to identify and eliminate speech harmful to both sexual orientation and gender identity development while protecting speech necessary for religious identity development. Through this Harmful Anti-LGBTQ Student Speech concept, schools can create an educational environment that genuinely protects against the psychological injury that speech can cause while supporting intellectual growth by allowing all students to explore and express their self-identity free from artificial limits or threats.

I. FEDERAL LAW AND RELIGIOUS LGBTQ STUDENT SPEECH

Federal law generally recognizes that schools must create and sustain an environment that fosters intellectual development.¹⁸ Beyond academics, the goal of supporting intellectual development requires schools to support and promote students'

18. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (“[S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.”). See also Mary Crossley, *Rick’s Taxonomy*, 66 SYRACUSE L. REV. 641, 646 (2016); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 972 (1996).

self-identity development.¹⁹ Self-identity development requires an educational environment where students feel safe and free to explore and express their personal characteristics and beliefs, including religious beliefs²⁰ and sexual identity.²¹ Thus, the law generally requires schools to create an environment that supports all aspects of student self-identity development.²²

Federal law also recognizes the vital role that student speech plays in self-identity development and, therefore, intellectual growth.²³ To fully explore and develop self-identity, the law has recognized that students must have the right to freely express themselves within the school environment as part of their intellectual development.²⁴ Thus, schools must permit controversial speech to create the vibrant marketplace of ideas necessary for spurring and developing intellectual growth.²⁵ Indeed, courts have found that schools cannot eliminate student speech just because it makes some

19. See *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005) (discussing the goal of education to help children become “healthy, productive, and responsible adults”).

20. See Josie Foehrenbach Brown, *Representative Tension: Student Religious Speech and the Public School’s Institutional Mission*, 38 J.L. & EDUC. 1, 3-4 (2009) (“As such an institution, the school must undertake a complex project—providing opportunities for children to express their identities, which may have a religious dimension, while ensuring that the school maintains its identity as a state institution that exhibits equal respect for all school community members without regard to their choices in matters of religious faith.”).

21. *Id.* See also Evan Ettinghoff, *Outed at School: Student Privacy Rights and Preventing Unwanted Disclosures of Sexual Orientation*, 47 LOY. L.A. L. REV. 579, 591 (2014) (discussing the process students go through to develop comfort with their sexual identity and the need to conduct this development in school without fear of rejection).

22. See Vasti Torres, Susan R. Jones & Kristen A. Renn, *Identity Development Theories in Student Affairs: Origins, Current Status, and New Approaches*, 50 J. COLL. STUDENT DEV. 577 (2009).

23. Frederic S. Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?*, 27 VAND. L. REV. 209, 235 (1974) (discussing the role student speech plays in the “primary function of public schools” to enable students to engage in intellectual inquiry). See also Stanley Ingber, *Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 95 (1987).

24. *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967) (“The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”). See also Sharon K. Mollman, *The Gender Gap: Separating the Sexes in Public Education*, 68 IND. L.J. 149, 176 (1992).

25. Alan Goldberg, *Textbook Removal Decisions and the First Amendment—A Better Balance*, 62 TEMP. L. REV. 1317, 1332 (1989). See also Henry M. Levin, *The Theory of Choice Applied to Education*, in 1 CHOICE AND CONTROL IN AMERICAN EDUCATION 247, 255-66 (William H. Clune & John F. Witte eds., 1990) (“Research on political socialization has shown that tolerance for diversity is related to the degree to which different children are exposed to different viewpoints on controversial subjects in both the home and school.”).

uncomfortable or clashes with popular opinion.²⁶ This protection is guaranteed by free speech and religious protections, which schools must uphold.²⁷

However, the law also recognizes that schools must limit speech that would otherwise be protected in general society if it harms the intellectual development of other students.²⁸ Specifically, the law recognizes that some speech in the school context can prevent other students from fully exploring and expressing the core characteristic of their self-identity.²⁹

Therefore, the law requires schools to find a delicate balance when addressing student speech to protect self-identity development and intellectual growth. Schools must honor speech rights to allow students to explore and express their self-identities fully.³⁰ However, schools must also eliminate speech that harms the self-identity development and, therefore, the intellectual growth of other students.³¹ This balance requires schools to identify harmful speech while protecting “controversial speech” or speech that makes some uncomfortable but does not rise to the level of discourse that harms intellectual growth.³² To identify this speech

26. *Leontiev v. Corbett Sch. Dist.*, 333 F. Supp. 3d 1054, 1064 (D. Or. 2018). *See also* J.C. *ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1123 (C.D. Cal. 2010) (finding that schools cannot limit student speech based on “a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”).

27. *See* Loffler, *supra* note 6. *See also* Philip T.K. Daniel & Jeffrey C. Sun, *Two Cases, Two Different Freedoms: Student Free Speech Through Social Media and the Rights of Minoritized Students*, 27 TEX. J.C.L. & C.R. 179, 195 (2022).

28. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)).

29. *See* Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165, 195 (2011) (discussing cases reviewing student speech and finding that speech can be limited if it threatens the “core characteristics” of a student’s identity).

30. *See* Cheryl B. Preston & Brandon T. Crowther, *Legal Osmosis: The Role of Brain Science in Protecting Adolescents*, 43 HOFSTRA L. REV. 447, 448–49 (2014).

31. Lisa Shaw Roy, *Inculcation, Bias, and Viewpoint Discrimination in Public Schools*, 32 PEPP. L. REV. 647, 664 (2005). *See also* Abby Marie Mollen, *In Defense of the “Hazardous Freedom” of Controversial Student Speech*, 102 NW. U. L. REV. 1501, 1523 (2008).

32. Mollen, *supra* note 31, at 1523. *See also* *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 680 (7th Cir. 2008) (J., Rovner, concurring) (“The First Amendment as interpreted by *Tinker* is consistent with the school’s mission to teach by encouraging debate on controversial topics while also allowing the school to limit the debate when it becomes substantially disruptive.”).

and help draw this line, the courts rely on the U.S. Supreme Court's *Tinker* standard.³³

A. Protecting Self-Identity Development Through the Tinker Standard

In the seminal case *Tinker v. Des Moines Independent School District*, the Court established the general standard for placing limits on student speech.³⁴ The Court generally recognized that students do not lose their free speech rights while in school.³⁵ However, to promote intellectual growth and create a vibrant educational environment, the *Tinker* Court also established that schools could and should eliminate speech that harmed the education experience of other students.³⁶

To identify "harmful speech," the *Tinker* Court established that schools should limit speech that either substantially interferes with the operation of the school or violates the rights of other students "to be secure and to be let alone."³⁷ The Court developed these standards to help schools find the balance between permitting speech to allow for intellectual growth and eliminating speech that harmed student development.³⁸ However, the *Tinker* test has been subject to much debate and criticism by other courts and legal scholars claiming both standards provide vague conceptions of harmful speech and therefore fail to find the balance necessary to protect the intellectual growth of all students.³⁹

33. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). See also Margaret Malloy, *Bell v. Itawamba County School Board: Testing the Limits of First Amendment Protection of Off-Campus Student Speech*, 2016 WIS. L. REV. 1251, 1252 (2016) (discussing the legacy of the *Tinker* standard).

34. *Tinker*, 393 U.S. at 504.

35. *Id.* at 506 ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

36. *Id.* at 507.

37. See *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1067 (9th Cir. 2013). See also Martha McCarthy, *Anti-Harassment Policies in Public Schools: How Vulnerable Are They?*, 31 J.L. & EDUC. 52, 53 (2002) (summarizing the standards established by the *Tinker* Court).

38. *Tinker*, 393 U.S. at 508-09 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949)). See also Bonnie A. Kellman, *Tinkering with Tinker: Protecting the First Amendment in Public Schools*, 85 NOTRE DAME L. REV. 367, 371 (2009).

39. See, e.g. Daniel & Sun, *supra* note 27; Jennifer Lavarias, *A Reexamination of the Tinker Standard: Freedom of Speech in Public Schools*, 35 HASTINGS CONST. L.Q. 575, 594 (2008) and Laura K. Schulz, *A "Disacknowledgment" of Post-Secondary Student Free Speech—Brown v. Li and the Applicability of Hazelwood v. Kuhlmeier to the Post-Secondary Setting*, 47 ST. LOUIS U. L.J. 1185, 1197 (2003).

1. The Inherently Vague "Substantial Interference" Standard

The "substantial interference" standard of student speech created by the *Tinker* Court allows schools to limit speech if it constitutes "material and substantial interference with schoolwork or discipline."⁴⁰ However, the *Tinker* Court and several subsequent courts interpreting the "substantial interference" standard recognized that schools should not limit all speech that could potentially disrupt school.⁴¹ To actively promote the free exchange of ideas necessary for educational development, the courts recognized that schools must tolerate and encourage a certain amount of controversial speech.⁴² Even though this "controversial speech" may cause discomfort, eliminating it would prevent the free exchange of ideas necessary for intellectual growth.⁴³

Thus, the "substantial interference" standard established by the *Tinker* Court requires schools to identify harmful speech that substantially interferes with the educational experience and separate it from "controversial speech" that may cause some students to feel uncomfortable.⁴⁴ However, neither the *Tinker* Court nor subsequent cases provide much specific guidance to find this balance.⁴⁵ Courts and scholars have criticized the "substantial interference" standard as inherently vague and encouraging overbroad speech limits.⁴⁶ Further, neither the *Tinker* Court nor other courts interpreting this standard provide a clear definition of the speech that may be disruptive but does not rise to the level of

40. *Tinker*, 393 U.S. at 511.

41. *Tinker*, 393 U.S. at 508 (establishing that speech cannot be limited just because it potentially creates "undifferentiated fear or apprehension of disturbance"). See also Grayned v. City of Rockford, 408 U.S. 104, 117 (1972); Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 25 (1st Cir. 2020); Cuff ex rel. B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 112 (2d Cir. 2012); Guiles ex rel. Guiles v. Marineau, 461 F.3d 320, 326 (2d Cir. 2006); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 253 (3d Cir. 2002); and Ponce v. Socorro Indep. Sch. Dist., 508 F.3d 765, 769 (5th Cir. 2007).

42. *Tinker*, 393 U.S. at 512 (citing Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

43. See Tenney, *supra* note 3.

44. *Id.* See also Ralph D. Mawdsley & Charles J. Russo, *Hostility Toward Religion and the Rise and Decline of Constitutionally Protected Religious Speech*, 240 EDUC. L. REP. 524, 537 (2009).

45. See Sandra Ragland, *Rights or Wrongs? Student Newspapers and the First Amendment*, 27 J.L. & EDUC. 165, 166 (1998).

46. See, e.g., Ronald D. Wenkart, *Sexual Harassment Policies and the First Amendment: Is There A Potential Conflict?*, 255 EDUC. LAW REP. 1, 10 (2010). See also Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419, 430 (9th Cir. 2008) (noting that the *Tinker* Standard of substantial interference leaves unresolved questions based on its narrow application).

substantial interference.⁴⁷ Indeed, several courts and scholars have offered various concepts to encapsulate controversial speech that may cause discomfort in some students but must be protected to uphold free speech rights.⁴⁸ These attempts to provide further clarity suffer from the same vagueness that plagues the “substantial interference” conception provided in *Tinker*.⁴⁹ This substantive interference test is especially ill-equipped to address inherently controversial speech dealing with sexual orientation and gender identity issues.⁵⁰ Thus, the courts turned to the second conception of harmful speech outlined in *Tinker* to address student speech about LGBTQ issues.⁵¹

2. The Underdefined “Right to be Let Alone” Standard

The *Tinker* Court also established that schools can limit speech if it violates the “rights of other students to be secure and to be let alone.”⁵² After *Tinker*, the courts largely discounted the “right to be let alone” standard when assessing student speech.⁵³ The courts

47. Bo Malin-Mayor, *Proceduralize Student Speech*, 131 YALE L.J. 1880, 1894 (2022). See also Corales v. Bennett, 567 F.3d 554, 565 (9th Cir. 2009) But see Robert H. Wood, *The First Amendment Implications of Sexting at Public Schools: A Quandary for Administrators Who Intercept Visual Love Notes*, 18 J.L. & Pol’y 701, 717 (2010) (“While critics have suggested that the Court has implicitly abandoned *Tinker*, leaving no “comprehensive First Amendment approach to public education,” the Court has yet to explicitly abandon the *Tinker* approach, choosing to carve out exceptions on a case by case basis.”).

48. See, e.g., Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, 672 (7th Cir. 2008); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 535 (2000); Erwin Chemerinsky, *Teaching That Speech Matters: A Framework for Analyzing Speech Issues in Schools*, 42 U.C. DAVIS L. REV. 825, 830 (2009); Derek Ruzicka, *If’s Political, You Can’t Be Offended! A Discussion of the Student Speech Analysis in Guiles Ex Rel. Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), 32 S. ILL. U. L.J. 469, 471 (2008).

49. See Allison Belnap, *Tinker at A Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. REV. 501, 520–21 (2011).

50. Brian Pickard, *Tinkering with the Rights of Others: Harper v. Poway Unified School District* 445 F.3d 1166 (9th Cir. 2006), 8 RUTGERS J. L. & RELIGION 7 (2006).

51. Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 366 (2007).

52. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

53. Allison N. Sweeney, *The Trouble with Tinker: An Examination of Student Free Speech Rights in the Digital Age*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 359, 414 (2018) (“Though the Court explicitly recognized the ‘rights of other students to be secure and to be let alone,’ this prong of the *Tinker* standard is perplexingly largely overlooked by lower courts and seldom cited to justify the regulation of off-campus online student speech.”).

generally found the “right to be let alone” standard unclear and undefined.⁵⁴ However, in *Harper v. Poway Unified School District*, the Ninth Circuit focused on this “right to be let alone” to analyze student religious speech about LGBTQ issues specifically.⁵⁵

In *Harper*, a student, Tyler Chase Harper (“Student Harper”), wore a shirt to school with the following statements: “I Will Not Accept What God Has Condemned,” and “Homosexuality Is Shameful ‘Romans 1:27’”⁵⁶ The school required Student Harper to remove the shirt, finding it threatened and interfered with the rights of LGBTQ students.⁵⁷ In response, Student Harper sued the school district, claiming the school’s actions violated his free speech and religious rights.⁵⁸

Harper justifiably found that the substantial interference standard was ill-equipped to address the complexity of speech at issue.⁵⁹ Thus, the *Harper* court focused on the “right to be let alone” standard established in *Tinker*.⁶⁰ After a detailed analysis of this right, the court upheld the school’s decision to limit Student Harper’s speech, finding that it violated other students’ “right to be left alone” by threatening the “core characteristics” of LGBTQ students and, therefore, creating “psychological injury.”⁶¹

Harper represented a significant step in the courts’ analysis of student speech in two ways. First, *Harper* suggested that the “right to be let alone” standard created in *Tinker* should be used to assess religious-based student speech to assess its effect on LGBTQ students.⁶² Although the “substantial interference” standard received most of the attention from the courts, *Harper* suggested a shift in focus.⁶³ Secondly, *Harper* attempted to clarify the “right to be let alone” standard by establishing that student speech could

54. *Bowler v. Hudson*, 514 F. Supp. 2d 168, 176 (D. Mass. 2007) (“The precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear.”).

55. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177 (9th Cir. 2006).

56. *Id.* at 1171.

57. *Id.*

58. *Id.* at 1173.

59. *Id.* at 1177.

60. *Id.* at 1177.

61. *Harper*, 445 F.3d at 1189.

62. *Id.* at 1178. See also Elizabeth M. Jaffe & Robert J. D’Agostino, *Bullying in Public Schools: The Intersection Between the Student’s Free Speech Rights and the School’s Duty to Protect*, 62 MERCER L. REV. 407, 418 (2011).

63. See Sweeney, *supra* note 53.

violate other student's rights by attacking their "core characteristics" and, therefore, creating "psychological injury"⁶⁴ Thus, *Harper* linked the "right to be let alone" to the overall goal of promoting self-identity development by suggesting speech should be restricted if creates psychological injury by attacking a person's core characteristics.⁶⁵

Although *Harper* provided some clarity to the "right to be let alone" standard by introducing psychological injury into the analysis, it provided an incomplete and one-sided assessment. As noted in Judge Kozinski's dissent, the speech at issue caused "psychological injury" but the school district failed to utilize psychological analysis to define or identify this "injury."⁶⁶ Further, the *Harper* decision addressed the relationship between speech and self-identity development by focusing on how the speech at issue affected the "core characteristics" of LGBTQ students.⁶⁷ However, the *Harper* decision failed to consider how limiting the speech at issue would harm the core characteristics and self-identity development of the speaker's religious beliefs.⁶⁸

In other words, *Harper* provided an incomplete picture of how speech can cause psychological injury based on its relationship to core characteristics. While the court was correct in considering how speech affected the core characteristics of LGBTQ students, it failed to balance this concern with how limiting the speech would affect the core characteristic development of the speaker.⁶⁹

Although *Harper* acknowledged the religious overtones of the speech at issue, the decision did not recognize the special place that religious beliefs play in the core characteristic of

64. *Harper*, 445 F.3d at 1182. See also *Bowler v. Hudson*, 514 F. Supp. 2d 168, 183 (D. Mass. 2007).

65. See Steven J. Macias, *Adolescent Identity Versus the First Amendment: Sexuality and Speech Rights in the Public Schools*, 49 SAN DIEGO L. REV. 791, 806 (2012) (discussing antigay or anti-identity speech).

66. *Harper*, 445 F.3d at 1198-99 ("What my colleagues say could be true, but the only support they provide are a few law review articles, a couple of press releases by advocacy groups and some pop psychology.").

67. *Id.* at 1182.

68. See Martha McCarthy, *Student Expression That Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?*, 240 EDUC. L. REP. 1, 8 (2009) ("Lower courts have not uniformly applied *Tinker's* second prong in post-*Harper* cases").

69. See *infra* Part II.D. See also Clay Calvert, *Tinker's Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1182 (2009).

some students.⁷⁰ Instead, the Court relied on misunderstanding and misrepresentations of religious speech. Indeed, its failure to recognize the importance of religious development and speech contributed to a line of case law that de-emphasizes religious speech's legal protections and developmental significance in schools.⁷¹

3. Student Religious Speech Stripped of its Special Status

Student religious speech has a complex and changing history. Traditionally, student religious speech is treated as a distinctive form of speech that is entitled to more protections.⁷² This special status was based on the widely held acknowledgment that people often consider religious beliefs fundamental components of their core identity.⁷³ Thus, the courts assessed religious speech based on the distinctive effect it can have, both for the speaker and students subject to it.⁷⁴ Granting religious speech special consideration fell in line with the special considerations religious activities were afforded in the Constitution.⁷⁵

However, in a series of decisions starting in 1993, the Supreme Court removed the special consideration granted to student religious speech.⁷⁶ Specifically, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court found that religious speech should be subjected to the same test as other viewpoint speech

70. Brian D. Eck, *Rebel Without a Clause: The Right "Rights of Students" in Nixon v. Board of Education and the Shadow of Freedom Under Harper v. Poway*, 6 AVE MARIA L. REV. 197, 199 (2007).

71. Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. DAVIS L. REV. 889, 926–27 (2009).

72. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). See also Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843, 867–68 (2009) (“[P]articularly within the context of public education, the Court has traditionally viewed religious speech as distinctive from other forms of speech.”).

73. Josie Foehebnach Brown, *Representative Tension: Student Religious Speech and the Public School's Institutional Mission*, 38 J.L. & Educ. 1, 2 (2009) (explaining that student religious speech received special protection because schools are “a place where children have the opportunity to express their individual and family identities, identities that may or may not place religious belief at their core, while learning to negotiate how to share the school community with others whose identities differ but who have an equivalently legitimate claim to membership.”).

74. *Id.*

75. Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 12 (2000).

76. For a summary of the history of student religious speech, see Green, *supra* note 72 at 865.

when determining its appropriateness in the school setting.⁷⁷ This decision broke with the traditional analysis of student religious speech, which suggested that religious speech should be afforded special consideration based on religion's unique role in self-identity formation.⁷⁸

This change from granting school religious speech special consideration to treating religious speech the same as other speech has been criticized for failing to recognize the importance of religious speech.⁷⁹ Some argue that treating religious speech as just another viewpoint grants it too much protection by ignoring the potentially powerful influence it could have on others.⁸⁰ Conversely, others contend that religious speech should be given special consideration because it represents more than mere opinions but principles that guide some people's lives.⁸¹

Justice Thomas is often credited as the driving influence that resulted in the Supreme Court subjecting school religious speech to the same treatment as other controversial speech.⁸² However, stripping religious speech of its special consideration led other courts, including the *Harper* court, to underestimate the harm that eliminating religious speech has on the educational experience and overestimate the damage religious speech can have on other students.

4. Underestimating the Harm of Eliminating Student Religious Speech

Harper has become a seminal case with respect to how the courts approach religious LGBTQ speech.⁸³ The Ninth Circuit's analysis represents how the current process used by the courts to assess student speech mishandles religious LGBTQ speech issues.⁸⁴ *Harper* and subsequent cases analyzing student religious speech failed to

77. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 385 (1993).

78. *Id.* See also Green, *supra* note 72, at 865.

79. See, e.g., Green, *supra* note 72, at 867-68 ("The equal treatment theorem, though, undervalues these distinctive qualities of religious expression within the school context.").

80. René Reyes, *The Fading Free Exercise Clause*, 19 WM. & MARY BILL RTS. J. 725, 741 (2011).

81. *Id.* See also Green, *supra* note 72, at 867-68.

82. Green, *supra* note 72, at 868-69.

83. See Mark A. Perlaky, *Harper v. Poway Unified School District: The Wrong Path to the Right Outcome?*, 27 N. Ill. U. L. Rev. 519, 536 (2007).

84. *Id.* See also Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of Tinker*, 38 J.L. & EDUC. 593, 602 (2009).

fully consider the importance of religious speech to the development of the speaker and its contribution to the exchange of ideas necessary for student intellectual growth.⁸⁵ Instead, religious speech is often treated similarly to other controversial forms of speech, often focusing solely on the potential harm of the speech to the audience but failing to consider its importance to the speaker's self-identity development.⁸⁶ This lack of consideration resulted from several misconceptions about religious speech.

a. Undervaluing the importance of the school environment for religious identity development. The *Harper* court recognized that the speech at issue expressed Student Harper's religious beliefs.⁸⁷ However, it found that restricting the speech did not create an undue burden on Harper's religious practice because he was "free to express his views, whatever their merits, on other occasions and in other places."⁸⁸ Essentially, *Harper* and its progeny suggest that schools can limit student religious expression because students can express their religious beliefs outside school.⁸⁹ However, the court's suggestion that schools can restrict religious speech without stifling the student's religious rights misrepresents the importance of student religious expression and the critical role that the school environment plays in student development.⁹⁰

85. Green, *supra* note 72, at 868.

86. Prior to *Harper*, federal courts generally recognized the importance of religious speech in student development. See David de Andrade, *The Equal Access Act: The Establishment Clause v. the Free Exercise and Free Speech Clauses*, 33 N.Y.L. SCH. L. REV. 447, 461 (1988) ("The federal courts have stated that religious discussion and study satisfy the standard that student activity groups promote the intellectual and social development of students."). See also *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (affirming the lower court's determination that the "primary effect" allowing religious speech "would not be to advance religion, but rather to further the neutral purpose of developing students' social and cultural awareness as well as [their] intellect").

87. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1192 (9th Cir. 2006).

88. *Id.* at 1188.

89. John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 260 (2007).

90. Richard M. Esenberg, *Must God Be Dead or Irrelevant: Drawing a Circle that Lets Me In*, 18 WM. & MARY BILL RTS. J. 1, 6 (2009) ("The notion that faith can be cabined into a private sphere largely concerned with metaphysical assertions is itself a claim about what religion is or should be.").

In childhood, students explore, develop, and express their religious identity through social interactions with their peers.⁹¹ Thus, healthy religious development does not occur “in private” or solely in religious settings.⁹² Instead, religious development occurs through social interaction with peers who may not share the same views.⁹³ Indeed, this social interaction may help students shed some negative beliefs encouraged within their religious communities but rejected by larger society based on the harm it can cause to others.⁹⁴

For many children, the school environment constitutes the primary setting where they can interact with their peers and society to fully develop their self-identity and religious identity.⁹⁵ Thus, robbing students of their ability to express their religious beliefs in school robs them of one of the primary sources of social and personal development.⁹⁶ Indeed, *Harper* acknowledged the importance of the school environment in children’s social development.⁹⁷ It upheld the school’s decision to eliminate the speech at issue by finding that speech hostile towards LGBTQ issues is especially harmful to LGBTQ students’ development in a school context.⁹⁸ However, it downplayed the role of a school

91. Green, *supra* note 72, at 848–49 (“Religious faith is a significant component in the lives of many children, forming their identity, values, and sense of self-worth in their developing years. A climate that respects student religious expression enhances their personal and intellectual growth while it advances freedom of expression in the aggregate.”).

92. Anna B. Lopez, Virginia W. Huynh & Andrew J. Fuligni, *A Longitudinal Study of Religious Identity and Participation During Adolescence*, 82 CHILD DEV. 1297, 1299–1301 (2011), <https://srcd.onlinelibrary.wiley.com/doi/abs/10.1111/j.1467-8624.2011.01609.x>.

93. *Id.*

94. Elsbeth Visser-Vogel, Janneke Westerink, Jos de Kock, Marcel Barnard & Cok Bakker, *Developing a Framework for Research on Religious Identity Development of Highly Committed Adolescents*, 107 OFFICIAL J. RELIGIOUS EDUC. ASS’N, 108, 109–110 (2012), <https://www.tandfonline.com/doi/abs/10.1080/00344087.2012.660413>.

95. Kathryn Wentzel, *Socialization in School Settings*, in HANDBOOK OF SOCIALIZATION: THEORY AND RESEARCH 251–75 (E. Grusec & P. D. Hastings eds., 2015), <https://psycnet.apa.org/record/2015-05080-011>.

96. Clotilde Pontecorvo, *Social Interaction in the Acquisition of Knowledge*, 5 EDUC. PSYCHOL. REV. 293, 293–94 (1993).

97. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006).

98. *Id.*

environment when assessing the religious component of the speech at issue.⁹⁹

This resulted in an inconsistent portrayal of the school environment in student development. On one hand, *Harper* found that the school environment played a crucial role in student development and, therefore, schools should eliminate speech hostile to LGBTQ students.¹⁰⁰ On the other hand, it found that the school environment was not essential to a student's religious development and, therefore, schools can limit religious speech.¹⁰¹ Other courts followed suit, issuing opinions that downplayed the importance of the school setting in religious identity development.¹⁰²

Social science demonstrates that schools constitute a crucial environment for children's self-identity development.¹⁰³ Therefore, schools must support both religious identity development and sexual identity development. To create this supportive environment, schools must allow students to express their religious and sexual identities and beliefs, even if their views are controversial or unpopular. Thus, the critical role of schools in children's development, as acknowledged and championed by *Harper*, does not justify limiting religious speech.¹⁰⁴ Instead, the importance of the school environment requires schools and the law to find a balance between respecting speech necessary for religious identity development and eliminating speech harmful to sexual identity development. *Harper* attempted but failed to provide this balance by misrepresenting the importance of religious speech within the school environment and offering an imbalanced process for analyzing student speech. This imbalanced view pervades other

99. Jorge O. Elorza, *Secularism and the Constitution: Can Government Be Too Secular?*, 72 U. PITT. L. REV. 53, 63 (2010). See also William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1372 (2010).

100. *Harper*, 445 F.3d at 1178-79 ("The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development.").

101. *Id.* at 1188 ("Harper remains free to express his views, whatever their merits, on other occasions and in other places. The prohibition against the wearing of a T-shirt in school does not constitute a substantial burden on the exercise of his religious beliefs.").

102. See Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 217 (2013) (generally discussing student speech restrictions and the cases that involve religious speech).

103. *Infra* Part II.C.

104. *Harper*, 445 F.3d at 1176.

courts' decisions and contributes to the general de-emphasis of student religious speech rights.¹⁰⁵

b. Stigmatizing religious beliefs through censorship. The *Harper* decision also failed to recognize the harmful effect that branding religious speech as improper can have on students' religious identity development. As part of his claim, Student Harper argued that the school's decision to limit religious speech constituted an improper attempt to change his religious beliefs.¹⁰⁶ The court rejected this argument, finding that schools have the ultimate right to teach tolerance "even if the message conflicts with the views of a particular religion."¹⁰⁷ Thus, the court found that that school was justified in eliminating Student Harper's religious speech to protect "civility essential to a democratic society."¹⁰⁸

By suggesting that certain religious beliefs are "intolerant" and contrary to basic "civility," schools are telling students that certain religious beliefs will be, or should be, rejected by the larger society. Moreover, this message will encourage students to hide or be ashamed of their religious beliefs, harming their religious identity development.¹⁰⁹ Indeed, schools cannot promote "tolerance" by eliminating, and thereby being intolerant of, religious speech.¹¹⁰

Tolerance and civility require schools to find the balance between protecting speech that may make some uncomfortable and eliminating speech that threatens the self-identity development of others. *Harper* was correct to declare that some specific speech should be limited because it harms the rights of others to express their core sexual characteristics. However, it failed to consider the harm that banning religious speech will have on the expression of the core characteristics of religious students. Just as harmful speech will make LGBTQ students afraid to express their sexual identity,

105. See Bowman, *supra* note 102.

106. *Harper*, 445 F.3d at 1186.

