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COMPETITION

Identity, Interrupted:
The Parental Notification Requirement of the
Massachusetts Anti-Bullying Law

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I. INTRODUCTION

In response to a nationwide epidemic of school bullying, marked by a particular animus towards students due to their sexual orientation or perceived sexual orientation (many instances of which had devastating consequences), the Massachusetts Legislature passed an Anti-Bullying Law in an effort to curb school bullying and prevent further teen suicides in the state.¹ The statute requires that a parent or guardian of a victim of school bullying be promptly notified of the incident by a school official.² This broad mandate, however well-intentioned, can have devastating consequences, particularly for those students whom are bullied based on sexual orientation or perceived sexual orientation. In some circumstances the notice requirement will result in school officials essentially outing lesbian, gay, bisexual, and transgender (LGBT) youth

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1. See MASS. GEN. LAWS ch. 71, § 37O (2010). Note, however, that the suicide of teenager Phoebe Prince in 2010, who was not bullied based on her sexual orientation or a perceived sexual orientation, was also a force behind the Massachusetts legislation. See James Vaznis, *Senate OKs Bill To Curtail Bullying*, BOS. GLOBE, Mar. 12, 2010, at 1, available at http://www.boston.com/news/education/k_12/articles/2010/03/12/senate_oks_bill_to_curtail_bullying/.

2. MASS GEN. LAWS ch.71, § 37O(g)(iv).

to their parents. This requirement, and thus the law itself, has the potential to harm rather than shield LGBT youth. Accordingly, the Massachusetts anti-bullying legislation—enacted in large part as a response to nationally reported LGBT-based bullying—can have detrimental consequences for students whom it was originally designed to protect.

The rationale behind the notice requirement—to alert the victim’s parents as soon as possible in an effort to provide adult support for the target at home—is certainly commendable. However, the reality is that the mandatory reporting system makes a number of assumptions that could result in harming, rather than helping, the victim. First, in the case of an LGBT student, the notice requirement either assumes that the parents of the target are already aware of their son or daughter’s sexuality or completely disregards the consequence of outing a student as incidental. This creates an alarmingly strong disincentive for a closeted LGBT student to report having been bullied.³ Additionally, the requirement falsely assumes that all students who are being bullied based on sexual orientation or perceived sexual orientation have accepting parents who will provide support upon learning that their son or daughter is: (a) LGBT, and/or (b) being bullied for not conforming to gender stereotypes. Further, the law also presumes that most parents can identify the distinction between the two and will not, upon learning of the nature of the bullying, either force an identity upon their child or pressure their child to alter that identity.

Many youth who are being bullied do not, or have not yet, identified themselves as LGBT; rather, the bullying that they face in school is rooted in a failure to conform to gender stereotypes.⁴ While some young students may already identify with a specific sexual orientation, many may simply not feel the need to identify as either gay or straight at a young age or, even in some cases, at any point in their lives.⁵ Arguably,

3. To the extent that students are cognizant of mandatory reporting, the notice requirement will stifle adult involvement rather than promote it. If reporting an incident of bullying will result in the victim being outed to his or her parents, or as is also possible in the case of bullying based on perceived sexual orientation, creates a fear that his or her parents will react negatively upon learning the context of the bullying, then in both situations there is a strong disincentive for the victim to report being bullied, which directly conflicts with the purpose of the legislation itself.

4. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 187-88, 195 (1988); see also Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 202, 218 (1994).

5. The average age of identification of sexual orientation, for both males and females, is about age fourteen, with the average age of disclosure for both sexes at about age fifteen. However, lesbian, gay, and bisexual youth first felt different from their peers at approximately age

when the assumptions of the notice requirement fail, as they often do,⁶ students are subjected to the possibility of an unsafe home environment where they are “bullied” by their parents. This is in addition to internal and external pressure to adopt one of two identities that have been presented to them: the gay identity imposed by the bully or the normative identity urged by non-accepting parents. This consequence is the direct by-product of the bullying itself and, in turn, an extension of the bully himself.

Part II of this Comment explores the Massachusetts anti-bullying statute and regulations in greater detail and argues that the Department of Elementary and Secondary Education (DESE) failed by not promulgating more sensitive regulations to account for the statute’s disproportionately negative effect on youth whom are bullied based on their sexual orientation or perceived sexual orientation. Part III of this Comment discusses the consequences of outing and the pressures associated with the need to identify with one community or another. I argue that the anti-bullying law places an undue amount of power in the hands of the bully, in the sense that not only does the bully have the power to torment the victim physically and verbally, but the bully may also out his or her target through the notice requirement, thereby asserting a level of control over the victim’s identity. The statute, in fact, gives the bully an apparatus by which he or she may impose a “gay” identity upon the target.

Part IV discusses how a constitutional right to privacy, in light of case law from the past decade,⁷ could successfully be employed to combat the notice requirement as an invasion of that constitutional right. Throughout this discussion, however, it will become evident that this legal doctrine is a troubled concept that has and could continue to fall short of protecting the targets of school bullying. Furthermore, the

eight and, on average, recognized their same-sex attraction as early as age twelve to thirteen. Anthony R. D’Augelli, Arnold H. Grossman & Michael T. Starks, *Gender Atypicality and Sexual Orientation Development Among Lesbian, Gay, and Bisexual Youth: Prevalence, Sex Differences, and Parental Responses*, 12 J. GAY & MENTAL HEALTH 121, tbl.1 (2008).

6. See, e.g., *Gillman v. Sch. Bd. for Holmes Cnty., Fla.*, 567 F. Supp. 2d 1359, 1362 n.1 (2008) (“Testimony at trial revealed that Jane’s father threatened to kick Jane out of the house upon learning of his daughter’s sexual orientation.”).

7. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1191 (C.D. Cal. 2007) (finding that, despite public displays of affection with her girlfriend on school grounds, a minor student had a reasonable expectation of privacy in keeping her sexual orientation from being disclosed to her mother by the school principal in the context of explaining a suspension); see also *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000) (finding that “[i]t is difficult to imagine a more private matter than one’s sexuality and a less likely probability that the government would have a legitimate interest in disclosure of sexual identity”).

privacy doctrine inherently assumes an identity for the victim, such that the doctrine of privacy and the notice requirement could lead to a strikingly similar result.

In conclusion, there are great costs that accompany the notice requirement that disproportionately affect LGBT youth and those students whom are bullied based on perceived sexual orientation. The requirement should be reworked, or removed, so that the anti-bullying legislation adequately protects the most vulnerable students in Massachusetts,⁸ rather than aid the bully in further controlling his or her victim's identity.

II. THE NOTICE REQUIREMENT OF THE MASSACHUSETTS ANTI-BULLYING LEGISLATION OF 2010

Eleven-year-old Carl Joseph Walker-Hoover hanged himself with an extension cord in his home in Springfield, Massachusetts, on April 6, 2009.⁹ Carl killed himself after enduring several months of ruthless teasing at school, including repeatedly being called “gay,” “girlie,” and “fag” by some of his sixth-grade classmates.¹⁰ In response to Carl taking his own life, in addition to the bullying-induced suicide of another Massachusetts student less than one year later,¹¹ the Massachusetts Legislature responded in May 2010 by passing an “emergency law” directed at the “prevention of bullying in schools.”¹² The Act mandated that, *inter alia*, each school district develop “a plan to address bullying prevention and intervention,” including adopting procedures for “promptly notifying the parents or guardians of a victim.”¹³ Further, the Act explicitly required DESE to promulgate rules and regulations pertaining to the notice requirement.¹⁴

8. See HARRIS INTERACTIVE AND GLSEN, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA—A SURVEY OF STUDENTS AND TEACHERS (2005), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/499-1.pdf.

9. Susan Donaldson James, *When Words Can Kill: 'That's So Gay,'* ABC NEWS (Apr. 14, 2009), <http://abcnews.go.com/Health/MindMoodNews/story?id=7328091>.

10. *Id.*

11. Phoebe Price, a Massachusetts teenager, committed suicide in 2010 after being bullied by her classmates. See Erik Eckholm & Katie Zezima, *6 Teenagers Are Charged After Classmate's Suicide*, N.Y. TIMES (Mar. 29, 2010), <http://www.nytimes.com/2010/03/30/us/30/bully.html>.

12. 2010 Mass. Legis. Serv. ch. 92 (S.B. 2404) (West).

13. MASS. GEN. LAWS ch. 71, § 37O(d) (2010).

14. *Id.* 2010 Mass. Legis. Serv. ch. 92, § 17 required that DESE promulgate rules pertaining to the notice requirement by September 30, 2010, giving DESE only 4 months after the legislation went into effect on May 3, 2010. *Id.*

In the notice and comment period leading up to promulgation, DESE received a number of public comments on its proposed regulations. One comment urged that the regulations instructing school officials to notify a bullied victim's parents not include any information that "would reveal the actual or perceived gender identity or expression or sexual orientation of the victim or perpetrator, unless the victim or perpetrator provides express written consent to disclosure of his or her gender identity or sexual orientation."¹⁵ DESE rejected this proposal and promulgated regulations requiring prompt notification to "the parents of the target" and permitting the principal to contact the target's parents "about a report of bullying or retaliation prior to a determination that bullying or retaliation has occurred."¹⁶ Subsequently, DESE issued policy guidance, not carrying the force of law, that aimed to "assist school officials" in implementing the notice requirement in situations where the bullying is based on sexual orientation or a perceived sexual orientation.¹⁷

In this policy guidance, DESE recognized the "special circumstances of a bullying incident involving actual or perceived sexual orientation or gender identity/expression"; however, the Department failed to do anything more than shed light on the most obvious repercussion—that notification "might inadvertently disclose the sexual orientation or gender identity/expression of an LGBT student to his/her parents or to the public" and result in "[u]nintended consequences, such as familial rejection or family conflict."¹⁸ Thus, DESE merely *recommended* that school officials support a student "[a]s much as possible" in "his or her decision to disclose his or her sexual orientation or gender identity/expression to family members on his or her own terms."¹⁹ DESE, following the lead of the Massachusetts Legislature,

15. Mass. Dep't of Elementary and Secondary Educ., *Analysis of Public Comments on Proposed New 603 CMR 49.00: Notification of Bullying or Retaliation* 13-14 (Sept. 2010), www.doe.mass.edu/boe/docs/0910/item5regs.doc.

16. 603 MASS. CODE REGS. 49.05(1) (2010). DESE claimed that "§ 370 requires [D]ESE to promulgate regulations in a limited area, i.e., a principal's duty to notify parents and law enforcement of bullying and retaliation. The [GLAD] recommendation refers to areas outside the scope of that charge." Mass. Dep't of Elementary and Secondary Educ., *supra* note 15, at 2.

17. Mass. Dep't of Elementary & Secondary Educ., *Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression: Implementation of 603 CMR 49.05* (Jan. 2011), <http://www.doe.mass.edu/bullying/PNguidance.html> [hereinafter *Policy Guidance*].

18. *Id.*

19. *Id.* In response to DESE's recommendation, it is unrealistic to expect that school officials would be able to discuss an incident of bullying with a victim's parent without revealing the nature of the bullying. It is likely that the first question a parent would ask, after ensuring that

made a somewhat blind assumption of its own: that school officials and administrators are both supportive and accepting, which is clearly not always the case.²⁰ Indeed, their policy “guidance” places an unchecked amount of discretion in the hands of school officials that would have otherwise been controlled by law had DESE adopted appropriate regulations. DESE relied solely on the important, yet less than comprehensive, factor of the “mental or physical health and safety of the student”²¹ as a reason for *caution*, while completely ignoring the privacy interests at stake. More importantly, DESE failed to recognize the repercussions that the notice requirement may have on shaping a target’s identity through the inadvertent, yet unforgiving, grant of power to the bully.

