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ARTICLES

OUR CHILDREN: KIDS OF QUEER PARENTS & KIDS WHO ARE QUEER: LOOKING AT SEXUAL MINORITY RIGHTS FROM A DIFFERENT PERSPECTIVE

*Ruthann Robson**

I. INTRODUCTION

Much of the conservative right's rhetoric in the realm of minority sexualities has focused on children.¹ Drawing on themes of disease and seduction, Christian fundamentalists have portrayed gay men and lesbians as predators who target children, hoping to "seduce them into a life of depravity and disease."² As Jeffrey Weeks noted many years ago, it was no accident that Anita Bryant called her anti-homosexual campaign "Save Our Children, Inc."³ The United

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¹ See Herma Hill Kay, *Symposium on Law in the Twentieth Century: From the Second Sex to the Joint Venture: An Overview of Women's Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017, 2091 (2000) (stating that "children and the traditional family are the focal point around which conservatives rally to implement their call for a return to 'family values,'" and that "the religious conservative critique of twentieth-century family life seems to suggest that . . . homosexuals in search of social approval of alternative lifestyles . . . threaten to destroy the sanctuary once provided by the father-dominated, home-centered, mother-dependent, traditional family").

² DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 78-79 (1997). Professor Herman notes the similarity of this disease and seduction discourse to anti-Semitic discourses associating Jews with disease, filth, urban degeneration, and child-stealing. *Id.* at 79; see also MICHAEL BRONSKI, *THE PLEASURE PRINCIPLE: SEX, BACKLASH, AND THE STRUGGLE FOR GAY FREEDOM* 112 (1998) ("While all studies show that physical and sexual abuse of children is far more likely to occur within the heterosexual biological family, the fear of the homosexual molester is persistent and powerful.").

³ See JEFFREY WEEKS, *SEXUALITY AND ITS DISCONTENTS: MEANINGS, MYTHS AND MODERN SEXUALITIES* 224 (1985) (observing that the "guardians of morality may have given up hope of changing adult behavior, but they have made a sustained effort to protect our young, whether from promiscuous gays, lesbian parents or perverse pornographers").

States Supreme Court implicitly considered the issue of whether gay men should have contact with children with its recent decision in a case involving the Boy Scouts of America.⁴ In the family law arena, adoption and custody of children remain concerns of conservative legal writers, and one conservative law professor has recently argued that "homosexual parenting" is dangerous to children.⁵

In composing their anti-gay rhetoric in terms of child protection, conservatives have inaccurately grouped children into a monolithic category, often excluding the real interests of two specific classes of children: children of sexual minority parents and minors who are themselves lesbian, gay, transgendered, or bisexual.⁶ First, the conservative right's rhetoric has monolithically constructed the children of sexual minority parents as victims in need of rescue.⁷

⁴ See *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2449 (2000) (noting the Boy Scouts organization maintains that "homosexual conduct is inconsistent with the values it seeks to instill"). In considering whether forcing the Boy Scouts to include a gay scoutmaster "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints" that are protected by the First Amendment, the Supreme Court concluded that the "application of New Jersey's public accommodations law to require that the Boy Scouts accept [a gay man] as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association." *Id.* at 2452, 2455. This decision reversed a decision of the New Jersey Supreme Court, where a concurring justice noted that the case raised the "pernicious stereotype" of homosexuals as child molesters, but that the "myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished." *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1243 (N.J. 1999) (Handler, J., concurring), *rev'd*, 120 S. Ct. 2446 (2000).

⁵ See Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 837-38 & n.12 (expressing concern that "the extension of parental rights to nonbiologically related homosexuals who wish to assume parental status (custody, visitation, adoption, foster care, etc.)" would result in "the elimination of consideration of homosexual behavior by a parent or prospective parent as a factor in parenting cases (disputes over custody, visitation, etc.) and legal endorsement of the equivalence of homosexual parents to heterosexual parents"); see also *id.* at 852-67 (discussing potential dangers arising from homosexual parenting, such as children living with homosexual people developing homosexual interests and lacking the "strengths and attributes" that are contributed by parents of different genders).

⁶ I prefer the term "sexual minorities" because it is both inclusive of lesbians, gay men, transgendered persons, and bisexuals and because it emphasizes their minority status in a world of heterosexuality and gender conformity. At times, however, this term becomes unwieldy, and I resort to the term "queer," which is inclusive, even if suffering from faults ranging from being offensive to being trendy. When terms such as "gay," "lesbian," or "gay and lesbian" are used, they are meant specifically.

⁷ See Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 GEO. L.J. 261, 285 (1995) (quoting a conservative group's view of the homosexual movement as "aggressively propos[ing] radical changes in social behavior, religion, morality and law" and marriage and the family as "the most effective institutions for the rearing of children," leading to the group's conclusion that "homosexuality is preeminently a concern about the vulnerabilities of the young" (quoting Colloquy, *The Homosexual Movement: A Response by the Ramsey Colloquium*, 41 FIRST THINGS 15-21 (1994), available at <http://www.firstthings.com/ftissues/ft9403/articles/homo.html>)); Micah R. Onixt, Note, Romer v. Evans: *A Positive Portent of the Future*, 28 Loy. U. Chi. L.J. 593, 617 n.190 (1997) (noting a

These children are presumably akin to abused children who will suffer more from contact with their parents than from a deprivation of their parents; any love such children have for their parents is presumptively overwhelmed by the assumed disapproval such children would have of their parents' sexuality.⁸

Second, the conservative right's rhetoric has excluded minors who are themselves sexual minorities, even while conservatives fear that children will become sexual minorities by exposure to gay, lesbian, bisexual, or transgendered adults.⁹ Regardless of what causes people to become sexual minorities, the conservatives' tactic of hostility towards such people harms children and adolescents who are—or who may become—sexual minorities.