107. *Id.* at 1189-90.

108. *Id.* at 1185 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

109. Ilene Allgood, *Faith and Freedom of Religion in U.S. Public Schools: Issues and Challenges Facing Teachers* 111 OFF. J. RELIGIOUS EDUC. ASS'N 270, 270-72 (2016).

110. See Kumar Yogeeswaran, Levi Adelman & Maykel Verkuyten, *The U.S. Needs Tolerance More than Unity*, SCIENTIFIC AMERICAN (Mar. 2, 2021), <https://www.scientificamerican.com/article/the-u-s-needs-tolerance-more-than-unity>. See also Derrick Morgan, *The Intolerant 'New Tolerance'*, THE HERITAGE FOUNDATION (Aug. 21, 2012), <https://www.heritage.org/commentary/the-intolerant-new-tolerance>.

overregulating religious speech will make religious students afraid to express their religious identity.

Indeed, eliminating religious speech harms the development of religious students and the intellectual debate necessary for intellectual growth. To create an environment that fosters intellectual growth, social science indicates that schools can and should protect speech expressing an opinion that might be controversial or outside the mainstream but does not threaten others.¹¹¹ Indeed, this controversial speech is necessary for religious development and the free exchange of ideas required for intellectual growth.¹¹² To support self-identity development in all its forms, schools should only limit speech that harms the intellectual debate itself by explicitly threatening the ability of others to express their self-identity.

By deeming religious beliefs “intolerant,” the courts and schools inject their opinion of what constitutes tolerance or acceptable viewpoints into controversies that have not been resolved within larger society. While many agree that discrimination against LGBTQ students is abhorrent, there are many LGBTQ-related issues that remain unresolved in society and are a topic of mainstream debate.¹¹³

c. Harming the Educational Mission of Schools by Restricting Student Religious Speech. The *Harper* court also found that schools can limit religious expression as part of “performing their proper educational mission.”¹¹⁴ However, it failed to provide a clear or complete definition of this “educational mission” and failed to acknowledge the role that free speech and religious expression play in this mission.

Indeed, one of the main “educational missions” of schools is to instill and uphold the essential elements of democracy, as suggested in *Harper*.¹¹⁵ However, these essential elements of

111. See *infra* Part II.D.

112. See *infra* notes 285–88.

113. See *Tenney*, *supra* note 3.

114. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1190 (9th Cir. 2006).

115. *Id.* For a discussion of this educational mission in the context of education law, see Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Incultation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 64 (2002); Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1020 (2008); and Glenn Omatsu, *Teaching for Social Change: Learning How to Afflict the Comfortable and Comfort the Afflicted*, 32 LOY. L.A. L. REV. 791, 796–97 (1999).

democracy include the principles of free speech and religious expression freedom.¹¹⁶ To fulfill their educational mission, schools must create an environment where students are free to express their values and be exposed to different and controversial ideas.¹¹⁷ Thus, the “educational mission” of schools and the “essential elements of democracy” require schools to protect religious speech, even speech critical of LGBTQ issues, to fulfill their educational mission.

Harper and its progeny provide an accurate but incomplete assessment of the educational environment when assessing speech. To promote the self-identity development of all students, the educational mission requires schools to protect LGBTQ students from discrimination and uphold free speech and religious expression. In other words, the educational mission of schools requires a balance between eliminating speech harmful to civility and supporting speech necessary for intellectual development, even if this speech is offensive to some. The courts have failed to find this balance by underestimating the value and importance of religious speech to the educational mission of schools.

5. *Overestimating the Harm of Religious Speech*

In addition to underestimating the harm of limiting student religious speech, *Harper* and its progeny also overestimate the harm religious speech causes to LGBTQ students. Instead of relying on social science input, the court declared that specific speech could cause “psychological injury” and should be limited by schools.¹¹⁸ However, by failing to define this “psychological injury” with social science input, *Harper* propagated many misconceptions about the effect of religious speech on LGBTQ students.

a. *Vaguely defining psychologically injurious speech.* The *Harper* decision generally recognized the need to protect “controversial speech” that may make some students uncomfortable.¹¹⁹ Nonetheless, it justified limiting Student Harper’s religious speech because it went beyond controversial speech and caused “psychological injury” to

116. See *Seidman v. Paradise Valley Unified Sch. Dist.* No. 69, 327 F. Supp. 2d 1098, 1109 (D. Ariz. 2004). See also *Bible Club v. Placentia-Yorba Linda Sch. Dist.*, 573 F. Supp. 2d 1291, 1293-94 (C.D. Cal. 2008).

117. See *Bible Club*, 573 F. Supp. 2d at 1294.

118. *Harper*, 445 F.3d at 1189.

119. *Id.* at 1182.

LGBTQ students by targeting their “core characteristics.”¹²⁰ However, the court failed to define the features of speech that cause psychological injury or how this speech can be distinguished from speech that merely causes negative emotions in some students. Instead, it concluded that the religious speech was “demeaning” to LGBTQ students, not only to their psychological health and well-being but also to their educational development.¹²¹

In his dissent, Judge Kozinsky demonstrated that the majority did not rely on sufficient scientific or social science analysis to support its conclusion that the speech at issue caused psychological injury.¹²² Instead, the court based its “psychological injury” conclusion on “a few law review articles, a couple of press releases by advocacy groups, and some pop psychology.”¹²³ The only scientific source cited by the court to support its psychological injury finding claimed, without scientific evidence, that school underachievement is likely caused by “verbal and physical abuse at school.”¹²⁴ However, this research did not define “verbal abuse” or demonstrate that speech without the threat of physical abuse could cause psychological injury.¹²⁵ Judge Kozinsky noted that the analysis cited by the majority would not meet the general requirements for scientific evidence established by the federal courts, which require evidence to be more than subjective belief or unsupported speculation.¹²⁶

Harper confirmed and established that the potential harm of anti-LGBTQ speech could be assessed based on social science, namely the “psychological injury” that can result from speech.¹²⁷ However, *Harper* relied on a general conception of “psychological injury” that did not distinguish harmful speech from speech that may cause emotional distress but does not cause the harm necessary to justify censorship.¹²⁸ Without this clarity, the

120. *Id.* at 1178.

121. *Id.* at 1178-79.

122. *Id.* at 1199 (Kozinski, J., dissenting).

123. *Id.* at 1198-99 (Kozinski, J., dissenting).

124. *Id.* at 1179.

125. *Id.* at 1199 (Kozinski, J., dissenting).

126. *Id.* at 1199 (Kozinski, J., dissenting).

127. *Id.* at 1189.

128. *Id.* at 1198-99 (Kozinski, J., dissenting) (“What my colleagues say could be true, but the only support they provide are a few law review articles, a couple of press releases by

“psychological injury” concept has been interpreted broadly to include any speech that merely causes mental or emotional discomfort.¹²⁹

Indeed, social science research about the effect of speech demonstrates that the psychological injury concept established by *Harper* is overly broad and threatens to swallow up speech that does not cause psychological harm but merely creates distress.¹³⁰ Social science suggests this distress-inducing speech not only does not create psychological injury but can provide psychological benefits.¹³¹ Indeed, religious-based speech benefits religious identity development.¹³² It can also help the development of LGBTQ students by allowing them to face and overcome stressful speech in the school environment, which is a vital component of sexual identity development.¹³³ Thus, by failing to fully define or analyze the potential “psychological injury” that speech may cause, *Harper* added to the vagueness of *Tinker*’s “right to be let alone” standard by suggesting speech causing discomfort could be considered psychologically injurious and subject to limitation.

b. Confusing “Compelling Speech” with “Convincing Speech.” The *Harper* decision also justified limiting student religious speech by deeming it an improper attempt to force religious beliefs on others: “The Constitution does not authorize one group of persons to force its religious views on others or to compel others to abide by its precepts.”¹³⁴ However, this conclusion fundamentally misrepresents the purpose and effect of student religious speech.

The Supreme Court has separately confirmed that schools cannot limit speech simply because it is intended to convince or convert other students.¹³⁵ Instead, schools must allow students to

advocacy groups and some pop psychology. Aside from the fact that published articles are hardly an adequate substitute for record evidence, the cited materials are just not specific enough to be particularly helpful.”).

129. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring). See Kevin W. Saunders, *Hate Speech in the Schools: A Potential Change in Direction*, 64 ME. L. REV. 165, 169 (2011).

130. See *infra* notes 272-74 and accompanying text.

131. See *infra* Part II.D.

132. See Laura Leets, *Experience Hate Speech: Perceptions and Responses to Anti-Semitism and Antigay Speech*, 58 J. SOC. ISSUES 341, 353-55 (2002).

133. See *infra* notes 275-77 and accompanying text.

134. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1188 (9th Cir. 2006).

135. See generally Kimberly T. Morgan, *Can Students Do What the State Cannot Do?: The Constitutionality of Student Initiated, Sponsored, Composed and Delivered Prayers at Graduation*,

be exposed to different beliefs and opinions to create the marketplace of ideas necessary for intellectual growth.¹³⁶ In other words, intellectual development in schools requires students to engage in speech that may try to convince each other of differing viewpoints.

A central principle of most major religions is to advocate for their faith and beliefs, known as proselytizing.¹³⁷ The underlying intent of most religious speech is not to compel compliance but to convince others and the larger society of the religious principles underlying the speech.¹³⁸ Thus, if the courts allowed schools to limit religious discourse based on its intent to convince or even convert others, all religious speech could be eliminated.

Indeed, social science demonstrates that students generally have the cognitive capacity to recognize and resist other student speech designed to convince them of beliefs or actions contrary to their self-identity.¹³⁹ Thus, student speech intended to change or convince other students of specific ideas, including religious beliefs, generally does not have the effect of compelling or coercing compliance from other students. Schools cannot justify eliminating religious speech just because it intends to influence others. *Harper* incorrectly classified student religious speech as “compelling speech” when the law and social science recognized it as protected speech designed to convince.

c. Misrepresenting student speech as school-endorsed speech. Current student religious speech jurisprudence runs contrary to basic Establishment Clause principles by conflating the relationship

12 ST. JOHN'S J. LEGAL COMMENT. 273, 290 (1996) (discussing how schools should protect student-initiated prayer even if the underlying intent is to inspire other students to pray). See also Christina Engstrom Martin, *Student-Initiated Religious Expression After Mergens and Weisman*, 61 U. CHI. L. REV. 1565, 1586 (1994) (“Student proselytizing . . . is protected by the Free Speech Clause, just as students’ attempts to convince other students to join the Democratic Party constitute protected speech.”).

136. *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967).

137. See Martin, *supra* note 135.

138. See JOHN LOCKE, A Letter Concerning Toleration, in TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 215 (Ian Shapiro ed., 2003). See also Ashutosh Bhagwat, *The Conscience of the Baker: Religion and Compelled Speech*, 28 WM. & MARY BILL RTS. J. 287, 291 (2019).

139. Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 372–73 (1988). See also Thomas J. Berndt, *Friends’ Influence on Students’ Adjustment to School*, 34 EDUC. PSYCH. 15, 15–18 (2010).

between the school's speech and a student's speech.¹⁴⁰ In sum, the courts suggest that schools can limit student speech because it would be interpreted as the school's endorsement of the underlying religious belief, in violation of the Establishment Clause.¹⁴¹ However, this conclusion misrepresents the Establishment Clause's scope and underestimates students' ability to distinguish between school and student speech.

The Establishment Clause prohibits public schools from promoting or discriminating against religious beliefs.¹⁴² With respect to religious speech, the Establishment Clause prohibits schools from promoting speech that endorses a specific religion.¹⁴³ However, the Supreme Court has established that religious speech is only subjected to the Establishment Clause limitation if the speech at issue is sponsored or could be reasonably interpreted as sponsored by the school.¹⁴⁴ Thus, the Establishment Clause plays a role when student speech is made within the context of school-sponsored events, such as graduation or school newspapers.¹⁴⁵ However, the Establishment Clause does not require or permit schools to limit student speech just because it occurs on school grounds.¹⁴⁶ When students speak on their own accord, their speech is not endorsed by the school and, therefore, cannot be limited based on the Establishment Clause.¹⁴⁷

Recent law fails schools and students on many levels by failing to distinguish and protect religious-based speech. First, by failing to protect religious speech adequately, the law fails to support the critical role religious expression plays in students' intellectual growth and self-identity development.¹⁴⁸ Secondly, courts have

140. Ralph D. Mawdsley & Charles J. Russo, *Hostility Toward Religion and the Rise and Decline of Constitutionally Protected Religious Speech*, 240 EDUC. L. REP. 524, 527 (2009).

141. *Id.* See also Gilbert A. Holmes, *Student Religious Expression in School: Is It Religion or Speech, and Does It Matter*, 49 U. MIAMI L. REV. 377, 412 (1994).

142. Susannah Barton Tobin, *Divining Hazelwood: The Need for A Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 251 (2004).

143. *Id.* See also Ralph D. Mawdsley & Steven Permuth, *Distribution of Religious Materials in Public Schools*, 197 EDUC. L. REP. 7 (2005).

144. Bd. of Educ. of Westside Cmty. Sch. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 228 (1990).

145. Norman B. Smith, *Constitutional Rights of Students, Their Families, and Teachers in the Public Schools*, 10 CAMPBELL L. REV. 353, 372-73 (1988).

146. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115 (2001).

147. *Id.* See also Smith, *supra* note 145.

148. See *infra* Part II.B.

failed to fully uphold students' legal religious and free speech rights.¹⁴⁹ Finally, this failure to support the expression of sincerely held religious beliefs eliminates the free exchange of ideas necessary to promote intellectual development in schools for all students.¹⁵⁰ These failures are exacerbated by the law's failure to provide clear guidance regarding the protections schools must provide to LGBTQ students.

B. The Vague and Unsettled Federal Protections of LGBTQ Students

As demonstrated by *Harper*, religious student speech has been de-emphasized and unsupported by the courts for various unjustified reasons. In contrast, federal law includes several regulations designed to protect LGBTQ students.¹⁵¹ These protections generally require schools to eliminate speech that harms LGBTQ students.¹⁵² However, the law fails to establish the specific scope of this LGBTQ student protection or adequately balance it against competing concerns, including free speech and religious rights. This vagueness, along with the current societal focus on LGBTQ rights, further exacerbates the de-emphasis of religious speech and the imbalance regarding student speech regulations, harming all students.