III. AN APPARATUS IN SERVICE OF FORCING AN IDENTITY

It is well established that outing can have extremely detrimental effects, particularly on youth.²² Still, there are many people within the gay community that support outing in certain circumstances,²³ and even more people who preach the benefits of coming out of the closet.²⁴ The

his or her child is safe, is for the details of the incident. If the school official does not offer the information at the parent’s request, the parent is sure to pressure his or her child to provide them with the details of the incident.

20. See, e.g., *Gillman v. Sch. Bd. for Holmes Cnty, Fla.*, 567 F. Supp. 2d 1359, 1362 n.1 (2008) (finding high school student was threatened by her father with being kicked out of the house upon his learning of her sexual orientation from the school principal); *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000) (finding police officer threatened to “out” an eighteen-year-old boy to his grandfather, resulting in the boy’s suicide).

21. *Policy Guidance*, *supra* note 17.

22. *Id.*

23. Gabriel Rotello, *Why I Oppose Outing*, OUTWEEK, May 29, 1991, *reprinted in* LARRY GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* 277-81 (1993). Rotello contends that the term “outing” has an inaccurately negative connotation; that “the closet is not a safe place at all, as anyone who has spent time there can attest.” *Id.* at 277. He suggests that “[t]hose who are publically lesbian or gay . . . be described as having ‘come in,’ meaning into the safety of a healthy self-image and a burgeoning community.” *Id.* Outing then, for Rotello, is: “equalizing homosexuality and heterosexuality.” *Id.* at 278. He proposed instead that the term “outing . . . with its antiquated, slanted, pejorative imagery” be replaced with the term “equalizing.” *Id.*

24. *Id.* at 277-78; see also Hunter Madsen, *Tattle Tale Traps*, OUTWEEK, May 16, 1990, *reprinted in* GROSS, *supra* note 23, at 236-42 (“No gay person should deny another the incomparable, irreplaceable, once-in-a-lifetime opportunity to come out of the closet under his or her own steam, as the fruit of deep personal reflection, courage and conviction.”). *Id.* at 237.

The “It Gets Better Project” was a national phenomenon, started by author Dan Savage. The goal was to show LGBT youth, who could not imagine a future for themselves, what was in store for them by making available the recordings of thousands of gay adults explaining their experiences with bullying or nonacceptance as youth and contrasting that with how happy they are today because they persevered. Underlying this message was that there is an inherent community to which you belong and that if LGBT youth could only stick it out through this “rite

predominant articulation of the latter view is well captured in Gabriel Rotello's *Why I Oppose Outing*, where he claims that he has "met not a single out person who says that life was safer when they were in [the closet]." ²⁵ Hunter Madsen, in debate with Rotello about whether and when outing is appropriate, argues that "this rite of passage, [the process of coming out], is far too important to the development of a *positive gay identity* for someone else . . . to callously preempt it, to steal it away." ²⁶ In studying the debate, it becomes evident that two principles underlie both arguments: (1) coming out is inevitable and the *right thing* to do because there is a single truth—the *positive gay identity*; and (2) there is a *community* awaiting those who have not yet come out—one to which they belong.

However well-intentioned, these assumptions are dangerous, particularly in the context of impressionable, questioning youth. Madsen and Rotello, in advocating the notion of one true gay identity, ironically stand on the same side as the bully who exercises control over the identity of the target of his aggression. The bully's control over the victim is twofold. Not only can the bully physically and verbally abuse the victim based on sexual orientation or perceived sexual orientation, thus imposing both an identity and a community upon the victim, but also, through the notice requirement, the bully can exercise further control over the victim's identity by essentially determining when the victim will *come out* to his/her family. The bully acts as the catalyst of the notice requirement. Ultimately, the bully exercises control over the whole apparatus, which itself is in service of a *gay identity*.

In some sense, Madsen, Rotello, and the bully, albeit through different tactics and for different reasons, are urging the targets in the same direction—out of the alleged closet in which they are trapped and toward their *true* identity. Neither the bully, nor the authors, show any respect for an alternative option—the victim's decision to select his or her own identity, separate and distinct from either in or out of the closet, gay or straight, accepted or non-accepted.

of passage," then they would eventually make it successfully into the gay community. Of course, to get there, they had to first continue to endure being tormented as adolescents. The Project implies that all LGBT persons share a common experience of being bullied based on sexual orientation. The message is to persevere and it will all get better later. I not only took part in this project, but coordinated a group of law students to film a video together. I certainly see the value in it. However, I also recognize that it does suggest, similar to Madsen and Rotello, only one way to discovering your true identity and that is (1) being bullied and (2) joining with the gay community, neither of which are prerequisites to self-discovery. IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/> (last visited Jan. 26, 2012).

25. Rotello, *supra* note 23, at 277.

26. Madsen, *supra* note 24, at 237-38 (emphasis added).

Janet Halley draws on K. Anthony Appiah to articulate the intricacies of the black or white dilemma:

Demanding respect for people . . . as gays requires that there are some scripts that go with . . . having same-sex desires. There will be proper ways of being . . . gay, there will be expectations to be met, demands to be made. It is at this point that someone who takes autonomy seriously will ask whether we have not replaced one kind of tyranny with another. If I had to choose between the worlds of the closet and the world of gay liberation . . . I would, of course, choose . . . the latter. But I would like not to have to choose. I would like other options.²⁷

Halley goes on to analyze Appiah's statement of the issue within two different frameworks: the call of assimilation coming from above versus that called for from below.²⁸ In the bullying context, we see both of these in play. The bully, representing the dominant view of society, is molding his victim's identity due to perceived traits which, based on gender norms, the bully associates with being gay. He not only "outs" the target directly, but also indirectly through the notification requirement, thereby exercising control over the identity of the target and the entire apparatus that was designed to protect him. Halley would argue that this call for assimilation comes from above, from what society has instilled in the bully as being normative, and in turn, what the bully sees as counter-normative in the target and thus, the basis for bullying. The gay community, for which both Madsen and Rotello advocate, calls for assimilation from below into one community where everyone shares the same underlying identity of having once been closeted, but now free.