At its most basic level, my argument is that we—those of us who are members of a sexual minority—must continue to take

conservative group, Colorado for Family Values (CFV), asserts that children would be unhappy victims of homosexual marriages if these unions were allowed).

⁸ Cf. Wardle, *supra* note 5, at 864-66 (observing that "homosexual-parenting-affirming studies," which emphasize homosexual parents' ability to love, care for, and raise children while de-emphasizing those parents' homosexuality, "pose[] a comparison between incomparable considerations—between a potentially positive parenting quality on one hand and a potentially negative parenting quality on the other—and speculates in the abstract that having the positive is more important than avoiding the negative"). The author further points out that the "sexuality of the parent includes some serious risk factors that are just as important to child welfare as positive factors such as nurturing." *Id.* at 866.

⁹ See Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 287 (1998) (noting that Wardle espouses a social constructionist theory that sexual orientation is not innate, but, rather, determined by one's social environment, under which the "possibility [exists] that parents' sexual orientation plays an important role in determining the sexual orientation of their children"); Macedo, *supra* note 7, at 291-92 (exploring the possibility that "political equality for homosexuals will . . . harm the young" by discussing E.L. Pattullo's argument that public censure of homosexual practices will turn "young waverers" away from sexual minority lifestyles and back towards heterosexuality); Wardle, *supra* note 5, at 855-57 (noting that "social science research . . . does suggest that there are some particular and unique potential risks to children raised by active homosexual parents"); David S. Dooley, Comment, *Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes*, 26 CAL. W. L. REV. 395, 396 (1989-1990) (observing that "courts fear that exposing [a] child to the gay parent's homosexuality might cause the child to be sexually disoriented"). But see S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (finding no evidence that an infant boy's exposure to his lesbian mother would increase the likelihood of his becoming homosexual); Conkel v. Conkel, 509 N.E.2d 983, 986 (Ohio Ct. App. 1987) (rejecting the appellant's argument that exposing her two boys to their homosexual father may cause them to become homosexual, and taking judicial notice that, while the causes of homosexuality are elusive, most experts agree that it is not caused by contact with a homosexual parent); Wardle, *supra* note 5, at 852-56 (conceding that the "sympathetic orientation and methodological bias" of social scientific studies tending to demonstrate that children of homosexual parents are more likely to become homosexual renders such studies unreliable); David P. Russman, Note, *Alternative Families: In Whose Best Interests?*, 27 SUFFOLK U. L. REV. 31, 58 (1993) (stating that "[a]lthough some courts fear that children of gay parents will become gay themselves, little evidence suggests that a parent's sexual orientation influences that of the child").

responsibility for our children. Part II of this article considers the children to whom we are biologically related, the children we would adopt, and the children with whom we live.¹⁰ Part III of this article addresses the minors who are presently sexual minorities or who may be in the future.¹¹ In both cases, we must ensure that our children are not damaged by the law.

II. THE BEST INTEREST OF OUR CHILDREN

Depriving a child of the continued care of his or her sexual minority parent, based on parental sexuality, harms children, despite any court's findings that such a deprivation is in the "best interest of the child." The established standard in custody disputes between parents, the "best interest of the child" test,¹² has devolved into several different approaches regarding parental sexuality.¹³

¹⁰ See *infra* Part II (discussing the "best interest of the child" standard, and arguing that the standard is often a ruse for discrimination against homosexuals, that such decisions violate constitutionally protected family relationships, and that society has entered a watershed period with respect to our perception of children).

¹¹ See *infra* Part III (discussing difficulties facing homosexual adolescents, particularly in academic environments, and how different jurisdictions have responded to teenagers' attempts to bring homosexual awareness to their respective schools and curricula).

¹² See, e.g., *Peters v. Peters*, 433 N.Y.S.2d 693, 693 (App. Div. 1980) (mem.) ("The best interest of the child involved must govern in the adjudication of custody." (citation omitted)); *Berard v. Berard*, 749 A.2d 577, 579 (R.I. 2000) ("It is well-settled that the best interests of the child remain the 'lode-star principle' for determining child custody awards."); *Price v. Price*, 541 A.2d 79, 81 (Vt. 1987) (stating that both Vermont common law and state legislation used the best interest of the child standard to determine custody); see also David M. Rosenblum, Comment, *Custody Rights of Gay and Lesbian Parents*, 36 VILL. L. REV. 1665, 1665 (1991) (asserting that courts "overwhelmingly apply" this standard when making custody determinations). Rosenblum also notes that the "best interest of the child" test is "highly problematic" because "judges often inject their biases and prejudices about societal norms and morality under the guise of the 'best interest' of the child." *Id.* at 1666.

¹³ As Rosenblum notes,

Courts making custody determinations differ with respect to the standards and tests applicable when one parent is homosexual. Several courts have held that a parent's homosexuality may be an absolute bar to his or her custody rights. Other courts apply a conclusive presumption of unfitness, and find that a person's status as a gay man or lesbian woman directly contradicts his or her status as a parent. Some courts, rather than applying a conclusive presumption, nevertheless require gay and lesbian parents to rebut the presumption that homosexuality renders them unfit to raise their children.

Rosenblum, *supra* note 12, at 1669-70 (citations omitted); see also Russman, *supra* note 9, at 42-55 (discussing the various approaches to homosexual parental fitness in custody disputes between homosexual parents and heterosexual parents, heterosexual non-parents, or the state). While I have noted elsewhere that there were three approaches, (see RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 130-31 (1992) (noting there are three approaches to ascertaining the parental fitness of a homosexual: first, treating homosexuality as a per se disqualification; second, the "middle ground" approach, which presumes that exposure to a gay lifestyle will harm children even though parental homosexuality is not inherently harmful; and, third, the "nexus approach," by which living with a homosexual parent is considered to be in a child's best interest unless the parent's

Spanning the continuum, a court may decide that a parent's sexual minority status is a per se disqualification of custody or that parental sexuality is irrelevant.¹⁴ Between these two poles is the nexus approach, which requires the court to find a relationship between parental sexuality and harm to the child.¹⁵ Under the

homosexuality is shown to actually harm the child)), in accordance with the accepted views, (see, e.g., D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 830-31 (1998) (noting that the "emerging consensus" of courts use the nexus approach)), I believe it is important to add a fourth—and, I would argue, the only acceptable—approach: that of irrelevance.