1. Title IX's Protection Against Sexual Harassing Speech

Federal law addresses sex-based discrimination in schools through Title IX of the Educational Amendments ("Title IX").¹⁵³ The scope of Title IX's protection is determined by regulation and policies created by the Office for Civil Rights of the U.S. Department of Education (OCR).¹⁵⁴ Taken together, Title IX and the

149. See *infra* Part I.C.

150. Daniel Washburn, *Student-Initiated Religious Speech in Public Schools* (Chandler v. James, 180 F.3d 1254 (11th Cir. 1999)), 39 WASHBURN L.J. 273, 286 (2000).

151. For a summary of federal protections of LGBTQ students, see Marisa S. Cianciarulo, *Refugees in Our Midst: Applying International Human Rights Law to the Bullying of LGBTQ Youth in the United States*, 47 COLUM. HUM. RTS. L. REV. 55, 60–68 (2015).

152. *Id.* See also Emily Suski, *A First Amendment Deference Approach to Reforming Anti-Bullying Laws*, 77 LA. L. REV. 701, 733–40 (2017).

153. 20 U.S.C. § 1681; 34 C.F.R. § 106.30.

154. 34 C.F.R. § 106.1. See *Title IX and Sex Discrimination*, DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (Aug. 20, 2021) (summarizing OCR's role in enforcing Title IX).

regulations established by OCR require schools to protect against discrimination based on sexual orientation and gender identity.¹⁵⁵

Concerning student speech, Title IX generally requires schools to eliminate sexual speech that constitutes sexual harassment by creating a “hostile environment.”¹⁵⁶ This “hostile environment” speech may include speech referencing gender identity or sexual orientation.¹⁵⁷ However, the Title IX definition of what constitutes a “hostile environment” has undergone several changes, none providing a clear conception of the type of speech that creates this “hostile environment” for LGBTQ students.¹⁵⁸ This lack of clarity fails to enable schools to differentiate harmful LGBTQ speech versus speech that may be controversial but must be protected as free speech. Thus, schools have been left to attempt to design speech policies to protect LGBTQ students based on constantly changing but uniformly vague federal conceptions of harmful LGBTQ speech.

In 2010, OCR attempted to clarify the types of speech that constitute sexual harassment and, therefore, violates Title IX.¹⁵⁹ Through published guidance, OCR indicated that speech constitutes sexual harassment if it is “sufficiently severe, pervasive, or persistent to interfere with or limit a student’s ability to participate in or benefit from the services, activities, or opportunities offered by a school.”¹⁶⁰ This sexually harassing speech included speech that referenced gender identity or sexual orientation.¹⁶¹ Thus, schools had to determine whether the speech

155. See OFF. FOR C.R., DEAR COLLEAGUE LETTER: HARASSMENT AND BULLYING, 8 (Oct. 26, 2010) (stating that Title IX protects LGBTQ students).

156. 20 U.S.C. § 1681; 34 C.F.R. § 106.30.

157. See, e.g., *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, Exec. Order No. 14021, 86 Fed. Reg. 13803–04 (Mar. 8, 2021). See also Ashley Rohleder-Webb, *50 Years of Title IX: So Much More Than Sports*, J. KAN. B. ASS’N, May/June 2022, 30, 34 (2022).

158. Rohleder-Webb, *supra* note 157, at 33–38 (summarizing the history of Title IX and the definition of sexual harassment).

159. See OFF. FOR C.R., DEAR COLLEAGUE LETTER: HARASSMENT AND BULLYING 1 n.4 (Oct. 26, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

160. *Id.*

161. *Id.* (“Title IX also prohibits sexual harassment and gender-based harassment of all students, regardless of the actual or perceived sexual orientation or gender identity of the harasser or target.”). See also Arthur S. Leonard, *U.S. Department of Education Doubles Down on Applying Bostock Reasoning to Title IX to Protect LGBT Students*, 2021 LGBT L. NOTES 6 (2021).

at issue was “severe,” “pervasive,” or “persistent” enough to interfere with a student’s ability to participate in school programs. Free speech advocates argued that this definition was too broad and arbitrary to protect free speech.¹⁶²

In 2018, the Trump Administration implemented new Title IX regulations that defined sexual harassment as speech “determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”¹⁶³ In addition, the Trump Administration enacted a separate Title IX regulation requiring schools to implement Title IX protections in a way that did not violate other Constitutional rights, including free speech.¹⁶⁴

While these changes were hailed by those calling for free speech protections to balance out protections against sexual harassment, the changes primarily relied on the same vague terms originally established by OCR.¹⁶⁵ The new definition still required schools to determine if the speech at issue was “severe,” “pervasive,” and “objectively offense” enough to interfere with the educational experience of other students.

On June 24, 2022, the Biden Administration released new revisions to the Title XI regulations, which proposed changes to the definition of sexual harassment speech yet again.¹⁶⁶ This new definition sought to reinstate the original conception of sexual harassment before the Trump Administration’s revisions.¹⁶⁷ Specifically, the Biden Administration defined sexual harassment as “[u]nwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s

162. See Letter from Francisco M. Negrón, Jr., Gen. Counsel, Nat’l Sch. Bds. Ass’n, to Charlie Rose, Gen. Counsel, U.S. Dep’t of Educ. 1 (Dec. 7, 2010), <http://www.nsba.org/schoollaw/issues/nsba-letter-to-ed-12-07-10.pdf>.

163. 34 C.F.R. § 106.30.

164. 34 C.F.R. § 106.6(d)(2) (2022).

165. 34 C.F.R. § 106.44.

166. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106).

167. See Dustin Jones, *Biden’s Title IX Reforms Would Roll Back Trump-era Rules, Expand Victim Protections*, NPR (Jun. 23, 2022), <https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination>.

ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)."¹⁶⁸

This definition was hailed by those who advocated for a more robust definition of sexual harassment.¹⁶⁹ However, others argued that this definition suffers from the same vagueness and over-broadness that infected the prior sexual harassment definitions.¹⁷⁰ Still, the new definition relied on the same terms and added similar vague terms, requiring school districts to consider subjective and objective "circumstances" to determine if speech creates a hostile environment.

2. *The Vague and Shifting Conception of Hostile LGBTQ Student Speech*

Title IX has produced several vague, shifting conceptions of sexually harassing speech. Throughout these definitions, OCR has recognized that schools cannot limit speech that is merely controversial and, therefore, must only target sexually harassing speech that creates a "hostile environment" based on the several definitions offered through Title IX.¹⁷¹ The conception of harmful sexually harassing speech has changed from definitions that focus on eliminating all forms of sexual harassment to definitions that focus on protecting free speech.¹⁷² However, all definitions rely on inherently vague terms and fail to provide objective guidance to

168. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390-01 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106).

169. See Eden Metzger, *Biden Administration to Restore and Expand Title IX Protections*, WELL NEWS (Jul. 7, 2022), <https://www.thewellnews.com/education/biden-administration-to-restore-and-expand-title-ix-protections>.

170. See Ethan Blevins & Alison Somin, *Biden Administration Threatens Free Speech with Title IX Gender Identity Rule*, THE HILL (Sept. 12, 2022), <https://thehill.com/opinion/education/3636741-biden-administration-threatens-free-speech-with-title-ix-gender-identity-rule>.

171. See Rohleder-Webb, *supra* note 157 at 33-38. See also Yonas Asfaw-Cooper, *(De-)prioritizing Prevention: A Case Against the 2020 Title IX Sexual Harassment Rule*, 97 N.Y.U. L. REV. 1631, 1641-44 (2022).

172. See *supra* notes 162-73. See also Suzanne Eckes, R. Shep Melnick & Kimberly J. Robinson, *Reactions to the Biden Administration's Proposed Title IX Changes from Education Law Scholars*, BROOKINGS (Jun. 30, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars>.

identify harmful speech and differentiate controversial speech.¹⁷³ Further, the definitions of sexually harassing speech have been, and continue to be, subject of controversy and legal challenges, leaving schools without consistent or stable regulations guiding their speech policies.¹⁷⁴

Thus, school districts are left navigating several vague, volatile, and controversial laws to develop a speech policy to address sexual harassment speech generally and harassment of LGBTQ students specifically. Although OCR and the Title IX regulations have consistently recognized the need to balance protections against harassing speech with the need to respect free speech rights and protect “controversial speech,” the law has failed to provide clear or consistent guidance. The courts continue to rely on the *Tinker* standard in conjunction with Title IX to assess LGBTQ student speech, even though *Tinker* occurred before Title IX came into effect and is mostly ill-equipped to address the complexities of student religious LGBTQ speech.¹⁷⁵

C. The Current Legal Landscape for Religious LGBTQ Student Speech

In sum, the law fails to provide schools with the clear guidance necessary to address religious speech regarding LGBTQ issues. Instead of establishing the delicate balance between protecting against speech harmful to LGBTQ students and protecting religious rights, schools are left to navigate a legal landscape filled with conflicting, changing, and vague requirements.

The law requires schools to meet several basic requirements. Generally, schools must eliminate speech that interferes with the rights of others “to be let alone” by causing “psychological injury.”¹⁷⁶ However, the law fails to clarify these standards, suggesting schools should eliminate any speech critical of LGBTQ

173. See *supra* Part I.B.

174. See also Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32640 (Jun. 22, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf>.

175. *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 679 (7th Cir. 2008) (noting that there is a difference between religious speech that may be offensive to LGBTQ students LGBTQ harassment, which is a distinction that the *Tinker* standard does not address).

176. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1189 (9th Cir. 2006).

issues.¹⁷⁷ The law also requires schools to protect against sexual harassment by removing speech that creates a “hostile environment” for LGBTQ students. However, various definitions of this sexually harassing speech offered by the law are similarly vague and subject to continuous changes and legal challenges.¹⁷⁸ Conversely, the law also requires schools to uphold students’ religious and free speech rights but fails to provide guidance or explicit protections regarding religious speech. Finally, the law requires school districts to generally balance protecting LGBTQ students from harmful speech while upholding religious rights and free speech but fails to provide clear guidance establishing this balance.

The lack of clear guidance as to these requirements, along with societal influences, creates increasing pressure on schools to adopt policies that provide vague and overbroad protections to LGBTQ students without the balance necessary to support the rights and development of all students. As a result, schools have adopted similarly unclear and skewed school codes that ignore the validity of religious-based speech to eliminate any speech critical of sexual orientation or gender identity issues.¹⁷⁹ Instead of upholding the self-identity development of all students, schools often focus on policies that will avoid the political blowback and potential legal problems associated with speech critical of LGBTQ issues.¹⁸⁰ Instead of adopting speech policies that attempt to find the balance between religious and sexual identity development, schools are compelled to focus on sexual identity development at the expense of religious development.¹⁸¹

To support both religious and sexual identity development, and therefore, the self-identity development and intellectual growth of

177. See Richard Fossey, Suzanne Eckes, and Todd A. DeMitchell, *Anti-Gay T-Shirt Litigation in the Seventh and Ninth Circuits: Conflict of Outcomes, but Shared Values*, 256 EDUC. L. REP. 1, 13 (2010).

178. See *supra* Part I.B.

179. See David L. Hudson, *K-12 Expression and the First Amendment*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Apr. 14, 2017), <https://www.thefire.org/news/k-12-expression-and-first-amendment>. See also Jonathan Pyle, *Speech in Public Schools: Different Context or Different Rights?*, 4 U. PA. J. CONST. L. 586, 587 (2002); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 972 (1996).

180. See James Moore, *Why Teachers Must Defend the First Amendment?*, 1 J. CULTURE & VALUES EDUC. 23, 29-34 (examples of overbroad school speech rules).

181. See *supra* notes 10-11 and accompanying text.

all students, the law must provide clear speech guidelines. These guidelines must find a balance between protecting free speech and religious expression to allow students to freely explore and express their self-identity while eliminating speech that threatens the self-identity development of others. To find a balance between protecting sexual identity and religious self-identity development, the law can turn to social science.

II. SOCIAL SCIENCE AND SELF-IDENTITY DEVELOPMENT

Social science provides vast insight into the components necessary to create a school environment that supports intellectual development.¹⁸² Social science establishes that schools must create an environment beyond the fundamentals of education that allows students to develop their self-identity to support intellectual growth.¹⁸³ In an environment where students are free to explore, develop, and express their self-identity, students not only develop a healthy self-identity but also learn how to interact with and accept others with different identities.¹⁸⁴ Thus, social science supports the general principle, also found in the law, that schools must support student self-identity development to support intellectual growth in students.¹⁸⁵

Social science broadly defines self-identity as the core beliefs and characteristics that make up a person's self-description.¹⁸⁶ Thus, self-identity is a combination of personal traits and fundamental beliefs.¹⁸⁷

182. See generally Monique Verhoeven, Astrid M. G. Poorthuis & Monique Volman, *The Role of School in Adolescents' Identity Development. A Literature Review*, 31 EDUC. PSYCH. REV. 35, 35-42 (2019) (summarizing various lines of social science research establishing that identity development generally occurs during adolescent school years). See also Alan Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 DEV. PSYCH. 341, 3413-43 (1982).

183. Ulrich Trautwein, Oliver Lüdtke, Olaf Köller & Jürgen Baumert, *Self-Esteem, Academic Self-Concept, and Achievement: How the Learning Environment Moderates the Dynamics of Self-Concept*, 90 J. PERS. & SOC. PSYCH., 334, 334-36 (2006).

184. Ralinda Watts, *Encouraging Middle School Students to Embrace Differences*, EDUTOPIA (Apr. 30, 2021), <https://www.edutopia.org/article/encouraging-middle-school-students-embrace-differences>.

185. See *supra* Part IA.

186. Steven Hitlin, *Values as the Core of Personal Identity: Drawing Links Between Two Theories of Self*, 66 SOC. PSYCH. Q. 118, 120 (2003).

187. *Id.* See also Rebecca Schlegel, Joshua Hicks, Jaime Arndt & Laura King, *Thine Own Self: True Self-Concept Accessibility and Meaning in Life*, 92. J PERS. SOC. PSYCHOL. 473, 475 (2009).