Both the calls from above and from below simultaneously reject the idea that is proposed by Appiah, that some may not want to choose—some may want other options besides the script they are offered from above and below.²⁹ Through outing, the bully hands the victim a *script* to which the victim must strictly adhere. Upon adherence, Madsen and Rotello's community will be there to accept the victim with open arms. For both parties, the bully and the community, there is no in-between. Rotello, of course, would counter this formulation by contending that he fully acknowledges that "private lesbians and gays have a right to stay private" and that "targeting deeply closeted gays [with the threat of outing] who aren't even out to their close friends or family would be cruel, possibly devastating—and would hardly advance anyone's

27. Janet Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW* 115, 117 (David Kairys ed., 1998).

28. *Id.* at 118.

29. *Id.* at 117.

agenda.”³⁰ Nevertheless, Rotello only contemplates two worlds: one where previously closeted gays come out to the community and assume their gay identity, and the other being the closet, where “those who are hiding their sexual orientation would be termed ‘out’—as in ‘out in the cold.’”³¹

What the bully and DESE, as well as Madsen and Rotello, all fail to recognize (despite being embedded in Appiah’s statement of the issue) is brilliantly illuminated by author Philip Roth in *THE HUMAN STAIN*.³² Roth’s protagonist, an African-American male, talks about being caught between the black community at Howard University, which has one set of expectations for him, and the bigotry of the white population of Washington D.C., which forces an entirely different identity upon him through their racism. The protagonist is heavily burdened by being caught between these two pressures. He articulates his dilemma by stating that “[y]ou can’t let the big *they* impose its bigotry on you any more than you can let the little they become a *we* and impose its ethics on you.”³³ Ultimately, Roth’s protagonist desired only “the raw I with all its agility[,] [*s*]elf-discovery and . . . [*s*]ingularity.”³⁴ Neither the bully (controlling through physical and verbal abuse, as well as through the power granted to him by the notice requirement) nor the gay community (torn between “outing” and “calling,” yet yearning for the same end result) recognizes the freedom in the liberated identity advanced by Appiah and Halley and illuminated by Roth.

The call to come out by the gay community and the forceful dragging out by the bully both point in the same direction and contemplate only two identities from which to choose. The victim of bullying based on sexual orientation or perceived sexual orientation is confronted with overwhelming pressures—the bully pushes the identity towards the *gay identity*, while the gay community, perhaps not as forcefully, calls for the same. Meanwhile, the notification requirement, triggered by the bully’s decision to target the victim, adds further pressures in the home environment, with accepting parents pushing in one direction and nonaccepting parents asserting pressure the opposite way. What is lost in all of this is Appiah’s profound recognition that real

30. Rotello, *supra* note 23, at 279-80. Rotello is clear, however, that outing should be encouraged for “those celebrities who are already out in their private lives.” *Id.* at 280. The implication here, of course, is that these celebrities are not “out enough” to be considered a true part of the community or to have fully come to terms with their true identity.

31. *Id.* at 277.

32. PHILLIP ROTH, *THE HUMAN STAIN* 108-09 (First Vintage Int’l ed., 2001).

33. *Id.* at 108 (emphasis added).

34. *Id.*

notions of autonomy demand options beyond either the normative or the communal.

The idea that the victim of bullying is presented with only two options is particularly alarming considering Sylvia Law's approach.³⁵ Law offers that "the disapprobation of homosexual behavior is a reaction to the violation of gender norms, rather than simply scorn for the violation of norms of sexual behavior."³⁶ Further, she argues that "[c]ontemporary condemnation of gay and lesbian people is not simply a matter of individual attitude or idiosyncrasy, but rather is deeply embedded in the structure of our culture and law."³⁷ If this is true, then the bully's hostility towards the target is based upon neither sexual acts, nor self-identification by the victim as being gay or straight, but rather on a violation of prescribed gender norms. The notice requirement only reinforces this fact when school officials relay to the victim's parents that he or she is being targeted by the bully as being "gay." Accordingly, both the young girl who prefers pants over dresses and excels at sports as well as the young boy who is non-athletic and who enjoys fashion are at a higher risk of being bullied and, therefore, of having pressure asserted upon their identities by the bully, independently of whether they actually identify as gay or straight. It is highly unlikely that this distinction will be taken into account by the school officials responsible for notifying the victim's parents about an incident of school bullying.

On average, youth under the age of fourteen have not yet identified with a particular sexual orientation.³⁸ If this statistic is true, a whole subset of school bullying is necessarily targeted at students whose perceived sexual orientation is based on gender nonconformity, independent of the fact that the target may identify as being gay when he or she is older. Further, the control that the bully has over the entire apparatus forces both gay and straight youth alike into particular identity categories, based solely upon a violation of what the bully perceives as gender appropriate.

Similarly to Law, Andrew Koppelman advances the argument that "[i]t should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual's supposed deviance from traditional sex roles."³⁹ Koppelman further asserts that "[m]ost Americans learn no later than high school that one of the nastier

35. Law, *supra* note 4.

36. *Id.* at 187.

37. *Id.* at 195.

38. D'Augelli et al., *supra* note 5, tbl.1.

39. Koppelman, *supra* note 4, at 234.

sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality."⁴⁰

The dynamics of school bullying suggest that both Koppelman and Law are correct. The notification process, opening up the victim to the potential of being outed to their parents and giving control to the bully over the target's identity, threatens to force the victim into either adhering to traditional gender norms to avoid being bullied, and consequently "outed," or alternatively accepting the gay identity that the bully has created for him or her. Because the victim deviates from prescribed gender roles, he or she is labeled by the bully as a "fag" or "dyke" and must either accept or resist that identity. In either case, the notice requirement provides the bully with the mechanism to extend his control beyond the walls of the school and into the victim's home, ultimately swallowing the victim's identity whole.