¹⁴ See *In re J. S. & C.*, 324 A.2d 90, 94-97 (N.J. Super. Ct. Ch. Div. 1974) (noting that, although depriving a parent of visitation rights solely on the basis of parental homosexuality would constitute "unjustified discrimination," the court restricted parental visitation rights on the basis of the father's homosexual conduct, purportedly in the child's "best interest"). Compare, *G.A. v. D.A.*, 745 S.W.2d 726, 727-28 (Mo. Ct. App. 1987) (awarding custody of a preschool-age boy to his heterosexual father instead of his homosexual mother, even though the mother's household was superior with respect to physical comfort), and *L. v. D.*, 630 S.W.2d 240, 243-44 (Mo. Ct. App. 1982) (holding that a Missouri trial court did not err in observing that homosexuality was not entitled to constitutional protection, and that homosexuality was a crime of "[d]eviate sexual intercourse"), with *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215-16 (Mass. 1980) (accepting expert testimony that parental sexual orientation was "irrelevant" to parental capability, and finding a "total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent"), and *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (reaffirming that "a parent's lifestyle, standing alone, is insufficient ground for severing the natural bond between a parent and a child"), and *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983) (en banc) (noting that homosexuality is not a per se bar to visitation rights), modified 718 P.2d 7, 8 (Wash. Ct. App. 1986).

¹⁵ See Dooley, *supra* note 9, at 396 ("[U]nder the nexus approach, the court requires proof that the parent's homosexuality has or will adversely affect the child before custody can be denied. Only in this approach does the court rely on the evidence, rather than on presumption, to determine the parental capabilities of each parent." (citation omitted)). See also, e.g., *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (holding that a lesbian mother's sexual orientation bore no negative impact upon an infant child's development, which would have justified awarding custody to a heterosexual father); *In re Marriage of Birdsall*, 243 Cal. Rptr. 287, 289-91 (Cal. Ct. App. 1988) (stating "a parent is not unfit, as a matter of law, merely because he or she is homosexual," and finding no connection between a gay father's lifestyle and religious practices and undesirable behavior in his child); *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979) (noting a lack of evidence suggesting that a lesbian mother's homosexuality will adversely affect her daughters, as well as the strong likelihood that exposure to their lesbian mother will benefit the children by making them more tolerant and accepting of the differences of others); *Conkel v. Conkel*, 509 N.E.2d 983, 986-87 (Ohio Ct. App. 1987) (rejecting three arguments—that exposure to homosexual father would trigger homosexuality in two young boys, the likelihood of the boys contracting AIDS from their father, and a desire to shield the boys from the "slings and arrows of a disapproving society"—in sustaining the trial court's decision to award visitation rights to the father); Vicki Parrott, Note, *The Effect on the Child of a Custodial Parent's Involvement in an Intimate Same-Sex Relationship—North Carolina Adopts the "Nexus Test" in Pulliam v. Smith*, 19 CAMPBELL L. REV. 131, 132 (1996) (stating that after the *Pulliam* decision, North Carolina courts could not find adverse effects on a child based solely on "the judge's opinion, speculation and conjecture"). But see *T.C.H. v. K.M.H.*, 784 S.W.2d 281, 284-85 (Mo. Ct. App. 1989) (rejecting the per se approach to determining parental unfitness, but nevertheless finding a nexus between a lesbian mother's homosexual conduct and adverse effects on the "morality" and "well-being" of her children).

"true" nexus approach, the burden of persuasion is allocated so that there must be proof that parental sexuality will have an adverse impact on the child.¹⁶ Nonetheless, some courts presume adverse impact, demanding that the sexual minority parent prove an absence of harm to the children.¹⁷

In all of these approaches, except for the irrelevance approach, the courts construe the sexual minority parent as a potential cause of harm to the child.¹⁸ In fact, much greater harm is caused by judicial decisions that deprive a child of the care and companionship of his or her parent. In the notorious situation of Sharon Bottoms and her son Tyler, the Virginia Supreme Court deprived Sharon Bottoms of custody because of her lesbianism.¹⁹ In doing so, the

¹⁶ See, e.g., *S.N.E.*, 699 P.2d at 879 (holding that there was no presumption of parental unfitness based on sexual conduct, and that "[c]onsideration of a parent's conduct is appropriate only when the evidence supports a finding that a parent's conduct has or reasonably will have an adverse impact on the child and his best interests"); *M.P.*, 404 A.2d at 1259 (noting that, in custody disputes, the party seeking modification of custody orders "bears the burden of showing sufficient changed circumstances so as to require modification," and, thus, a heterosexual father bears the burden of demonstrating that a lesbian mother's homosexual conduct constitutes "changed circumstances" sufficient to warrant change of custody orders); see also *Conkel*, 509 N.E.2d at 985 (noting that "an irrebuttable presumption [of parental unfitness based on sexual activity] offends . . . constitutional standards"); Parrott, *supra* note 15, at 132 (noting the court in *Pulliam* determined that "a court cannot conclude that a child is adversely affected by a parent's involvement in an intimate same-sex relationship, unless the moving party produces evidence that 'the conduct has or will likely have a deleterious effect on the children'").

¹⁷ See, e.g., *Thigpen v. Carpenter*, 730 S.W.2d 510, 513-14 (Ark. Ct. App. 1987) (noting that Arkansas courts entertained a presumption that "illicit sexual conduct on the part of the custodial parent is detrimental to the children" and that the trial court determined that "homosexuality is generally socially unacceptable"). Professor Julie Shapiro calls this a standard of "permissible determinative inference." Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 639-41 (1996).