Healthy self-identity development occurs during adolescence and involves sexual identity development and spiritual or religious belief development.¹⁸⁸ Thus, to support intellectual growth, schools must create an environment where students are free to explore, express, and develop both their sexual identity and religious identity. Student speech is vital to this supportive environment.¹⁸⁹

A. Self-Identity Development Includes Sexual Identity Development

A key component of self-identity development in adolescents involves the development of sexual identity.¹⁹⁰ The term “sexual identity” generally means how a person forms romantic and relational attachments and encompasses sexual orientation and gender identity.¹⁹¹ For many young people, exploring, finding, and becoming comfortable with sexual orientation and gender identity is critical to self-identity development and intellectual growth.¹⁹² Although gender identity and sexual orientation development are often associated with LGBTQ students, this “sexual identity” development is necessary for all students, including cisgender and heterosexual students.¹⁹³ A healthy sexual self-identity concept is important to healthy psychological development for all students.¹⁹⁴

188. See generally Wim Beyers & Figen Cok, *Adolescent Self and Identity Development in Context*, 31 J. ADOLESCENCE 147, 147-50 (2008) (discussing the key components of self-identity development in adolescents). See also Koen Luyckx, Seth Schwartz, Luc Goossens, Wim Beyers & Lies Missotten, *Processes of Personal Identity Formation and Evaluation*, in HANDBOOK OF IDENTITY THEORY AND RESEARCH 2, 77-98 (Seth J. Schwartz et al. eds., 2011).

189. See Beyers & Cok, *supra* note 188 at 148. See also Michael Shively & John DeCecco, *Components of Sexual Identity*, 3 J. HOMOSEXUALITY 41, 41-2 (1977).

190. Stephen Russell, Elisabeth Thompson & Robby Harris, *Sexual Orientation in* ENCYCLOPEDIA OF ADOLESCENCE 325-332 (Bradford Brown & Mitchell Prinstein eds., 2011).

191. Arielle White, Julia Moeller, Zorana Ivcevic & Marc Brackett, *Gender Identity and Sexual Identity Labels Used by U.S. High School Students: A Co-occurrence Network Analysis*, 5 PSYCHOL. SEXUAL ORIENTATION & GENDER DIVERSITY 243, 244 (2018).

192. See Gerulf Rieger & Ritch Savin-Williams, *Gender Nonconformity, Sexual Orientation, and Psychological Well-Being*, 41 ARCHIVES SEXUAL BEHAV. 611, 612-14 (2013). See also Frank Floyd & Terry Stein, *Sexual Orientation Identity Formation among Gay, Lesbian, and Bisexual Youths: Multiple Patterns of Milestone Experiences* 12 J. RSCH. ADOLESCENCE 167, 169 (2002).

193. For a summary of the sexual identity construct, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 941 (1989).

194. Devon Hensel, Dennis Fortenberry, Lucia O’Sullivan & Donald Orr, *The Developmental Association of Sexual Self-Concept with Sexual Behavior Among Adolescent Women*, 34 J. ADOLESCENCE 675, 677 (2011). See also Grant Brenner, *How Our Sexual*

1. Self-Identity Development and Sexual Orientation

To develop a healthy self-identity, students must feel free to “come out of the closet” and express their sexual orientation in society and school.¹⁹⁵ Adolescents unable to express their sexual orientation in social settings, including school, often suffer from depression, poor self-concept, and decreased school performance.¹⁹⁶ Conversely, students who can explore and express their sexual orientation in a supportive social environment are more likely to develop a healthy self-identity conception.¹⁹⁷

Thus, social science supports the general idea that students must be free to explore and express their sexual orientation in school as part of their overall self-identity development and intellectual growth.¹⁹⁸ To support this expression, schools must protect against speech that harms or threatens students’ ability to express their sexual orientation.¹⁹⁹ Specifically, schools must create an environment where students can express their sexual orientation without fear of harm from other students.²⁰⁰

Self-Image Influences Attachments, PSYCHOLOGY TODAY (Dec. 20, 2017), <https://www.psychologytoday.com/us/blog/experimentations/201712/how-our-sexual-self-image-influences-attachments>.

195. Gregory Phillips et al, *Sexual Identity and Behavior Among U.S. High School Students, 2005–2015*, 48 ARCHIVES SEXUAL BEHAV. 1463, 1463–66 (2019). See also George Cunningham, Andrew Pickett, E. Nicole Melton, Woojun Lee & Kathi Miner, *Psychological Safety and the Expression of Sexual Orientation and Personal Identity in* ROUTLEDGE HANDBOOK OF SPORT, GENDER AND SEXUALITY 5 (Jennifer Hargreaves & Eric Anderson eds., 2014).

196. Margaret Rosario & Eric Schrimshaw, *The Sexual Identity Development and Health of Lesbian, Gay, and Bisexual Adolescents: An Ecological Perspective*, in HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION 87, 88–92 (C. J. Patterson & A. R. D’Augelli, eds., 2013). See also V. Paul Poteat, Christian Berger & Julio Dantas, *How Victimization, Climate, And Safety Around Sexual Orientation and Gender Expression Relate to Truancy*, 14 J. LGBT YOUTH 424, 424–26 (2017).

197. See Phillips et al., *supra* note 195. See also JANE KROGER, *IDENTITY DEVELOPMENT: ADOLESCENCE THROUGH ADULTHOOD* 68–70 (Sage Publications 2d ed. 2007).

198. Reina Evans-Paulson, *Examining the Link Between Sexual Self-Concept And Sexual Communication Among Adolescents*, 69 COMM. Q. 525–27 (2021).

199. Sujita Kumar Kar, Ananya Choudhury & Abhishek Pratap Singh, *Understanding Normal Development of Adolescent Sexuality: A Bumpy Ride*, 8 J. HUMAN REPRODUCTION SCIENCE 70, 71–73 (2015).

200. Johanna van Oosten, Dian de Vries & Jochen Peter, *The Importance of Adolescents’ Sexually Outgoing Self-Concept: Differential Roles of Self- and Other-Generated Sexy Self-Presentations in Social Media*, 21 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 1, 5 (2018).

2. *Self-Identity Development and Gender Identity*

Gender identity is a critical component of self-identity.²⁰¹ Gender identity refers to a person's internal sense of their gender.²⁰² While most people's gender identity matches their biological sex, many identify with a gender different from their biological sex or with alternative gender configurations such as non-binary and gender fluid.²⁰³ Gender identity development begins in adolescence.²⁰⁴

Students who are unable or afraid to explore or express their gender identity are susceptible to psychological difficulties similar to those who are unable to express their sexual orientation.²⁰⁵ Specifically, stifling student gender identity expression can cause depression, anxiety, and low self-esteem.²⁰⁶ Social science also recognizes a specific psychological malady known as gender dysphoria, which develops when individuals struggle with expressing their gender identity.²⁰⁷ Further, gender dysphoria can be resolved through a social process in which children are supported in exploring and resolving their gender identity issues.²⁰⁸

Adolescents must be free to explore and express their gender identity in social settings to develop a healthy self-identity, specifically with a peer group.²⁰⁹ Schools play a significant and vital

201. Wendy Wood & Alice H. Eagly, *Two Traditions of Research on Gender Identity*, 73 *SEX ROLES* 461, 461-62 (2015).

202. *Id.*

203. Paul Larson, *Sexual Identity and Self-Concept*, 7 *J. HOMOSEXUALITY* 15, 18-30 (1981).

204. See Rosario & Schrimshaw, *supra* note 196.

205. Kate Collier, Gabriël van Beusekom, Henny M. W. Bos & Theo G. M. Sandfort, *Sexual Orientation and Gender Identity/Expression Related Peer Victimization in Adolescence: A Systematic Review of Associated Psychosocial and Health Outcomes*, 50 *J. SEX RSCH.* 299, 300-302 (2013).

206. See Poteat et al., *supra* note 196.

207. AM. PSYCHIATRIC ASS'N, *Gender Dysphoria Diagnosis*, <https://www.psychiatry.org/psychiatrists/diversity/education/transgender-and-gender-nonconforming-patients/gender-dysphoria-diagnosis> (last visited Nov. 7, 2023).

208. Amanda Davey, Walter P. Bouman, Jon Arcelus & Caroline Meyer, *Social Support and Psychological Well-Being in Gender Dysphoria: A Comparison of Patients with Matched Controls*, 11 *J. SEXUAL MED.* 2976, 2977-82 (2014).

209. Phyllis A. Katz, *Gender Identity: Development and Consequences in THE SOCIAL PSYCHOLOGY OF FEMALE-MALE RELATIONS* 21, 25-32 (Richard Ashmore & Frances Del Boca eds., 1984). See also Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021),

role in gender identity development by providing the primary forum where most children interact with their peer group and with society.²¹⁰ Thus, to promote self-identity development, schools must ensure that students feel safe to explore and express their gender identity.²¹¹ Specifically, schools must protect against student speech that makes others afraid to explore their gender identity.²¹²

Social science supports the idea that schools must create an environment where students can develop their “sexual identity,” including their sexual orientation and gender identity, to promote overall self-identity development.²¹³ Specifically, students must feel free to “come out of the closet” and express their sexual orientation and gender identity to their peers in the education environment.²¹⁴ To create this supportive environment, schools must eliminate speech that harms sexual identity development by making students afraid to explore or express their sexual orientation and gender identity.²¹⁵ Thus, instead of targeting speech that creates “psychological injury” as suggested by the courts, social science suggests schools can target speech that threatens the self-identity development of other students, which ultimately creates the “psychological injury” targeted by the courts.

<https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq>.

210. Kay Bussey, *Gender Identity Development in HANDBOOK OF IDENTITY THEORY AND RESEARCH* 603, 603–28 (Seth Schwartz et al. eds., 2011).

211. Lucia F. O'Sullivan, Heino F. L. Meyer-Bahlburg & Ian W. McKeague, *The Development of the Sexual Self-Concept Inventory for Early Adolescent Girls*, 30 *PSYCH. WOMEN Q.* 139, 142–43 (2006).

212. *Id.*

213. Kathleen Conn, *Transgender Students on Campus: Challenges and Opportunities*, 330 *EDUC. L. REP.* 441, 463 (2016) (“Student development theory also emphasizes the role that colleges and universities play in the development of healthy self-identities among all students. A more fluid understanding of sex, gender, and sexuality appears to be developing among student affairs professionals, although these changes may not reflect students’ experiences after graduation.”).

214. Patrick Corrigan & Alicia Matthews, *Stigma and Disclosure: Implications for Coming Out of the Closet*, 12 *J. MENTAL HEALTH* 235, 237–39 (2003). See also Chad M. Mosher, *The Social Implications of Sexual Identity Formation and the Coming-Out Process: A Review of the Theoretical and Empirical Literature*, 9 *FAM. J.* 164, 165 (2001).

215. Marilyn S. Anglade, *A Study of Sexual and Gender Identity Theories and the Legal Implications of the Departure from the Traditional Binary Understanding of Sex and Gender*, 317 *EDUC. L. REP.* 15, 18 (2015). See also Catherin V. Talbot, Amelia Talbot, Danielle J. Roe & Pam Briggs, *The Management of LGBTQ+ Identities on Social Media: A Student Perspective*, 24 *NEW MEDIA & SOC'Y*, 1729, 1740–42 (2022).

B. Self-Identity and Religious Identity Development

In addition to personal characteristics such as sexual identity, beliefs form the core of a person's self-identity.²¹⁶ Self-identity often includes a core set of religious beliefs.²¹⁷ Although religious beliefs vary, most major religions develop ideas that pervade their followers' self-identity and form believers' religious or spiritual self-identity.²¹⁸

1. Religious Identity Development in Schools

Similar to sexual identity development, religious identity development often begins in childhood.²¹⁹ Furthermore, this religious self-identity development is not limited to private prayer or practice within one's religious group but instead must be developed and expressed in general society.²²⁰ Thus, children must be able to explore and express their religious beliefs with their peer group to form a healthy self-identity.²²¹

The school environment represents a key area for children to explore and express self-identity, including religious beliefs, as part of their overall self-identity development.²²² Because the primary source of childhood social interaction with society occurs in schools, adolescents often rely on the school environment to develop their self-identity through school peer interaction.²²³ Further, schools provide a place where students can learn how their religious beliefs fit within larger society through the

216. Siebren Miedema, *Coming Out Religiously!?" Religion, the Public Sphere, and Religious Identity Formation*, 109 OFFICIAL J. RELIGIOUS EDUC. ASS'N. 362, 366 (2014).

217. Sabra L. Katz-Wise, *Sexual Fluidity in Young Adult Women and Men: Associations with Sexual Orientation and Sexual Identity Development*, 6 PSYCH. & SEXUALITY 189-91 (2015).

218. STEPHEN PROTHERO, *GOD IS NOT ONE: THE EIGHT RIVAL RELIGIONS THAT RUN THE WORLD—AND WHY THEIR DIFFERENCES MATTER* 12-13 (HarperCollins e-books 2010).

219. See Waterman, *supra* note 182.

220. *Id.* See also Visser-Vogel et al., *supra* note 94, at 108-10.

221. Pamela King, *Religion and Identity: The Role of Ideological, Social, and Spiritual Contexts*, 7 APPLIED DEV. SCI. 197, 200 (2010). See also Danielle Magaldi-Dopman & Jennie Park-Taylor, *Sacred Adolescence: Practical Suggestions for Psychologists Working with Adolescents' Religious and Spiritual Identity*, 1 SPIRITUALITY IN CLINICAL PRAC. 40, 42-49 (2013).

222. See Bruce Hunsberger, Michael Pratt & S. Mark Pancer, *Adolescent Identity Formation: Religious Exploration and Commitment*, 1 INT'L J. THEORY & RSCH. 365, 368 (2001).

223. See Gerdien D. Bertram-Troost, Simone de Roos & Siebren Miedema, *Religious Identity Development of Adolescents in Religious Affiliated Schools. A Theoretical Foundation for Empirical Research*, 27 J. BELIEFS & VALUES 303, 303-05 (2006).

responses they receive from authority figures such as teachers and administrators.²²⁴ Thus, adolescents must be free to fully explore and express their religious beliefs in school to develop their religious self-identity.²²⁵

Indeed, social science suggests that adolescents unable to fully express their core beliefs, including their religious beliefs, in social settings such as schools are susceptible to the same psychological harm that affects students unable to express their sexual identity.²²⁶ Stifling religious beliefs can lead to depression, low self-esteem, and poor school performance.²²⁷ In addition, students unable to express their religious beliefs feel like they cannot express their true selves to their peer group and form connections necessary for intellectual growth.²²⁸ Conversely, students who can express their views, even if their peers largely reject them, benefit from learning to fit in their peer group while upholding their religious beliefs.²²⁹

Further, the expression of religious self-identity is necessary for the overall social development of all students.²³⁰ In an environment in which students are free to exchange beliefs, students can express their views, receive feedback regarding their beliefs from other students, and be exposed to different religious viewpoints as part of their overall self-identity development.²³¹

Schools must support religious self-identity development to support student self-identity development and, therefore, the intellectual growth of all students. Religious identity development must be protected and promoted within schools, just like sexual

224. *Id.*

225. *Id.* at 306.