The notice requirement serves as an apparatus of power for the bully, which in turn triggers the resistance or acquiescence of the victim to a defined identity, ultimately reinforcing a constant relationship between the bully's power and the victim's reaction.⁴¹ The anti-bullying legislation was created within a regime that is defined and controlled by the terms "heterosexual" and "homosexual"; a regime which arguably reinforces the relationship between the bully's power and the sole responses available to the victim within the regime: resistance or conformity. The anti-bullying legislation, because it was created and operates within a regime that has drawn a clear and distinct line between heterosexual and homosexual, (where heterosexuals are in a position of power and homosexuals are in a reactive counterposition), fuels and

40. *Id.* at 235.

41. Michel Foucault maintained:

[P]ower must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, *strengthens*, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions, which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies.

MICHEL FOUCAULT, AN INTRODUCTION, 1 HISTORY OF SEXUALITY 92-93 (Robert Hurley trans., 1978) (emphasis added). The bully's power, in forcing the response of the victim to either resist or accept the identity created by the bully, strengthens the heterosexual/homosexual-defined regime in which the bully operates and the victim responds. The anti-bullying legislation, in a sense, furthers this dynamic by providing the bully a mechanism through which to elicit a *response*—one that is limited in scope by the gay/straight dichotomy.

strengthens the discourse of the regime by establishing a structure to the “bullying” that requires both a powerful bully and a defenseless victim—predominantly viewing the homosexual as the latter.⁴²

While it appears that a victim who is bullied based on sexual orientation or perceived sexual orientation has two entirely different options, to either resist or accept his or her gay identity, in reality the victim’s choices are flip sides of the same coin. Both choices are limited by the discourse of one dominant regime that has eliminated any notion of real autonomy by juxtaposing “gay” and “straight” as an all-encompassing dichotomy. Like the protagonist in the HUMAN STAIN, there are only two options available to a victim of bullying within the constraints of the anti-bullying legislation—resistance or acceptance. In either case, the victim is forced into choosing an identity that exists within a system of control that is both constraining and suffocating, as well as ignorant to the possibility of “the raw I” and the liberating process of “self-discovery.”⁴³

IV. THE POSSIBILITIES AND SHORTCOMINGS OF THE PRIVACY PRINCIPLE IN COMBATING THE NOTICE REQUIREMENT

Charlene Nguon was a sixteen-year-old junior at Santiago High School in California when she was outed to her mother by the school principal.⁴⁴ Charlene was the youngest of five children of Cambodian immigrants and neither of her parents spoke English well.⁴⁵ She was a bright student who had high grades for the first two and a half years of high school.⁴⁶ Charlene met Trang, a fellow female student, during a freshman year science class. By the conclusion of the following academic year, Charlene realized that she was “attracted to her more than [as] a friend.”⁴⁷ When junior year began, Charlene asked Trang to be her “girlfriend,” and within just a few months the two girls began to express their affection for one another publicly by holding hands and hugging.⁴⁸ Shortly thereafter, the two also began to kiss on school property.⁴⁹ At this time, however, Charlene had not revealed her sexual orientation to her

42. This applies where the victims are disproportionately LGBT or perceived to be LGBT and the bully exercises control based on that distinction. See GLSEN, *supra* note 8.

43. ROTH, *supra* note 32, at 108.

44. Nguon v. Wolf, 517 F. Supp. 2d 1177, 1179, 1191-92 (C.D. Cal. 2007).

45. *Id.* at 1179.

46. *Id.*

47. *Id.* at 1179-80.

48. *Id.* at 1180.

49. *Id.*

parents.⁵⁰ She was outed to her mother after being disciplined by the school principal for repeated “inappropriate public displays of affection.”⁵¹ As a result, her grades declined, which in turn resulted in UC-Santa Barbara withdrawing its offer of admission to Charlene during her senior year.⁵²

Charlene had been warned three times before the school disciplined her in the first instance.⁵³ Her public displays of affection stretched beyond hand holding and kissing.⁵⁴ After repeated infractions she was finally suspended.⁵⁵ It was in the context of explaining the suspension that the principal “conveyed Charlene’s sexual orientation to her mother.”⁵⁶ Charlene brought a number of constitutional claims against school officials relating to the disciplinary incidents, including a claim alleging a violation of her federal right to privacy for having been outed to her parents.⁵⁷

In evaluating whether her right to privacy was violated, the United States District Court for the Central District of California considered three factors: (1) Did Charlene have a reasonable expectation that her sexual orientation would not be disclosed to her parents; (2) As a factual matter, did Wolf [her principal] disclose to Charlene’s mother that she was gay; and (3) Assuming disclosure was made, did Wolf have a compelling state interest in making the disclosure?⁵⁸ The court concluded that, in revealing Charlene was being disciplined for public displays of affection with another female student, her principal did, in fact, disclose Charlene’s sexual orientation to her mother.⁵⁹ On the first factor the court surprisingly found, despite her open expressions of affection at school,⁶⁰ that disclosure in one sphere does not necessarily

50. *Id.*

51. *Id.* at 1181.

52. *Id.* at 1180. Charlene attended Orange Coast College. *Id.*

53. *Id.* at 1182.

54. *Id.* at 1183. The two girls were observed straddling one another with their hands up one another’s shirts. *Id.*

55. *Id.* at 1184. Charlene was suspended for three days. *Id.* She had received a one-day suspension prior to this. *Id.* at 1183. There were, in total, seven instances that were either reported or observed by the principal. *Id.* at 1183-84. She was first suspended after the third incident and then again after the sixth. *Id.* It was in the context of the suspensions that the principal met with Charlene’s mother. *Id.* at 1184.

56. *Id.* at 1192.

57. *Id.* at 1191.

58. *Id.*

59. *Id.* at 1192.