¹⁸ See *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985) (finding that a burden will be placed on a child due to the social "condemnation" of her father's homosexual relationship); see also Shapiro, *supra* note 17, at 644-45 (noting that a finding of harm is often justified by an assumption of societal bias against homosexuality). This bias, and the resulting stigmatization of the child, is itself seen as "harm" to the child. *Id.* at 645.

¹⁹ See *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995) [hereinafter *Bottoms II*] (stating that "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child"). The trial court decision and subsequent appeals attracted national media attention and inspired several periodical articles. See, e.g., Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. & FEMINISM 341 (1995); Peter Nash Swisher & Nancy Douglas Cook, *Bottoms v. Bottoms: In Whose Best Interest? Analysis of a Lesbian Mother Child Custody Dispute*, 34 U. LOUISVILLE J. FAM. L. 843 (1995-96); Joseph R. Price, Comment, *Bottoms III: Visitation Restrictions and Sexual Orientation*, 5 WM. & MARY BILL RTS. J. 643 (1997); B. Drummond Ayres, Jr., *Judge's Decision in Custody Case Raises Concerns*, N.Y. TIMES, Sept. 9, 1993, at A16; Debbie Howlett, *Judge Rules Lesbian "unfit" mother*, USA TODAY, Sept. 8, 1993, at 1A; Elizabeth Kastor, *The Battle for the Boy in the Middle: Little Tyler's Mom is a Lesbian, so Grandma Got to Take Him Away*, WASH. POST, Oct. 1, 1993, at C1, available at 1993 WL 2096263.

court had to overcome the constitutional doctrine of parental autonomy recognized by the Supreme Court for almost a century, because the person seeking custody was not Tyler's father—a man who had abdicated any responsibility for the child—but Tyler's grandmother.²⁰ As a grandparent, Sharon Bottoms' mother, Pamela Kay Bottoms, was a classic third party without any recognized claim to custody absent unusual circumstances.²¹ In a third party custody challenge the court would not even reach the best interest of the child test without first overcoming an initial hurdle, such as parental unfitness or abandonment.²² The trial judge predicated the finding of unfitness on Sharon Bottom's lesbianism, stating that,

The mother, Sharon Bottoms, has openly admitted in this court that she is living in an active homosexual relationship.

The amount of attention devoted to *Bottoms* might lead one to believe it was an aberration. However, the courts of Mississippi confronted a similar situation. In *White v. Thompson*, 569 So.2d 1181 (Miss. 1990), paternal grandparents sought custody of their grandchildren on the grounds that the mother was an unfit parent. *Id.* at 1182. The bulk of the testimony concerned the mother's lesbian relationship, which prompted the trial court to find the mother "unfit, morally and otherwise, to have custody of her children." *Id.* at 1183. On appeal to the Mississippi Supreme Court, the mother argued the trial court's finding was impermissibly predicated solely on her lesbianism. *Id.* The Mississippi Supreme Court finessed the issue of her sexuality, deciding not to reach the issue of whether lesbianism alone was sufficient to render a parent unfit, stating that, although

the predominant issue in this case seems to have been Mrs. White's lesbian relationship, and the chancellor may have relied almost entirely on this, we find that a review of the entire record and the circumstances present . . . shows that the chancellor's decision that Mrs. White was an unfit mother, morally and otherwise, was not against the overwhelming weight of the evidence.

Id. at 1184. The circumstances included some testimony that the "children had not been properly supervised," clothed or fed. *Id.* The mother testified that conditions at the trailer in which she lived with her children "were a lot better" than when her husband, the grandparents' son, had lived there. *Id.* at 1183. The dissenting justice in *White* began his opinion by observing that any neglect of the children was "no more than one would expect to find in any case where a twenty-four year old mother with but a high school diploma and no independent means" was attempting to support her children. *Id.* at 1185 (Roberston, J., dissenting). However, such neglect was sufficient to satisfy the state standard for rebutting the presumption of custody accorded to a legal parent. *Id.* at 1184 (stating that "[a] parent's chosen manner of living may not take precedence over the well-being of the children involved").

²⁰ See *Bottoms II*, 457 S.E.2d at 103, 105.

²¹ See, e.g., *Bennett v. Jeffreys*, 356 N.E.2d 277, 280 (N.Y. 1976) (holding "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances"); *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986) (affirming an award of custody to a child's stepmother instead of his mother that was based upon "extraordinary" circumstances); see also Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377, 1385 (1994) (exploring the court's traditional view of the family unit of one mother and one father, and the relegation of those not meeting this criteria to the lesser status of "third parties").

²² See *Bottoms II*, 457 S.E.2d at 104 (recognizing the presumption of parental custody, but stating that "it is rebutted when certain factors, such as parental unfitness, are established by clear and convincing evidence").

She admitted she is sharing a bedroom and her bed with another, her female lover, whom she identified by name as April Wade. Sharon Bottoms in this courtroom admitted a commitment to April Wade, which as she contemplates will be permanent, and as I understand her testimony, long lasting if not forever.

She readily admits her behavior in open affection shown to April Wade in front of the child. Examples given were kissing, patting, all of this in the presence of the child. She further admits consenting that the child referred to April Wade, her lover, as to quote the words "Da Da."²³

The trial judge found that the "mother's conduct [was] illegal," rendering her "an unfit parent," and that, while he was cognizant of the "presumption in the law in favor of the custody being with the natural parent," "Sharon Bottoms' circumstances of unfitness" were "of such an extraordinary nature" as to rebut the presumption of parental custody.²⁴ The trial court granted visitation to Sharon Bottoms on Mondays and Tuesdays, provided that it not "be in the home shared with April Wade or in April Wade's presence."²⁵ Although this decision was reversed by the intermediate court of appeals,²⁶ the trial court's decision was affirmed by the Virginia Supreme Court, which stated it would "not overlook" Sharon Bottoms' lesbian relationship: "living daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the 'social condemnation'

²³ Transcript of Hearing at 195-96, *Bottoms v. Bottoms* (Va. Cir. Ct. Henrico Co. 1993) (No. CH93JA0517-00) (on file on with *Albany Law Review*).