226. See Colin M. Macleod, *A Liberal Theory of Freedom of Expression for Children*, 79 CHI.-KENT L. REV. 55, 58 (2004).

227. *Id.* See also Julie J. Park, Jude Paul Matias Dizon & Moya Malcolm, *Spiritual Capital in Communities of Color: Religion and Spirituality as Sources of Community Cultural Wealth*, 52 URB. REV. 127, 133 (2019).

228. Park et al., *supra* note 227. See also Charles C. Helwig, *The Role of Agent and Social Context in Judgments of Freedom of Speech and Religion*, 68 CHILD DEV. 484, 485-90 (1997).

229. See Macleod, *supra* note 226.

230. REBECCA NYE, *CHILDREN'S SPIRITUALITY: WHAT IT IS AND WHY IT MATTERS* 41-55 (Church House Publishing 2009).

231. *Id.*

identity development, to promote overall self-identity development and growth.²³²

2. Religious Identity Development and Sexual Identity

Religious identity development often involves beliefs regarding gender identity and sexual orientation.²³³ Indeed, the major world religions hold specific beliefs about sexual identity, including sexual orientation and gender identity.²³⁴ Moreover, religious beliefs about sexual identity often connect to fundamental religious beliefs about society and morality.²³⁵ Thus, religious beliefs about sexual orientation and gender identity cannot simply be dismissed as insignificant or peripheral ideas that can be limited without stifling students' religious development and identity.²³⁶

Although religious beliefs about gender identity and sexual orientation may appear hostile towards LGBTQ individuals, most religious beliefs about sexual identity are not intended to threaten or harm others.²³⁷ Instead, these beliefs focus on instituting change as part of the overall goal of promoting a worldview that is ultimately designed to help individuals and society.²³⁸ For example,

232. William P. Marshall, *Religion as Ideas: Religion as Identity*, 7 J. CONTEMP. LEGAL ISSUES 385, 400 (1996) ("To begin with, religion is more than ideas; it is also ritual and practice. Leaving these aspects of religion unprotected will therefore undercut many values that religion offers. These values include, as we have seen, religion's particularly compelling role in the formation of an individual's sense of self and its benefits in furthering the values of pluralism through its role in the fostering, and in the sustaining, of community. A jurisprudence that does not protect religious identity would therefore miss much of what is most valuable about religion.").

233. See Clara L. Wikins, Joseph D. Wellman, Negin R. Toosi, Chad A. Miller, Jaclyn A. Lisnek & Lerone A. Martin, *Is LGBT Progress Seen as an Attack on Christians?: Examining Christian/Sexual Orientation Zero-Sum Beliefs*, 122 J. PERS. & SOC. PSYCH. 73–101 (2022). See also Gill Valentine & Louise Waite, *Negotiating Difference through Everyday Encounters: The Case of Sexual Orientation and Religion and Belief*, 44 ANTIPODE 474–92 (2011).

234. Kelsy Burke & Brandi Woodell, *Sexuality and Religion in COMPANION TO SEXUALITY STUDIES* 203, 203–24 (Nancy A. Naples ed., 2020).

235. *Id.*

236. *Id.* See also Rebecca W. Clarke, Chelom E. Leavitt, David B. Allsop, Loren d. Marks & David C. Dollahite, *How Sexuality and Religion Intersect in Highly Religious Families: Implications for Clinicians*, 37 SEXUAL & RELATIONSHIP THERAPY, 342, 344–50 (2021).

237. See Modi et al., *supra* note 9. See also Julia Kay Wolf & Lisa Platt, *Religion and Sexual Identities*, 48 CURRENT OP. PSYCH. 101495 (2022). See also Dawne Moon, *Beyond the Dichotomy: Six Religious Views of Homosexuality*, J. HOMOSEXUALITY 1215, 1218 (2014).

238. Moon, *supra* note 237. See also Stacey Horn, *Schooling, Sexuality, and Rights: An Investigation of Heterosexual Students' Social Cognition Regarding Sexual Orientation and the*

many religious preach the general idea of “love the sinner hate the sin.”²³⁹ Thus, instead of threatening or harming LGBTQ individuals, religious beliefs are often intended to convince others to adopt their worldview.²⁴⁰ Furthermore, many religious beliefs involve nuanced issues still debated in society and by social science.²⁴¹ Indeed, social science research suggests that the general view that religion is hostile towards LGBTQ individuals is overstated.²⁴²

With respect to sexual orientation, religious beliefs often involve general concerns about the over-sexualization of children by exposing children to sexually explicit material.²⁴³ In addition, religious speech often focuses on the rights and needs of parents to guide their child’s sexual identity development and instill religious teachings regarding sexual orientation.²⁴⁴ These beliefs do not intend to harm or threaten other LGBTQ students and do not necessarily result from an underlying hostility towards LGBTQ students but instead relate to concerns about how children are raised.²⁴⁵ Indeed, some of the issues involving the over-sexualization of students are shared by LGBTQ advocates.²⁴⁶

Rights of Gay and Lesbian Peers in Schools, 64 J. SOC. ISSUES 791, 791 (2008) (providing studies indicating that adolescents differentiate between their beliefs about homosexuality and the rights of others to be safe in school).

239. Craig Rodriguez-Seijas, *Love the Sinner, Hate the Sin: Religious Belief Does Not Equate Homophobia*, 3 J. DEP’T OF BEHAV. SCI. 1, 1-2 (2014).

240. See *supra* notes 237 and 239.

241. See Robert Wintemute, *Religion vs. Sexual Orientation: A Clash of Human Rights?*, 1 J.L. & EQUAL. 125, 126-29 (2022).

242. See Horn, *supra* note 238.

243. See Siraj Hashi, *Muslim Parents Defy Intersectionality, Join Christian Parents Against Sexualizing Kids*, NEWSWEEK (Oct. 22, 2022), <https://www.newsweek.com/muslim-parents-defy-intersectionality-join-christian-parents-against-sexualizing-kids-opinion-1751525>. See generally Liza Tsaliki, *The Way We Are...: The Reiteration of Sexualization in Academia, Policy, and the Media in CHILDREN AND THE POLITICS OF SEXUALITY* 11-31 (2016) (discussing concerns over the various influences that introduce young children to sexualization before they are developmentally prepared).

244. Douglas Nejaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 310 (2009). See also Jacob Felson, *The Effect of Religious Background on Sexual Orientation*, 7 INTERDISC. J. RSCH. RELIGION 1, 2-4 (2011).

245. Allison Fetter-Harrott, *Recognition of Same-Sex Marriage and Public Schools: Implications, Challenges, and Opportunities*, 2011 BYU EDUC. & L.J. 237, 244 (2011).

246. *Id.* See also L. Kris Gowen & Nichole Wings-Yanez, *Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youths’ Perspectives of Inclusive School-Based Sexuality Education*, 51 J. SEX RSCH. 788, 790-91 (2013).

Similarly, many religious-based beliefs regarding gender identity do not result from an underlying hostility towards transgender students.²⁴⁷ Instead, they are based on concerns over privacy, safety, and parental rights to be involved in their child's gender identity journey.²⁴⁸ Indeed, religious beliefs often support protecting transgender individuals from harm and harassment while focusing on the rights of other individuals.²⁴⁹

Of course, some students may find these religious-based beliefs offensive or even disruptive to their educational experience. However, the law requires, and social science supports, differentiating harmful speech from controversial speech, even if the controversial speech causes distressful emotions in some.²⁵⁰ Indeed, social science suggests that speech based on sincerely held religious beliefs does not threaten sexual identity development or cause psychological injury associated with other forms of speech.²⁵¹ Specifically, this religious-based speech enables LGBTQ students to face and overcome negative speech in the "controlled" environment of schools.²⁵² Expressing these religious beliefs can also assist LGBTQ students struggling with conflicting religious beliefs.²⁵³ Further, this religious-based speech contributes to the overall school environment by allowing the free exchange of ideas necessary for intellectual growth.²⁵⁴

247. Gowen et al, *supra* note 246.

248. Troy J. Perdue, *Trans* Issues for Colleges and Universities: Records, Housing, Restrooms, Locker Rooms, and Athletics*, 41 J.C. & U.L. 45, 61–62 (2015).

249. Jonathan S. Coley, *Social Movements and Bridge Building: Religious and Sexual Identity Conflicts*, in 37 INTERSECTIONALITY AND SOC. CHANGE 125–51 (Lynne M. Moehrle ed., 2014).

250. *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2047 (2021). See also Jesse D.H. Snyder, *I (Hearts) Boobies: What Breast Cancer and Bracelets Teach Us about Acceptable Speech in Public Schools*, 36 WHITTIER L. REV. 67, 71 (2014).

251. See Nicholas Asogwa & Michael Onwuama, *Hate Speech and Authentic Personhood: Unveiling the Truth*, SAGE JOURNALS (Mar. 31, 2021), <https://journals.sagepub.com/doi/10.1177/21582440211005772>.

252. See Michael P. Dentato, Shelley L. Craig, Michael R. Lloyd, Brian L. Kelly, Caitlyn Wright & Ashley Austin, *Homophobia Within Schools of Social Work: The Critical Need for Affirming Classroom Settings and Effective Preparation for Service with the LGBTQ Community* 35 SOC. WORK EDUC. 672, 674–80 (2015).

253. Angie Dahl & Renee V. Galliher, *The Interplay of Sexual and Religious Identity Development in LGBTQ Adolescents and Young Adults: A Qualitative Inquiry*, 12 INT'L J. THEORY & RSCH. 217, 219–22 (2012).

254. *Jaffe v. Alexis*, 659 F.2d 1018, 1021 (9th Cir. 1981). See also *Charles J. Russo, Mergens v. Westside Community Schools at Twenty-Five and Christian Legal Society v. Martinez: From*

Of course, some speech uses religious beliefs to justify threatening or harming individuals who do not conform to their beliefs, specifically regarding gender identity or sexual orientation.²⁵⁵ This threatening speech is not necessary for religious identity development, even though it claims to be tied to religion.²⁵⁶ Religious identity development is not furthered by and therefore does not require protection of ideas that intend to threaten or harm individuals.²⁵⁷ Simply stated, religious-based speech is necessary for self-identity development while hate-based speech is not.²⁵⁸ Thus, this harmful speech can and should be distinguished from speech based on sincerely held religious beliefs that do not carry the same ill intent. While the law has failed to provide definitive guidance to distinguish harmful speech from controversial speech, social science suggests that the underlying religious intent of the speech differentiates harmful speech from controversial speech necessary for religious identity development.²⁵⁹

C. Sexual Identity and Religious Identity Development in Schools

In sum, social science demonstrates that schools must support both sexual identity development and religious identity development to create an environment that promotes overall self-identity development and intellectual growth for all students.²⁶⁰ For sexual identity development, students must be free to express

Live and Let Live to My Way or the Highway?, 2015 BYU EDUC. & L.J. 453, 456 (2015); Christina Engstrom Martin, *Student-Initiated Religious Expression After Mergens and Weisman*, 61 U. CHI. L. REV. 1565, 1593 (1994).

255. Rory K. Little, *Hating Hate Speech: Why Current First Amendment Doctrine Does Not Condemn a Careful Ban*, 45 HASTINGS CONST. L.Q. 577, 581 (2018).

256. Matteo Bonotti, *Religion, Hate Speech and Non-Domination*, 17 ETHNICITIES 259, 261-63 (2017). See also Richard Allan, *Hard Questions: Who Should Decide What is Hate Speech in an Online Global Community?*, META.COM (June 27, 2017), <https://about.fb.com/news/2017/06/hard-questions-hate-speech>.

257. See Bonotti, *supra* note 256. See also Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 384 (2000).

258. See Asogwa & Onwuama, *supra* note 251. See also Mark Tappan, *Domination, Subordination and the Dialogical Self: Identity Development and the Politics of 'Ideological Becoming.'* 11 CULTURE & PSYCH. 47, 47-75 (200). See generally John A. Powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 148 (1998) (discussing how hate speech can and should be separated from controversial speech).

259. See Moon, *supra* note 237.

260. See *supra* Part II.A and Part II.B.

their sexual orientation and gender identity in the school environment.²⁶¹ For religious identity development, students must be free to express their sincerely held religious beliefs, including those related to sexual identity, in the school environment. If schools stifle either sexual identity development or religious identity, students can be subject to similar psychological trauma that will harm their intellectual development.²⁶² Still, the question remains, how do schools create an environment that supports self-identity development generally and both religious identity and sexual identity development specifically?

D. Speech and Self-Identity Development

Speech policies play a vital role in creating an environment that supports self-identity development.²⁶³ Generally, social science suggests that students must be free to fully express their beliefs and personal characteristics in the school setting as part of their self-identity and intellectual growth.²⁶⁴ This expression includes expressing religious beliefs as well as expressing sexual orientation and gender identity.²⁶⁵ The expression of religious beliefs consists of the expression of viewpoints that may seem controversial or even hostile toward LGBTQ issues.²⁶⁶ The expression of sexual identity requires students to feel safe and free to identify and express their sexual orientation and gender identity in the school environment, even if it clashes with religious principles.²⁶⁷ Thus, social science suggests schools should support student speech to allow for self-identity development in all its forms, even if some consider the speech controversial.

However, social science also recognizes that some speech can harm self-identity development by preventing others from feeling

261. *See supra* Part II.A.

262. *See supra* Part II.B.

263. Dora Shu-fang Dien, *The Evolving Nature of Self-Identity Across Four Levels of History*, 43 HUMAN DEV. 1, 2-8 (2000). *See also* Tappan, *supra* note 258.

264. Morwenna Griffiths, *Self-Identity and Self-Esteem: Achieving Equality in Education*, 19 OXFORD REV. EDUC., 301, 302-03 (2020).

265. *Id.* *See also* Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* in THE NEW SOCIAL THEORY READER 354, 354-62 (Steven Seidman & Jeffrey C. Alexander eds., 2008).

266. *See supra* notes 240-42.