60. Charlene testified that “she limited express disclosure of her gay orientation to five friends.” *Id.* at 1191.

relinquish the privacy right in every other context.⁶¹ Expounding on this analysis, the court added that “Charlene’s home was an insular environment, and that her activities with Trang at school were unlikely to be known to her parent[s] unless they were expressly informed.”⁶² Ultimately, the court held that “Charlene had a reasonable expectation of privacy concerning her sexual orientation at home.”⁶³ This holding demonstrates that courts have come a long way in defining the scope of the privacy principle and what it encompasses.⁶⁴

In the context of reporting on his heroic thwarting of an attempted assassination of Gerald R. Ford in 1975, Oliver Sipple, an ex-Marine, filed suit against a newspaper for tortious invasion of privacy after the paper published that he was gay.⁶⁵ While Sipple was out in the San Francisco gay community, he was not, however, out to his family. The story, which was picked up by other newspapers and made national headlines, essentially outed him to his parents.⁶⁶ In *Sipple* the California Supreme Court gave no credence to the rationale of *Nguon*—that being out in one sphere of life does not preclude a reasonable expectation of privacy from being outed in an entirely different context. The court viewed the facts that: Sipple was involved in activities within the gay community, he frequented gay bars, and a number of people in the San Francisco gay community knew his sexual orientation, as preclusive of a finding that his sexual orientation was a private fact.⁶⁷ Therefore, he had no reasonable expectation of privacy.⁶⁸

61. *Id.*

62. *Id.*

63. *Id.*

64. *Contra* Sipple v. Chronicle Publ’g Co., 154 Cal. App. 3d 1040 (Ct. App. 1984).

65. *Id.* at 1043-44.

66. *Id.* at 1044-45. Sipple’s “parents, brothers and sisters learned for the first time of his homosexual orientation” and as a result, he was “abandoned by his family.” *Id.*

67. *Id.* at 1047-48. Explaining the result in *Sipple*, Professor Ruthann Robson argued that:

Sipple’s choice not to come out to his family is legally over-ridden by his activity within his community and his exceptionality to discriminatory stereotypes. Both of these rationales are disturbing. There is no recognition that our communities are in any way unique From the standpoint of the rule of law, our communities are simply assimilable. The dominant culture is the only culture; biases of the dominant culture control. Any nonconformance to those biases is noteworthy, newsworthy and part of the public domain. These rationales would limit privacy only to the most closeted and stereotypical lesbian.

RUTHANN ROBSON, LESBIAN OUT(LAW): SURVIVAL UNDER THE RULE OF LAW 74 (1992). Robson maintained that Sipple’s deviance from the gay male stereotype was perceived as nonconformance to the biases of the dominant culture, ultimately resulting in a forfeit of his right to privacy. The same forces control in the context of bullying, which may suggest a stronger analogy to *Sipple* than to *Nguon* or *Sterling*. While both *Nguon* and *Sterling* arguably represent

The distinction made by the court in *Nguon*, that there is a reasonable expectation of privacy in the home even when students are out in a different sphere, can be directly applied to the notice requirement in the context of school bullying. By finding an expectation of privacy for a minor, *Nguon* provides a solid basis by which to challenge the application of the notice requirement. The notion that there is an expectation of privacy as to the knowledge of one's sexual orientation was strongly stated by the court in *Sterling v. Borough of Minersville*.⁶⁹ In that case, Marcus Anthony Wayman, an eighteen-year-old boy who was discovered by police having sex with a seventeen-year-old boy in his car, committed suicide following a threat by the arresting officer that, if Wayman did not admit to his grandfather that he was a homosexual, the officer was going to out the boy to his grandfather himself.⁷⁰ Wayman's mother, as executrix of his estate, brought suit against Minersville and the officers for, inter alia, an invasion of his right to privacy.⁷¹

In analyzing the issue, the United States Court of Appeals for the Third Circuit found that "[t]he right not to have intimate facts concerning one's life disclosed without one's consent . . . is a venerable one whose constitutional significance we have recognized."⁷² The Third Circuit found that the officer was "aware that one's sexual orientation is intrinsically personal," and "no compelling reason to disclose such information was warranted."⁷³ The court continued, stating that because "the right to privacy is well-settled, the concomitant constitutional

an expansion in privacy, in holding that a person's right to not having their sexual orientation exposed is not legally overridden by being out in one context but not another, the parties in both of these cases had adopted a gay identity, one that was in line with what the dominant culture expects of "homosexuals." In the context of bullying, where victims are often selected because they do not conform to gender stereotypes (but are not necessarily LGBT) there is the potential for a similar "non-conformance" to biases as that developed by Robson. The bully, operating within and according to the dominant regime, is uncomfortable when a victim defies gender norms yet refuses to accept his or her gay identity. The notice requirement is in service of the bully forcing the gay identity upon the victim and privacy is ill-equipped to combat this effect. As it is currently interpreted, there is no room for uniqueness within the bounds of the privacy doctrine. As is implicit in *Nguon*, acquiescence to the gay identity is a prerequisite.

68. *Id.*

69. 232 F.3d 190, 196 (3d Cir. 2000).

70. *Id.* at 192-93.

71. *Id.* at 193.

72. *Id.* at 195 (citing *Bartnicki v. Vopper*, 200 F.3d 109, 122 (3d Cir. 1999), *cert. granted*, 530 U.S. 1260 (2000)). Note that the decision in *Sterling* came down prior to *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding a right to privacy in consensual, sexual conduct between adults), which overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986). The Third Circuit recognized that while "the Supreme Court has not definitively extended the right to privacy to the confidentiality of one's sexual orientation," *Bowers* did not place "a limit on privacy protection for the intensely personal decision of sexual preference." *Sterling*, at 194-95.