²⁴ *Bottoms v. Bottoms*, 444 S.E.2d 276, 279-80 (Va. Ct. App. 1994) [hereinafter *Bottoms I*; see VA. CODE ANN. § 18.2-361[A] (Michie 1996) ("If any person carnally knows in any manner any brute animal, or carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge, he or she shall be guilty of a Class 6 felony . . .").

²⁵ *Bottoms I*, 444 S.E.2d at 280. After the Virginia Supreme Court affirmed the denial of custody, Sharon Bottoms petitioned for a modification of visitation. See *Bottoms v. Bottoms*, No. 0589-98-2, 1999 WL 1129720, at *1 (Va. App. June 29, 1999). The trial court denied the petition except to the extent that it extended the summer visitation from one week to two weeks. *Id.* Sharon Bottoms appealed, contending that the trial judge's order that visitation with her child shall occur outside the presence of her lover, April Wade, violated state law and her constitutional rights under the Equal Protection and Due Process clauses of the United States Constitution. *Id.* The appellate court refused to consider the constitutional issues, finding that they were not properly raised in the trial court, and affirmed the trial judge's restrictive visitation as being within the judge's broad discretion. See *id.* at *2 (stating that the standard to be used in determining visitation is the best interest of the child).

²⁶ See *Bottoms I*, 444 S.E.2d at 283-84 (Va. App. 1994) (noting that the trial court erred in adopting "a *per se* approach in finding Sharon Bottoms to be an unfit parent without finding that she engaged in conduct or exposed her son to conduct that would be harmful to him").

attached to such an arrangement, which will inevitably afflict the child's relationships with its 'peers and with the community at large.'"²⁷

The harm of social condemnation in the context of race has been declared an unconstitutional consideration in custody determinations. In *Palmore v. Sidoti*,²⁸ the United States Supreme Court declared that, although "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect."²⁹ Furthermore, judicial concern with social condemnation of homosexuality is questionable, since it does not attach any societal or peer disapproval to being raised by one's grandmother rather than one's mother.³⁰ Presumably, an argument that the child might be teased for living with his grandmother would not be taken seriously. The real basis of the decision is not societal disapproval of lesbianism, but judicial disapproval of lesbianism, which is buttressed by the court's reference to the illegality of lesbian sexual practices under Virginia's sodomy law.³¹

The emphasis that both the trial court and the Virginia Supreme Court placed on the family's private interactions, including the displays of affection between Sharon Bottoms and her lover, the integration of the lover into the household, and Sharon Bottoms' lack of shame about her relationship,³² suggests that the real harm

²⁷ *Bottoms II*, 457 S.E.2d at 108 (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)).

²⁸ 466 U.S. 429 (1984).

²⁹ *Id.* at 433. In *Palmore*, a father sought to modify a prior judgment awarding custody of his daughter to his former wife. *Id.* at 430. The father argued that the mother's cohabitation with and marriage to a man of a different race constituted changed circumstances. *Id.* The trial court awarded custody to the father based in part on the court's belief that the child would face "social stigmatization" as a result of living in a mixed race home. *Id.* at 431. The Supreme Court rejected this argument, and awarded custody back to the mother. *Id.* at 434. See also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448, 450 (1985) (applying the *Palmore* rule to reject an "irrational prejudice against the mentally retarded" in an exclusionary zoning context).

³⁰ This proposition is supported by the fact that the Supreme Court of Virginia affirmed the decision of the trial court, finding that awarding custody of Tyler to the senior Mrs. Bottoms would be in the child's best interest. See *Bottoms II*, 457 S.E.2d at 103-04, 108.

³¹ See *id.* at 108 (noting that the court had previously held that homosexuals are not per se unfit parents, but that "[c]onduct inherent in lesbianism" is a felony in Virginia and, "thus, that conduct is another important consideration in determining custody").

³² The attorney representing the grandmother, Pamela Kay Bottoms, called as his first witness Sharon Bottoms, and, after establishing her identity as the child's legal mother and the identity of his client as the child's grandmother, immediately focused his questions on lesbianism:

Q: Now, in the juvenile court you stated that you are in a lesbian relationship with whom?

A: April Wade.

Q: Now, for the record, would you tell me your definition of a lesbian relationship. What does it mean?

the courts envisioned for the toddler was not social condemnation, but exposure to homosexuality, with the increased chance that the child "will develop homosexual interests and behaviors."³³ While any link would be the result of the normalization of homosexuality in the child's perspective and, thus, the removal of some of the socially imposed terrors, some legal thinkers argue that the increase in homosexuality is the consequence of a lack of "cross-gender parenting."³⁴ In Tyler's case, however, this lack of dual-gender parenting is equally applicable to the household of Tyler's grandmother. The senior Ms. Bottoms had excluded her current boyfriend from her household on the advice of her attorney, given Sharon Bottoms' history of complaints concerning sexual abuse perpetrated by him.³⁵

The belief that exposure to homosexuality breeds homosexuality provokes several responses. The first, and, I believe, the correct response, is a resounding "so what?" As a lesbian myself, I am unwilling to engage in an argument that assumes that my sexual desires are pathological. Others have argued, however, that social science research does not support a correlation between being raised by a lesbian or gay parent and becoming a sexual minority.³⁶

A: It means two people of the same sex are together.

Q: In what way are they together?

A: In a relationship.

Q: Now, you say a "relationship," does that entail sex?

A: Yes.

Q: Hugging and kissing?

A: Yes.

Q: Sleeping in the same bed?

A: Yes.

Q: Now then, you're not at all ashamed of that relationship, is that correct?

A: No, sir.