267. *See supra* Part II.A.

safe exploring and expressing their identities.²⁶⁸ In other words, specific speech blocks the creation of an environment conducive to self-identity exploration and expression. Some speech can harm the sexual identity development of LGBTQ students by threatening their ability to explore and express their sexual orientation or gender identity fully.²⁶⁹ Moreover, this harmful speech about LGBTQ issues and sexual identity not only threatens sexual identity development but can cause measurable psychological injury.²⁷⁰

Thus, social science generally supports the principle within the law that student speech should be protected unless it creates a “hostile environment” causing psychological injury, specifically through threatening students based on their sexual orientation or gender identity. However, speech causing psychological injury is not as broad of a category as the law has established.²⁷¹ Most speech that is seemingly hostile towards LGBTQ issues does not create harm to self-identity development or the psychological injury that would justify its elimination.²⁷² Instead, this “controversial speech” benefits the self-identity development of the speaker, often by promoting the speaker’s religious self-identity development, and benefits LGBTQ students by allowing them to face and overcome hostile speech within the school environment.²⁷³ This controversial speech is also necessary to create an educational environment that

268. Timothy Jay, *Do Offensive Words Harm People?*, 15 PSYCH. PUB. POL’Y & L. 81, 83 (2009), <https://mcla.edu/Assets/uploads/MCLA/import/www.mcla.edu/Undergraduate/uploads/textWidget/1457.00018/documents/DoWordsHarm.pdf>. See also Halley, *supra* note 193.

269. Halley, *supra* note 193. See also EDWINA BARVOSA, *DELIBERATIVE DEMOCRACY NOW: LGBT EQUALITY AND THE EMERGENCE OF LARGE-SCALE DELIBERATIVE SYSTEMS* 187–88 (Cambridge Press 2018).

270. Barvosa, *supra* note 269.

271. Leets, *supra* note 132 (“Hurling hate slurs in an effort to harm a person’s identity does not appear to be similar to slinging arrows at the concentric circles of a target, as some would imagine. That is, there does not seem to be a center point for the maximal damage, with the degree of hurt varying with distance to that point. Instead, there seems to be a narrow mark that delineates damage, with all the slurs outside it having no effect.”).

272. *Id.*

273. David Rock, *Has Coddling an Entire Generation of Children Set Them Up*, PSYCH. TODAY (Mar. 5, 2012), <https://www.psychologytoday.com/us/blog/your-brain-work/201203/has-coddling-entire-generation-children-set-them-failure>. See also Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, THE ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356>.

promotes intellectual growth generally through the free exchange of ideas.²⁷⁴

1. *The Components of Speech Harmful to Self-Identity Development*

According to social science, speech harmful to self-identity, specifically sexual identity development, can be identified through specific, measurable features.²⁷⁵ These features distinguish harmful LGBTQ speech from “controversial speech” that may be objectionable to some but does not carry the inherent harm to self-identity development.²⁷⁶ Instead of relying on the general and vague conceptions of harmful speech that causes “psychological injury,” as suggested by the law, social science suggests harmful student speech can be identified and separated from controversial speech based on distinct factors.²⁷⁷ These features can be used to develop a “Harmful Anti-LGBTQ Student Speech” conception that will identify the particular speech that threatens sexual identity development while separating religious speech needed for religious self-identity development.

a. Individual versus general targeted speech. Speech harmful to self-identity development can be identified based on its target.²⁷⁸ Speech that targets specific people by singling them out based on their actual or perceived sexual identity can harm self-identity development by making the target feel unsafe expressing their sexual identity.²⁷⁹ By targeting a specific person, speech can create fear and anxiety in the target, making them afraid to express their gender identity or sexual orientation fully.²⁸⁰

274. See *supra* notes 253–57.

275. See Leets, *supra* note 132.

276. See Ifat Maoz & Clark McCauley, *Threat, Dehumanization, and Support for Retaliatory Aggressive Policies in Asymmetric Conflict*, 52 J. CONFLICT RESOL. 93, 94–95 (2008); Steve Loughnan, Nick Haslam & Yoshihisa Kashima, *Understanding the Relationship Between Attribute-Based and Metaphor-Based Dehumanization*, 12 GRP. PROCESSES & INTERGROUP RELS. 747, 750 (2009); Gail B. Murrow & Richard Murrow, *A Hypothetical Neurological Association Between Dehumanization and Human Rights Abuses*, 2 J.L. & BIOSCIENCES 336, 342 (2015).

277. See *infra* notes 282–03.

278. Chris Demaske, *Social Justice, Recognition Theory and the First Amendment: A New Approach to Hate Speech Restriction*, 24 COMM. L. & POL’Y 347, 399 (2019).

279. *Id.*

280. Thomas H. Ollendick, Audra K. Langley, Russell T. Jones & Christina Kephart, *Fear in Children and Adolescents: Relations with Negative Life Events, Attributional Style, and Avoidant Coping*, 42 J. CHILD PSYCH. & PSYCHIATRY & ALLIED DISCIPLINES 1029, 1031–32

Conversely, speech that does not target individuals but instead constitutes general statements about sexual orientation or gender identity issues is less likely to cause the fear and anxiety that stifle sexual identity development.²⁸¹ Indeed, social science suggests this “generalized targeted” speech may assist students in their sexual identity development by allowing them to confront and overcome negative comments without invoking the fear of speech that targets them personally.²⁸² The school environment can further this benefit by providing a safe environment where students exchange “generally targeted” speech as part of the school’s intellectual discussions while the school implements speech policies to ensure the speech does not turn into personally targeted attacks.²⁸³

Further, this “generalized targeted” speech is necessary to enable people to express their beliefs and, therefore, is essential for self-identity development.²⁸⁴ Thus, this generalized targeted speech can express sincerely held religious beliefs about sexual orientation or gender identity issues without the harm associated with individually targeted speech.²⁸⁵ Although some may claim that this generalized targeted speech causes harm by making some students feel uncomfortable, this uncomfortableness is necessary to help students overcome negative speech that does not inherently threaten self-identity development.²⁸⁶ In sum, generally targeted speech does not harm the sexual identity of other students, aids in

(2001). *See also* Sara E. Burke, John F. Dovidio, Marianne LaFrance, Julia M. Przedworski, Sylvia P. Perry, Sean M. Phelan, Diana J. Burgess, Rachel R. Hardeman, Mark W. Yeazel & Michelle van Ryn, *Beyond Generalized Sexual Prejudice: Need for Closure Predicts Negative Attitudes Toward Bisexual People Relative to Gay/Lesbian People*, 71 J. EXPERIMENTAL SOC. PSYCH. 145, 147-48 (2017).

281. Burke et al., *supra* note 280.

282. Terence A. Beck, *Identity, Discourse, and Safety in Controversial Issue Discussions*, 1 ANNALS SOC. STUD. EDUC. RSCH. TEACHERS 48, 49-50 (2020). *See also* Dahl & Galliher, *supra* note 253.

283. Elizabeth Kraatz, Jacqueline von Spiegel, Robin Sayers & Anna C. Brady, *Should We “Just Stick to the Facts”? The Benefit of Controversial Conversations in Classrooms*, 61 THEORY INTO PRAC. 312, 322-24 (2022). *See also* Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 214 (1991).

284. *See supra* Part II.B. *See also* Sweta Rajan-Rankin, *Self-Identity, Embodiment and the Development of Emotional Resilience*, 44 BRITISH J. SOC. WORK 2426, 2430-38 (2013).

285. *See also* Tappan, *supra* note 258. *See also* Linda J. Myers, Suzette L. Speight, Pamela S. Highlen, Chikako I. Cox, Amy L. Reynolds, Eve M. Adams & C. Patricia Hanley, *Identity Development and Worldview: Toward an Optimal Conceptualization* 70 J. COUNS. & DEV. 54, 54-55 (1991).

286. *See* Rock, *supra* note 273.

the religious identity development of the speaker, and contributes to the overall exchange of ideas necessary for intellectual growth.

b. Perceived intent to threaten versus change. Secondly, social science establishes that the perceived intent of the speech determines its overall effect on self-identity development.²⁸⁷ Speech can harm sexual identity development if the “targets” of speech believe the speaker intends to harm or threaten them based on their sexual orientation or gender identity.²⁸⁸ This perceived intent may cause the target to withhold, or at least restrict, the expression of their sexual orientation or gender identity, which, in turn, harms sexual identity development.²⁸⁹

Conversely, speech with the perceived intent to elicit change is less likely to invoke the emotions that harm sexual identity development.²⁹⁰ This “change intent” develops if the speaker’s target believes the speaker intends to convince them to change their sexual orientation, gender identity, or behaviors instead of threatening them into compliance.²⁹¹ If the target believes the speech is intended to inspire change, the target is less likely to experience the fear that harms their sexual identity development.²⁹² Instead of eliciting fear or anxiety, speech with this perceived intent to elicit change often inspires people to express their sexual identity and engage in counter-speech.²⁹³ Indeed, this “change intent” speech often invokes the robust debate and exchange of ideas necessary for intellectual growth.²⁹⁴ Thus, speech that intends to

287. See Jay, *supra* note 268. See also Brenda Geiger & Michael Fischer, *Will Worlds Ever Hurt Me?*, 21 J. INTERPERSONAL VIOLENCE 337, 340–42 (2006).

288. See Leets, *supra* note 132. See generally Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCH., PUB. POL’Y, & L. 250, 250–55 (2004) (discussing the psychological harm that hate can cause by creating the threat of harm).

289. Chad M. Mosher, *The Social Implications of Sexual Identity Formation and the Coming-Out Process: A Review of the Theoretical and Empirical Literature*, 9 FAM. J. 164, 169–71 (2001).

290. See Eran Halperin, Alexandra G. Russell, Carol S. Dweck & James J. Gross, *Anger, Hatred, and the Quest for Peace: Anger Can Be Constructive in the Absence of Hatred*, 55 J. CONFLICT RESOL. 274, 276 (2011). See also Agneta Fischer, Eran Halperin, Daphna Canetti & Alba Jasini, *Why We Hate*, 10 EMOTION REV. 309, 310 (2018) (discussing how hate speech does not intend to convince or change but instead intends to harm).

291. See Leets, *supra* note 132, at 353–55. See also JEROEN TEMPERMAN, RELIGIOUS SPEECH, HATRED AND LGBT RIGHTS 1–7 (2021).

292. See TEMPERMAN, *supra* note 291.

293. Jeffrey W. Howard, *Dangerous Speech*, 47 PHIL. & PUB. AFF. 208, 208–10 (2019).

294. Richard L. Roe, *Valuing Student Speech: The Work of the Schools as Conceptual Development*, 79 CAL. L. REV. 1269, 1279 (1991). See also Paula McAvoy & Diana Hess,

elicit change does not tend to harm self-identity development or create psychological injury.²⁹⁵

Social science suggests that sincerely held religious beliefs regarding sexual orientation or gender identity are often driven by the intent to inspire change.²⁹⁶ Therefore, if the target perceives the speaker intends to express a religious belief to effect change in society, the speech is less likely to threaten the target's self-identity development.²⁹⁷ Thus, the "change intent" factor will separate speech necessary for religious identity development and supportive of sexual identity development.

Of course, for some individuals, this religious speech may create negative feelings or inspire adverse reactions, causing them to feel uncomfortable expressing their sexual identity. However, schools should not eliminate speech just because it creates an adverse response.²⁹⁸ Indeed, social science demonstrates that part of sexual identity development includes facing and overcoming adverse reactions to one's sexual orientation or gender identity.²⁹⁹ In addition, children will likely encounter even harsher language outside of school.³⁰⁰ Thus, schools can provide a safe environment for students to face, address, and overcome this stressful language.

2. Utilizing Social Science to Identify Harmful Anti-LGBTQ Student Speech

In sum, social science supports the general principle that schools must create an environment that promotes self-identity development to support intellectual growth.³⁰¹ Further, this research demonstrates that self-identity development includes

Classroom Deliberation in an Era of Political Polarization, 43 CURRICULUM INQUIRY 14, 14-15 (2015).

295. Hark A. Bosma & E. Saskia Kunnen, *Determinants and Mechanism in Ego Identity Development: A Review and Synthesis*, 21 DEV. REV. 39, 40-44 (2001).

296. See *supra* notes 237-42.

297. See Geiger & Fischer, *supra* note 287.

298. See *supra* Part I.A and Part II.D.

299. See Michelle M. Johns, V. Paul Poteat, Stacey S. Horn & Joseph Kosciw, *Strengthening Our Schools to Promote Resilience and Health Amount LGBTQ Youth*, 6 LGBT HEALTH 146, 146-55 (2019).

300. Kenta Asakura, *Extraordinary Acts to "Show Up": Conceptualizing Resilience of LGBTQ Youth*, 51 YOUTH & SOC'Y 268, 268-70 (2019).

301. See *infra* Part III.

religious beliefs, sexual orientation, and gender identity.³⁰² Thus, to support all forms of self-identity development, school districts must find a balance between allowing speech that expresses sincerely held religious beliefs while eliminating speech that threatens the sexual identity development of others.³⁰³

This insight can be applied directly to real-world issues facing school districts. For example, student speech that tries to convince people that there are only two genders is less likely to cause psychological injury when compared to speech that attempts to bully transgender students into “conforming” with traditional gender norms. Instead of trying to have an open discussion on gender identity issues, this harmful language attempts to coerce compliance through threats.

To make real-world use of this social science insight, we must pair it with the legal conception of harmful speech to develop a concept that schools can use to craft speech policies that will find the delicate balance between harmful and controversial speech.

III. THE UPDATED CONCEPTION OF HARMFUL ANTI-LGBTQ STUDENT SPEECH

Both the law and social science suggest schools must create an environment that supports self-identity development to promote intellectual growth and meet the fundamental obligations and purpose of education.³⁰⁴ Further, the law and social science recognize that self-identity development includes sexual orientation, gender identity, and religious belief development.³⁰⁵

To promote self-identity development, schools must balance protecting speech to allow for self-identity expression and eliminating speech that stifles self-identity development.³⁰⁶ Specifically, schools must find a balance between protecting against speech that threatens students based on sexual orientation and gender identity while protecting speech necessary for religious

302. *See infra* Part III.A and Part III.B.

303. *See supra* Part II.D.

304. *See supra* notes 18–22 and accompanying text. *See also supra* notes 182–85 and accompanying text.

305. *See supra* notes 23–27 and accompanying text. *See also supra* notes 186–89 and accompanying text.

306. *See supra* Part I.A and Part II.D.

identity development.³⁰⁷ In the legal realm, this balance is dictated by freedom of speech and religious expression versus the school's obligation to protect students from sexual harassment.³⁰⁸ In the social science realm, this balance is dictated by speech that is necessary for personal development versus speech that stifles self-identity development.³⁰⁹

Thus, both the law and social science establish that schools should identify and eliminate speech that harms LGBTQ students while protecting controversial speech that is necessary for religious identity development.