73. *Sterling*, 232 F.3d at 198.

violation was apparent notwithstanding the fact that the very action in question [outing] had not previously been held to be unlawful.”⁷⁴ The Third Circuit’s reasoning in *Sterling* supplements the rationale of *Nguon* and provides a solid basis by which to challenge the notice requirement. Unlike Charlene, Wayman was eighteen years of age. Accordingly, the Court concluded that there was no compelling interest for the officer to “interfere with Wayman’s family’s awareness of his sexual orientation.”⁷⁵ It is therefore unclear whether the Court would have come out the same way had Wayman been a minor, as would be the case in the context of the notice requirement.

On the reasonable expectation of privacy prong, *Nguon* supports the argument that the holding of *Sterling* can and should be applied to minors. This, however, is where *Nguon* and *Sterling* split. As to the final prong, the question of whether there is a compelling governmental interest in disclosure that outweighs the expectation of privacy, the defendant police officer in *Sterling* went so far as to acknowledge that there was no reason to interfere with Wayman’s family’s awareness that he was gay.⁷⁶ Conversely, the court in *Nguon* held that, precisely because she was a minor and her parents were entitled to know the reasons for her disciplinary action, the interest in disclosure by Charlene’s principal stood “in sharp contrast to *Sterling*.”⁷⁷ The court reasoned that “[t]his is simply not an instance where the defendants gratuitously and without a governmental purpose disclosed facts which would reflect on the plaintiff’s sexual orientation.”⁷⁸ The court reasoned that the “disclosure of objective facts constituting and providing the context for the discipline imposed” constituted a compelling state interest and, therefore, unlike in *Sterling*, there was “no violation” of Charlene’s privacy rights.⁷⁹

In applying these cases to the context of the notice requirement, the Massachusetts anti-bullying statute and supporting regulations arguably address a compelling state interest. Therefore, they could bar a successful privacy claim where a school officer outs a student in the process of informing that student’s parents that they are being bullied. Doctrinally, this is where the right to privacy could fail as an effective mechanism to protect against the potential harm caused by the notice requirement. Still, the notice requirement can be distinguished from the

74. *Id.*

75. *Id.* at 197.

76. *Id.*

77. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1195 (C.D. Cal. 2007).

78. *Id.*

79. *Id.*

outing in *Nguon*. The principal in *Nguon* was required by the California Education Code to provide Charlene's parents with "an explanation why discipline was imposed."⁸⁰ The court explained that

Because the process contemplates more than just mere notification, there is a legitimate reason to provide facts which go beyond an abstract description of the conduct warranting discipline. If a school administrator is prevented from providing a parent with the context of the discipline, it is difficult to see how the school administrator could have a meaningful discussion of the conduct, or the parent could mount a meaningful protest.⁸¹

This rationale cuts both ways. While the mandatory aspect of the notification requirement is analogous to the explanation required in *Nguon*, it is unnecessary in the context of the notice requirement for a school official to expose the nature of the bullying to the victim's parent or guardian. DESE acknowledges in their policy guidance that, in notifying the victim's parents, the "discussion should focus on facts regarding the student's involvement as a target . . . and on safety planning, not on information that reveals the actual or perceived gender identity or sexual orientation of the student."⁸² While the policy guidance may be helpful in establishing that there is not a legitimate interest in outing a student through this process, the likelihood that a school official would be able to follow this recommendation is unrealistic.

The statute and the regulations, having the force of law, require prompt notification and outweigh any secondary interests that DESE may have elected to recognize in their policy guidance. Some of the most obvious questions that parents will ask when they are told that their child is being bullied will undoubtedly relate to the context of the incident. Unless school officials are prepared to refuse to offer this information upon request, which the policy guidance in no way suggests that they should, the fact that a school official did not go into the conversation with the intention of divulging the specific factual context of the bullying will not prevent the information from being relayed once insisted upon by the parent. In defense of an action predicated on violation of privacy, the school official can simply claim that, as in the context of discipline, factually accurate disclosure is necessary in the context of school bullying to protect the victim and garner support in the home environment.

80. *Id.* at 1194.

81. *Id.*

82. *Policy Guidance, supra* note 17.

In discussing the right to privacy in the context of *Nguon*, Holning Lau argues that:

The privacy rights of children should be distinguished from those of adults since a special right is sometimes necessary for childhood contexts. To discern whether children require a different legal test, jurists must ask what principle is animating the right to privacy and whether furthering that principle in childhood contexts requires heightening children's privacy rights.⁸³

Lau, in responding to the argument that "a school may need to disclose a student's sexual orientation to explain a rule infraction to parents[,]'" contends that "there will rarely be a need to disclose sexual orientation."⁸⁴ He explains that in Charlene's case, if the prohibition were generally against public displays of affection, "there would be no need to disclose information about Charlene's partner's sex," unless the law hinged on sexual orientation, in which case it would run up against the Equal Protection Clause.⁸⁵

Lau offers that outing is only appropriate when it is necessary to prevent "cognizable harms."⁸⁶ In light of the two suicides that prompted the anti-bullying legislation, Lau's argument would arguably fail to combat the notice requirement. His proposal of "a categorical rule unique to children" that states that "the government should not out gay and lesbian youth unless the government shows that doing so prevents cognizable harms"⁸⁷ would likely be defeated by an argument from school officials that the dangers of school bullying, mainly suicide, warrant parental notification. Even Lau himself offers as an example that "a public school might legitimately out a lesbian student to her parents if doing so was part of a plan to intervene in the student's imminent suicide attempt."⁸⁸ While Lau's argument may be persuasive in the context of Charlene's disciplinary notification, it runs up against a far greater challenge when balanced with the safety concerns raised by forgoing parental notification in the context of school bullying.

While Lau's general premise that "assimilation demands strike a blow to a person's sense of identity, imposing unjustified psychological

83. Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 370 (2007).

84. *Id.* at 371.

85. *Id.* Note that Lau's article, published in the summer of 2007, preceded the final decision in *Nguon* (September 25, 2007).

86. *Id.*

87. *Id.*

88. *Id.*

burdens[.]”⁸⁹ particularly in the sense that “youth who are outed to their parents may receive added pressure from their parents to cease exploring their sexual identity[.]”⁹⁰ is certainly true, he ignores the inherent assimilation demands of the privacy doctrine itself.