Transcript of Hearing at 9-10, *Bottoms v. Bottoms* (Va. Cir. Ct. Henrico Co.) (No. CH93JA0517-00) (on file with *Albany Law Review*).

³³ Wardle, *supra* note 5, at 852 (asserting that "[t]he most obvious risk to children from their parents' homosexual behavior suggested by the current studies relates to the sexual development of the child").

³⁴ *Id.* at 860-61 (arguing that a lack of heterosexual parenting can cause emotional damage to children, "[f]or example, the absence of a father in the home may result in a daughter having trouble relating to men throughout her adult life").

³⁵ See *Bottoms I*, 444 S.E.2d 276, 278-79 (Va. Ct. App. 1994) (noting that this history of sexual abuse against Sharon Bottoms was her motivating factor in deciding to remove her son from her mother's home). The Virginia Supreme Court more simply noted that the grandmother's "boyfriend ceased living with her shortly before the juvenile court hearing, and has not returned." *Bottoms II*, 457 S.E.2d at 105.

³⁶ For an excellent rehearsal of the social science research from a legal perspective, see Ball & Pea, *supra* note 10, at 280-285, discussing studies used by Wardle to argue that children raised by gays and lesbians risk becoming homosexual. For Wardle's response, see Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629, 629-31, concluding that courts should apply a rebuttable presumption in child

Furthermore, a correlation would not prove causation; other factors could explain any discrepancy.³⁷

In the context of the *Bottoms* litigation, any underlying belief that the harm to the toddler in being raised by his mother would be his eventual homosexuality is especially ironic: he is now in the custody of the one person in the litigation with the proven track record of raising a sexual minority, Sharon Bottoms' mother, Kay Bottoms.

Bottoms is illustrative rather than unique. Countless children have been removed from their sexual minority parents.³⁸ In many cases, sexual minority adults fought such removal in court, and the reporters are filled with our defeats, as well as our more recent successes.³⁹ In many other situations, lesbians and gay men did not bring their cases to court, believing that to do so would be a fruitless endeavor that would injure their children.⁴⁰ Yet, whether we fought

support cases that a parent's homosexuality is not in the best interests of the child. *See also* Susan Golombok & Fiona Tasker, *Do Parents Influence the Sexual Orientation of Their Children? Findings from a Longitudinal Study of Lesbian Families*, 32 DEV. PSYCHOL. 3, 8 (1996) (reporting that "the commonly held assumption that children brought up by lesbian mothers will themselves grow up to be lesbian or gay is not supported" by a study of lesbian and heterosexual families, and "there was no statistically significant difference between young adults from lesbian and heterosexual family backgrounds with respect to sexual orientation"); Charlotte J. Patterson & Richard E. Redding, *Lesbian and Gay Families with Children: Implications of Social Science Research for Policy*, 52 J. SOCIAL ISSUES 29, 30 (1996) (concluding, from an overview of social science literature, that gay and lesbian parents are as likely as heterosexual parents to provide a positive home environment).

³⁷ *See, e.g.*, Ball & Pea, *supra* note 10, at 286-288 (discussing heredity and a contemporary atmosphere of tolerance as other factors influencing sexuality).

³⁸ It seems the most frequent manifestation of this "removal" occurs when courts deny custody or visitation based on sexual orientation. *See, e.g.*, *Marlow v. Marlow*, 702 N.E.2d 733, 736-38 (Ind. Ct. App. 1998) (holding that visitations restrictions were appropriate where a sexual minority parent took a child to a "lesbian choir" and other gay-oriented activities); *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (denying visitation rights to a sexual minority partner who had raised a child from infancy because she was not the biological or adoptive mother and, therefore, "not a parent" for the purposes of the state's statute).

³⁹ *See, e.g.*, *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1001 (Sur. Ct. N.Y. County 1992) (granting adoption to sexual minority parents, noting that "a child's best interest is not predicated or controlled by parental sexual orientation"). *But see Marlow*, 702 N.E.2d at 737-38 (Ind. Ct. App. 1998) (holding that a restriction on a gay father's visitation rights by prohibiting the father from taking his child to "gay activist social gatherings" was appropriate).

⁴⁰ As one lesbian poet has written:

Women ask: *Why didn't you—?*

like they do of women who've been raped.

And I ask myself: Why didn't I? Why

didn't I run away with them? Or face

him in court? Or—

Ten years ago I

answered myself: No way for children to live.

Minnie Bruce Pratt, *The Child Taken from the Mother*, in CRIME AGAINST NATURE 24 (1990).

or not, when our children were deprived of their parents—us—they were seriously harmed.

In most cases, we assume that it is wrong to remove children from their parents.⁴¹ For example, one conservative legal writer decries the cruel persecution of the Amish, whose children were “declared wards of the state, removed from their homes, and placed in institutions” because the parents refused to be assimilated into the common culture.⁴² The writer is referring to the Amish in support of his argument against compulsory assimilation,⁴³ although his argument is equally applicable to other persecuted groups, such as Native Americans.⁴⁴ For example, the United States Congress and Supreme Court have recently admitted that the former removal of Native American children from their parents in order to civilize the children was a brutal mistake.⁴⁵ Native American lesbian theorist Beth Brant has explicitly made the connection between the forced removal of indigenous children by the United States government in the nineteenth century and a custody battle involving a lesbian parent.⁴⁶ The dominant regime removes the children of minorities

⁴¹ The exception to this general rule is for parental abuse and neglect, which is variously phrased in different jurisdictions, and which allows the state to remove a child for his or her protection. As in other areas of family law, however, definitions and applications of abuse and neglect are culturally conditioned and historically contingent, as is evident in an examination of cases involving corporeal punishment of children.

⁴² See Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 BYU L. REV. 569, 575-76 (noting ways the state carries out “religious persecution under the authority of education”).