A. The Law's Failure to Define Harmful Student LGBTQ Speech

Despite the general legal recognition of the need to balance speech to promote self-identity development, the law has failed to find the balance.³¹⁰ Instead, the law generally suggests that speech should be limited if it causes "psychological injury" by harming the rights of others "to be let alone."³¹¹ However, the law fails to define psychological injury or explain how it can be distinguished from controversial speech that must be protected as free speech to maintain the free exchange of ideas necessary for intellectual growth.³¹² Further, the law fails to grant any special consideration to religious-based student speech, thereby ignoring the critical role religious identity development plays in the self-identity development of students. The law currently does not provide clear guidelines to distinguish between harmful speech that should be restricted to protect sexual identity development and controversial speech that must be upheld to support religious identity development.

Despite its deficiencies, the law correctly suggests that schools should assess student LGBTQ speech based on its psychological impact.³¹³ This "psychological injury" test sets the stage for utilizing social science to identify how speech can cause psychological injury to LGBTQ students. Indeed, social science demonstrates that certain

307. *See supra* Part II.C and Part II.D.

308. *See supra* Part I.C.

309. *See supra* Part II.

310. *See supra* Part I.C.

311. *See supra* Part I.A.2.

312. *See supra* Part I.C.

313. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1189 (9th Cir. 2006).

speech can cause psychological injury to LGBTQ students through specific features that threaten self-identity development. Social science also suggests that eliminating religious speech can cause psychological injury by stifling religious identity development, leading to similar psychological maladies.³¹⁴ Thus, instead of relying on the vague conception of “psychological injury,” social science suggests schools can protect LGBTQ students while upholding religious identity development by targeting speech that exhibits the specific factors that harm self-identity development.

*B. Filling in the Gaps of the Legal Pathway to
Protect Student Self-Identity Development*

Speech causes psychological injury to LGBTQ students through two main factors, the “target factor” and the “perceived intent” factor.³¹⁵ The target factor distinguishes speech that targets a specific individual’s sexual identity from speech discussing sexual orientation or gender identity issues.³¹⁶ Speech that identifies a particular student based on his actual or perceived gender identity could create a hostile environment for that individual, making them afraid to explore or express their sexual identity.³¹⁷ However, social science suggests that generally targeted speech about sexual orientation or gender identity issues does not cause the psychological harm associated with individually targeted speech.³¹⁸ Instead, this generally targeted speech supports religious identity development and the exchange of ideas necessary for intellectual growth.³¹⁹

The “perceived intent” factor focuses on how the target of the speech likely interprets the speaker’s intent.³²⁰ If speech carries the perceived intent to threaten or harm individuals based on their sexual orientation or gender identity, it is more likely to threaten sexual identity development.³²¹ Conversely, if the speech carries the

314. See *supra* notes 226–29.

315. See *supra* Part II.D.

316. See *supra* Part II.D.1.a.

317. See *supra* notes 278–80 and accompanying text.

318. See *supra* notes 280–83 and accompanying text.

319. See *supra* notes 284–86 and accompanying text.

320. See *supra* Part II.D.1.b.

321. See *supra* notes 288–89 and accompanying text.

perceived intent to elicit change, it is less likely to cause harm.³²² Instead, this “change intent” speech is necessary to promote the speaker’s self-identity development and the exchange of ideas required for intellectual growth.³²³

Both factors can be used to identify speech that is harmful to LGBTQ students by threatening their self-identity development. Moreover, these factors explicitly distinguish harmful speech from speech that may cause negative emotions but does not threaten sexual identity development and is necessary for religious identity development.

C. Defining Harmful Student LGBTQ Speech

Based on this social science insight, harmful student LGBTQ can be defined as speech that a responsible person would interpret as personally targeting their ability to express their sexual orientation or gender identity. This “Harmful Anti-LGBTQ Student Speech” conception incorporates the two features of speech that threaten sexual identity development by creating three separate elements to assess speech. To be deemed Harmful to LGBTQ Student Speech, the speech must: (1) target an individual, (2) create the perceived intent to harm, and (3) be based on gender identity or sexual orientation.

Speech that does not fit this conception can be deemed controversial speech that must be protected to promote self-identity development and uphold students’ free speech and religious expression rights. This controversial student speech expresses a general opinion or belief about gender identity or sexual orientation issues with the intent to elicit change. Sincerely held religious-based speech necessary for religious identity development belongs in this controversial student speech category because it does not hold the features of Harmful Anti-LGBTQ Student Speech. Namely, most sincerely held religious beliefs do not intend to harm or threaten individuals but instead intend to elicit change.

Thus, this Harmful Anti-LGBTQ Student Speech conception will allow schools to eliminate speech that creates a hostile environment for LGBTQ students while protecting religious speech

322. See *supra* notes 291–92 and accompanying text.

323. See *Roe, supra* note 294.

necessary to support religious self-identity development. Further, this Harmful Anti-LGBTQ Student Speech conception will uphold the general goal of protecting self-identity development by targeting speech that threatens sexual identity development while protecting speech necessary for religious identity development.

1. Fitting Within the Current Legal Landscape

This conception of Harmful Anti-LGBTQ Student Speech does not require a full-scale re-conception of harmful speech, or a rejection of the standards already established in the law. Instead, it fits within the current legal conception of harmful speech by showing precisely how speech interferes with the rights of others by causing psychological injury.³²⁴ Thus, the Harmful Anti-LGBTQ Student Speech concept can be used to clarify and define this psychological injury specifically based on speech's effect on self-identity development. Indeed, the specific components of the Harmful Anti-LGBTQ Student Speech concept fit within the current legal framework by clarifying the concepts the law has attempted to use to identify harmful speech.

The perceived intent factor does not require an assessment of the speaker's actual intent but, instead, how a reasonable person would interpret the intent. The "reasonable person" standard is established throughout the law and exists in the definition of sexually harassing speech offered through Title IX.³²⁵ The reasonable person test allows an assessment of speech that avoids the common deficiencies of other laws attempting to address speech. The reasonable person test enables schools to assess speech without having to get "inside the head" of the speaker to determine intent.³²⁶ Similarly, focusing solely on how the target perceives the speech can make the assessment too subjective and overly reliant on the

324. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1182 (9th Cir. 2006). *See also* *Bowler v. Hudson*, 514 F. Supp. 2d 168, 183 (D. Mass. 2007).

325. *See* 87 Fed. Reg. 41390-01, *supra* note 168. *See also* Charles R. Calleros, *Title VII and the First Amendment: Content-Neutral Regulation, Disparate Impact, and the "Reasonable Person"*, 58 OHIO ST. L.J. 1217, 1258-59 (1997).

326. Katherine Parker, *Expanding the Regulation of Online Speech Through the Commerce Clause to Reduce Cyber Harassment*, 47 HASTINGS CONST. L.Q. 475, 486 (2020).

conditions of the target.³²⁷ Instead, the perceived intent factor allows schools to assess speech based on how a reasonable person would interpret the intent of the speech. Of course, the speaker's true intent can be considered part of this analysis, but it also allows for consideration of how the intent would likely be perceived by a person standing in the shoes of the target.

Further, by focusing on speech that intends to cause harm, the Harmful Anti-LGBTQ Student Speech conception will avoid eliminating student speech intended to inspire change. The courts recognize that students have the right to try to convince or even convert other students within schools, specifically with respect to religious beliefs.³²⁸ Thus, the Harmful Anti-LGBTQ Student Speech conception fits within the general legal principles that require schools to eliminate harassing speech while protecting the rights of students to engage in pervasive speech.

2. Protecting Sincere Religious Student Speech

Most sincerely held religious speech necessary for religious self-identity development does not contain the features of Harmful Anti-LGBTQ Student Speech.³²⁹ Instead, most religious-based speech focuses on making general comments about gender identity and sexual orientation issues with the intent to elicit change.³³⁰ Most religious believers differentiate between their beliefs regarding gender identity and sexual orientation issues and the rights of other students to exist free of threat.³³¹ Thus, this conception of Harmful Anti-LGBTQ Student Speech will distinguish and protect speech based on sincerely held religious beliefs while targeting harmful speech.

This Harmful Anti-LGBTQ Student Speech concept acknowledges that some people strongly disagree with religious beliefs about sexual orientation and gender identity and contend that expressing these

327. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 268–69 (3d Cir. 2002) (“When policies focus broadly on listeners’ reactions, without providing a basis for limiting application to disruptive expression, they are likely to cover a substantial amount of protected speech.”).

328. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 838 (9th Cir. 1998).

329. *See supra* Part II.B.2.

330. *See supra* notes 238–42 and accompanying text.

331. *See supra* notes 253–54.

beliefs harms individuals struggling with sexual identity issues.³³² However, from a legal perspective, speech cannot be limited simply because it attempts to spread a religious belief.³³³ Furthermore, from a social science perspective, this religious-based speech may elicit negative emotions but is unlikely to threaten sexual identity development or cause psychological injury.³³⁴

Indeed, social science suggests that allowing this controversial speech in school helps students who may find it objectionable by enabling them to develop the skills to address and overcome controversial speech.³³⁵ This supports the general idea that schools should support the free exchange of ideas, even if some ideas make some uncomfortable, as part of the intellectual development process.³³⁶ Schools can still provide resources to help students address the discomfort associated with this speech and ensure all students that speech crossing the line to personal threats will not be tolerated.³³⁷

The Harmful Anti-LGBTQ Student Speech concept will also enable schools to eliminate harmful religious speech. Some hateful speech is couched in religious beliefs as either a way to avoid the label of hate speech or because the speaker truly believes their religion calls on them to threaten or even harm LGBTQ students.³³⁸ This speech, despite its religious overtones, will still fit in the concept of Harmful Anti-LGBTQ Student Speech. This speech can and should be restricted even though it has religious overtones, both because it does not represent common religious self-identity expression and because its harm to LGBTQ students overwhelms any benefit it provides to religious self-identity development.³³⁹ While this harmful religious speech may be protected outside

332. See Joan Donovan, *High School Students, Social Media and the Illusion of Free Speech*, KNIGHT FOUNDATION (Nov. 20, 2019), <https://knightfoundation.org/articles/high-school-students-social-media-and-the-illusion-of-free-speech>.

333. See *supra* Part I.A.

334. See *supra* Part II.B.2.

335. See Rock, *supra* note 273.

336. See *supra* Part II.D.

337. Roberto L. Abreu, *LGBTQ Youth Bullying Experience in Schools: The Role of School Counselors Within a System of Oppression*, 11 J. CREATIVITY MENTAL HEALTH 325, 340–42 (2016).

338. See Todd Powell-Williams & Melissa Powell-Williams, “God Hates Your Feelings”: Neutralizing Emotional Deviance within the Westboro Baptist Church, 38 DEVIANT BEHAV. 1439, 1440 (2016).

339. See *supra* notes 255–57.

of the school environment, the law can deem this speech inappropriate for educational purposes because it harms self-identity development.³⁴⁰ By targeting speech based on its harmful features, instead of merely separating “religious speech,” the Harmful Anti-LGBTQ Student Speech conception will enable schools to eliminate “hateful speech” that is either hidden as religious speech or based on harmful religious beliefs.

By defining Harmful Anti-LGBTQ Student Speech as speech that targets individuals with the intent to harm or threaten their sexual identity, schools will be able to eliminate speech that, according to social science, harms sexual identity development by threatening LGBTQ students. Conversely, by separating and protecting speech that makes general comments about sexual orientation or gender identity issues with the perceived intent to change, schools will protect speech necessary for religious identity development. This conception of Harmful LGBTQ Speech fits within the current parameters of the law by providing further clarity to the “right to be let alone” standard for accessing student speech generally and the “psychological injury” that the courts have attempted to assess when reviewing student LGBTQ speech.

CONCLUSION

To promote intellectual growth, schools must create an environment that protects the self-identity development of all students. Self-identity development and intellectual growth require respect for religious beliefs, sexual orientation, and gender identity development. Gender identity, sexual orientation, and religion are complex subjects and involve many controversial issues.³⁴¹ Unfortunately, the current legal framework for assessing student speech fails to enable schools to address these issues in a way that will protect the rights and self-identity development of all students. Instead, the law provides vague and overbroad conceptions of

340. *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2047 (2021) (discussing cases establishing that schools can limit speech that would protect “outside the school context”).

341. See generally Suzanne Eckes & Maria Lewis, *The Complex and Dynamic Legal Landscape of LGBTQ Student Rights*, BOOKINGS (Oct. 19, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/10/19/the-complex-and-dynamic-legal-landscape-of-lgbtq-student-rights> (providing an overview of the many complex issues related to LGBTQ students, including religious concerns).

harmful speech that encourage schools to adopt overly broad speech codes that fail to identify harmful speech or adequately protect religious expression.

However, the law correctly establishes that harmful student speech should be assessed based on the psychological injury it can create. Social science can be used to further define this “psychological injury” standard concerning LGBTQ student speech by focusing on speech’s effect on self-identity development which includes the development of sexual identity, gender identity and religious or spiritual identity. Indeed, social science demonstrates that speech can harm self-identity development and cause psychological injury through specific features. These features distinguish harmful speech from controversial speech that must be protected to uphold religious rights and encourage the free exchange of ideas necessary for intellectual growth. This Article proposes a concept of “Harmful Anti-LGBTQ Student Speech” that incorporates social science to identify the specific speech that causes the psychological harm the law has attempted but failed to address.

By focusing on self-identity development, this “Harmful Anti-LGBTQ Student Speech” standard will enable schools to eliminate speech that harms LGBTQ students and protect controversial speech necessary for religious identity development. This Harmful Anti-LGBTQ Student Speech includes speech that specifically (1) targets an individual, (2) creates the perceived intent to harm, and (3) is based on gender identity or sexual orientation. With this trained focus, the law can enable schools to truly promote self-identity development in all its forms by protecting religious speech while eliminating harmful speech. In addition, this Harmful Anti-LGBTQ Student Speech conception will also uphold the legal principles of free speech, religious freedom, and protection from sexual discrimination.

As stated in *Harper*, beyond simple education, the fundamental purpose of schools is “the inculcation of fundamental values of habits and manners of civility essential to a democratic society.”³⁴² Perhaps the most basic value of a democratic society is respect for different lifestyles and beliefs. Therefore, instead of trying to dictate the type of speech that promotes civility in relation to the complex

342. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006).

issues related to gender identity and sexual orientation, schools should focus on creating an environment where students are free to explore, develop and express their self-identity, including their individual religious beliefs, sexual orientation, and gender identity. To achieve this goal, schools must adopt student speech policies that protect controversial speech and limit only the speech that crosses the line between controversial and threatening speech. With the conception of Harmful Anti-LGBTQ Student Speech based on social science, schools can find this balance and create an environment where all students are free to explore, explore and develop their self-identities on their path toward intellectual growth.