The crux of Lau’s argument is that “[t]aking self-determination seriously requires affording individuals the ability to determine when to disclose sensitive facts about themselves, facts that, upon disclosure, may inhibit individuals’ ability to develop themselves.”⁹¹ He believes that “[b]y disclosing one’s sexual orientation, an individual becomes more susceptible to assimilation demands”⁹² and thus, the concept of privacy should be heightened for children, who are particularly sensitive to such demands. The problem with using privacy to combat the identity issues explored in Part III of this Comment—which Lau touches upon in the context of *Nguon*—is that inherent to the doctrine of privacy itself is a requirement of assimilation. Furthermore, underlying Lau’s argument, like those of Madsen and Rotello, is the assumption that, while one should come out on their own terms and not be forced into doing so, they will eventually come out, such that forcing them to do so might ruin the discovery of his or her one true identity.

In applying his analysis to the notice requirement, Lau considers the dangers of assimilation within the context of the victim who is outed and, accordingly, pressured deeper into the closet. Lau does not, however, acknowledge the possibility of the opposite effect (just as troubling in terms of assimilation demands), where outing a victim of bullying may actually assert pressure to assimilate to the identity that the bully has created for his or her target. Ultimately, the victim may conform to what the gay community has prescribed as normative for its own members. Lau is primarily concerned with the pressure parents might place on their child to “cease exploring their sexual identity” upon learning of their son or daughter’s supposed sexual orientation.⁹³ Without acknowledging the possibility of the opposite effect, that adoption of the gay identity may be forced upon the victim by the bully, we arrive back to the black-and-white distinction of Madsen and Rotello: exploration of sexual identity cut short by premature outing denies the victim the possibility of discovering their *true identity*; that identity to which they would have otherwise arrived. A premature outing is predicated on the idea that at

89. *Id.* at 317.

90. *Id.* at 370.

91. *Id.*

92. *Id.*

93. *Id.*

some point coming out is inevitable. While Lau does not explicitly recognize this, the assimilation-demands analysis he offers is nevertheless predicated on the presumption of a gay identity, which outing disrupts. Accordingly, Lau's analysis is completely ignorant of the self-discovery that is offered by Appiah, Halley and Roth.

Additionally, Lau ignores the fact that a right to privacy inherently assumes that there is something private to protect. Privacy, as employed by Lau, masks the underlying assertion that one must choose a sexual orientation, either straight or gay, before declaring that their right to keep their sexual orientation private has been violated. How can an action for a privacy violation for exposing one's sexual orientation be maintained unless the claimant has chosen a sexual orientation with which to identify? For the purposes of privacy, students cannot be outed to their parents unless they are actually gay. The privacy principle, therefore, inherently asserts pressure on the formulation of an identity, as opposed to freeing that identity from assimilation. The doctrine of privacy, within the context of outing, does not account for those students who are bullied and do not identify as either straight or gay. Rather, as demonstrated by Law and Koppelman, they are bullied simply for failing to adhere to normative gender stereotypes. In *Nguon*, the court determined that Charlene had a reasonable expectation of privacy in her sexual orientation; but how would this apply to a student who has not yet identified with one sexual orientation or the other? Within the context of the notice requirement, the framework of *Nguon* fails to answer how notification could be challenged if there is no sexual orientation to expose. An even more expansive reading of the privacy explored in *Nguon*, within the context of school bullying, still operates in furtherance of assimilation, not further into the closet but, rather, out of it.

A privacy violation first requires a showing that the "relevant information [is] sensitive enough to trigger privacy interests."⁹⁴ Lau believes that for children the inquiry should stop here and that the second question, whether the reasonable expectation of privacy has been relinquished by "beginning a process of disclosure," should apply only to adults.⁹⁵ The result in *Nguon*, however, demonstrates that even where there is a reasonable expectation of privacy in one sphere, despite disclosure in another, the governmental interest can outweigh the right of a minor to not be outed.⁹⁶ Arguably, the interest of protecting children from bullying in school is more compelling than the requirement that

94. *Id.* at 371.

95. *Id.*

96. *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1195 (C.D. Cal. 2007).

school officials explain the context of school discipline. It is difficult to imagine a court which would disagree with this assertion. As such, the privacy principle is inherently limited in its ability to effectively combat the notice requirement.

Privacy fails to account for the fact that what is violated by the notice requirement is not necessarily the *revelation* of one's sexual orientation, as discussed in *Sterling* and *Nguon*, but rather the sense of autonomy articulated by Appiah. The notice requirement, and the doctrine of privacy itself, both reinforce the pressure asserted by the bully and extend his control over a legislative apparatus/mechanism that was designed to protect the victim.

V. CONCLUSION

There are aspects of the Massachusetts anti-bullying law that have the potential to positively impact the lives of students. The requirement that schools “develop, adhere to and update a plan to address bullying prevention and intervention,” as well as provide “for ongoing professional development to build the skills of all staff members,”⁹⁷ may lead to some real progress in combatting the bullying epidemic. The goal of the legislation should be to cultivate a culture of acceptance that dismantles constrictive brightline identities and provides support systems whenever that culture breaks down. While the notice requirement may not be detrimental in all circumstances, it comes with a very high price tag for students who are bullied based on sexual orientation or perceived sexual orientation. In effect, the requirement is an open invitation for bullies to exert further control over the identity of their victims, imposing a disincentive for victims to seek help. In order to remain true to the underlying purpose of the anti-bullying statute and the events that led up to it, DESE should revisit its regulations and account for the disproportionately negative effect that the notice requirement has on students who are being bullied based on their sexual orientation or perceived sexual orientation. The notice requirement must be removed or amended if the anti-bullying legislation is going to serve those students who need it most. Only then will the anti-bullying legislation allow for a liberated process of self-discovery.

97. MASS. GEN. LAWS ch. 71, § 37O(d) (2010).