⁴³ *Id.*

⁴⁴ See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (noting that “[s]tudies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented [at] Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions”). For a discussion of the multiple paradoxes posed by fundamentalist objections to a liberal education that exposes children to a variety of ideas, see Nomi Maya Stolzenberg, *“He Drew a Circle that Shut Me Out”: Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581, 584-87 (1993), noting that “liberalism condemns indoctrination but refuses to acknowledge its own reliance upon it.”

⁴⁵ See 25 U.S.C. §§ 1901-1902 (1994) (stating that “the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families”); *Choctaw Indians*, 490 U.S. at 32-37 (noting that the enactment of the Indian Child Welfare Act of 1978 was in response to concerns “over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes”).

⁴⁶ See BETH BRANT, *A Long Story*, in *MOHAWK TRAIL* 77, 77-79 (1985) (telling the parallel stories of a Native American woman and a lesbian woman who had custody of their children taken away and who were told “[i]t [was] good for [the children]” and “it was in [the child’s] best interests”).

so that the children do not become like their parents: the Amish children were removed so they would not be Amish adults, the native children were removed so they would become unfamiliar with native culture, and the children of sexual minorities are removed so they will not become homosexuals.

In all of the above-mentioned situations, the constitutional rights of the parents and of the children were violated. The Amish emerged victorious from the fight for control of their children, the results of which can be found in the United States Supreme Court decision in *Wisconsin v. Yoder*.⁴⁷ Native American parents did not have a similar constitutional victory in the courts.⁴⁸ However, the practice of removing Native American children was finally addressed by Congress, resulting in the Indian Child Welfare Act of 1978.⁴⁹ Meanwhile, the persecution of sexual minority parents by

⁴⁷ 406 U.S. 205, 234 (1972) (holding that compulsory education beyond the eighth grade violated the First and Fourth Amendment rights of the Old Order Amish).

⁴⁸ See, e.g., *In re Cantrell*, 495 P.2d 179, 181-82 (Mont. 1972) (affirming a district court order removing a Native American child and awarding custody to the Department of Public Welfare of Valley County, Montana); *In re Adoption of Doe*, 555 P.2d 906, 921-22 (N.M. Ct. App. 1976) (finding that a Native American father had abandoned his child and granting custody of the child to non-Native American adoptive parents, instead of the child's Native grandfather, against the father's wishes). The court in *Doe* disregarded the argument asserted by the father that he could not have abandoned his child under Navajo custom because maternal grandparents traditionally assumed the responsibilities of raising children if a Navajo father did not carry out parental duties. *Id.* at 920.

⁴⁹ 25 U.S.C. §§ 1901-1963 (1994) (setting forth legislation intended "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families"). For discussions of the history of forced child removal as the genesis of the Act, see Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 22-24 (1996). The Act was described as "one of the singular most important pieces of federal legislation recognizing tribes' sovereign rights to protect the interests of their communities and their children." *Id.* at 33-34. See generally Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM. INDIAN L. REV. 1 (1997) (detailing the Act, analyzing the state courts' application of the Act, and illustrating political pressures limiting implementation of the Act).

The removal of Native American children from their parents occurred by two different methods. The earlier plan, administered by the Bureau of Indian Affairs, resulted in the wholesale removal of children from their families and tribes and in their "education" in boarding schools for eight years, during which time the children were not permitted to speak their native language, wear native clothes, or keep their hair long. See B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 247-48 & n.44 (1999) (noting that "federal policymakers targeted Indian children as the agents of change in an era when Indian people were perceived as 'savages' who needed to be rehabilitated and Christianized"); Kunesh, *supra*, at 21 (describing the federal government's policy of attacking Native American familial bonds with education as "one of the most pernicious Indian child removal methods"). The later removal policy was based on the presumption that Native American children were abused and neglected. The claims were often based on poverty or on cultural practices, such as extended kinship systems that viewed parental responsibility differently from the dominant white culture. See *id.* at 23-24 (maintaining the reservation system itself created the dependence and poverty that was then

child-removal is lessening in some states through judicial decisions, usually based on judicial interpretations of state substantive law rather than on constitutional grounds.⁵⁰

While parental constitutional rights are important, the constitutional rights of the children, which are implicated when children are removed from their parents, are important as well. Discrimination against the children of sexual minority parents is analogous to discrimination against the children of unwed parents. The Supreme Court has decided more than thirty cases dealing with illegitimate children.⁵¹ Most of these cases proceed from the premise that it is constitutionally problematic to discriminate against children based on conditions they cannot control.⁵² The Court has measured various state provisions regarding illegitimate children against the Equal Protection Clause of the Constitution, relying on the notion that the provisions make a quasi-suspect classification.⁵³ When considering what government interests are

used against the Native Americans to take their children). The extent to which the state welfare practices have been ameliorated is doubtful; as one recent commentator noted, "[a]n Indian child in North Dakota is over eight times more likely to be placed in foster care than a non-Indian child." Jones, *supra*, at 246 (explaining that this disproportionate foster care placement prompted Congress to enact the Indian Child Welfare Act).

⁵⁰ See, e.g., *Pryor v. Pryor*, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999) (relying on precedent to hold that "sexual orientation as a single parental characteristic is not sufficient to render that parent unfit to retain physical custody of a child"); *Hodson v. Moore*, 464 N.W.2d 699, 701 (Iowa Ct. App. 1991) (finding that a "discreet homosexual relationship" is not a *per se* bar to custody of a child); *Paul C. v. Tracy C.*, 622 N.Y.S.2d 159, 160 (App. Div. 1994) (citing state case law to hold that "[w]here a parent's sexual preference does not adversely affect the children, such preference is not determinative in a child custody dispute").

⁵¹ See Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court* From Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 1 n.1 (1999) (citing all of the United States Supreme Court cases decided between 1968 and 1989 involving unwed parents and their children).

⁵² The *Weber* Court expressed this view most eloquently:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (citation omitted). A few years earlier, the Court noted that no action of the children was relevant to the case, and quoted William Shakespeare's, *King Lear*, act 1, scene 2: "Why bastard, wherefore base?" *Levy v. Louisiana*, 391 U.S. 68, 72 n.6 (1968).

⁵³ See Jill Dinneen, Comment, *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati: The Sixth Circuit Narrowly Construes Romer v. Evans*, 73 ST. JOHN'S L. REV. 951, 962 (1999) (stating that "[o]ver the years, the Supreme Court found that classifications . . . based on illegitimacy and gender are quasi-suspect, and has applied the developed levels of review to uphold or strike down challenged laws" (citations omitted)). Dinneen notes that homosexuals have not obtained any level of protected status. *Id.* at 963.

sufficient within the context of illegitimacy, the Court has rejected the asserted interests of encouraging and strengthening marriage or supporting traditional family life.⁵⁴ However, illegitimacy classifications have been upheld when the government interest supporting the provisions' constitutionality has been related to the proof of paternity.⁵⁵

The Court's Equal Protection jurisprudence regarding the children of unwed parents is applicable to the children of sexual minority parents, children who likewise had no control over the conditions of their birth. Neither the children of sexual minority parents nor the children of heterosexual parents make a proper category for Equal Protection classification because both interfere with the fundamental right of intimate familial relationships between children and their parents. The asserted state interests of encouraging marriage and traditional family life are no more valid when applied to discrimination against the children of sexual minority parents than when applied to the children of unwed parents. Furthermore, there is no other valid state interest—such as problems relating to the proof of paternity—that could support the governmental interest in discrimination. Thus, state laws and practices that impose a higher burden on a child's right to maintain an intimate familial relationship with a sexual minority parent should be deemed an unconstitutional violation of the child's rights.

Shifting the focus to the child's interests, such as to the toddler Tyler, instead of his mother, Sharon Bottoms, is consonant with the orientation of family law toward the best interest of the child⁵⁶ and

⁵⁴ See e.g., *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 619-20 (1973) (quoting *Weber* for the proposition that a statutory scheme intended to preserve family life cannot constitutionally deny benefits to illegitimate children while granting them to legitimate children); see also *Weber*, 406 U.S. at 175, (acknowledging a state's interest in protecting "legitimate family relationships," but rejecting it as a compelling reason to discriminate against illegitimate children).

⁵⁵ The problems regarding proof of paternity became dispositive in *Lalli v. Lalli*, 439 U.S. 259 (1978), in which the Court found the state's interest in the "just and orderly disposition of property at death" was served by the statutory requirement that the father's paternity be determined prior to his death in a judicial proceeding. *Id.* at 268, 275-76. Earlier, the Court, in *Fiallo v. Bell*, 430 U.S. 787 (1977), deferred to Congressional judgment regarding the exclusion of illegitimate children of men (but not women) from an immigration statutory preference, citing the "serious problems of proof that usually lurk in paternity determinations." *Id.* at 797, 799. Proof of paternity concerns may not be enough in some circumstances. For example, the Court declared unconstitutional a Texas common law practice denying illegitimate children the right to legal support from their fathers, despite the Court's recognition of the "lurking problems with respect to proof of paternity." *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

⁵⁶ See, e.g., *Troxel v. Granville*, 120 S. Ct. 2054, 2073 (2000) (calling the best interest of the child rule an "entirely well-known" standard). In *Troxel*, the Court explained that there is a strong presumption that parents act in the best interest of their child, but that "there may be

is apparent in such practices as unlinking visitation and child support.⁵⁷ Admittedly, asserting the constitutional interests of children can be problematic. For example, although the child is central in constitutional illegitimacy jurisprudence, the decisions also balance the child's interests with parental rights, or allow the child's rights to be encompassed by parental rights.⁵⁸ Moreover, although the Supreme Court has famously stated that the Bill of Rights, in general, and the Fourteenth Amendment, in particular, are not "for adults alone,"⁵⁹ juveniles are generally relegated to the position of having lesser constitutional rights than adults, as the constitutional developments in a minor's right to abortion amply illustrate.⁶⁰ The ambivalence of the United States towards the

circumstances in which a child has a stronger interest at stake" that may be more important than an isolated right of the parents, at least where the parents act arbitrarily. *Id.*

⁵⁷ See, e.g., *Hodge v. Hodge*, 507 F.2d 87, 92 (3d Cir. 1975) (holding the denial of visitation rights is not justified if this is done only to punish the father for failure to pay child support); *Stewart v. Soda*, 642 N.Y.S.2d 105, 106 (App. Div. 1996) (holding that failure to pay child support was not a proper reason to terminate visitation).

⁵⁸ See *Lehr v. Robertson*, 463 U.S. 248, 266-67 (1983) (noting that, in evaluating the rights of a parent and the best interest of a child, a relevant criterion is "the existence or nonexistence of a substantial relationship between parent and child"); *Caban v. Mohammed*, 441 U.S. 380, 383-84, 392-93 (1979) (finding the father of illegitimate children had an equal protection interest in blocking the adoption of his natural children by the children's stepfather).

⁵⁹ See *In re Gault*, 387 U.S. 1, 13, 42 (1967) (holding that due process requires the state to appoint an attorney for indigent minors in juvenile delinquency proceedings that might result in commitment to an institution in which the juvenile's freedom is impaired); see also *Troxel*, 120 S. Ct. at 2072 n.8 (citing precedent acknowledging "that children are in many circumstances possessed of constitutionally protected rights and liberties").

⁶⁰ The Court has decided numerous cases regarding a minor's restricted constitutional right to abortion, and instituting the compromise of a judicial bypass procedure to guarantee a minor's rights are not overborne by her parents. See, e.g., *Lambert v. Wicklund*, 520 U.S. 292 293-94 (1997) (reversing the Ninth Circuit's holding that a judicial bypass procedure was too narrow to protect the minor's rights because bypass was limited to situations where notification was not in the best interest of the child, but did not extend to scenarios where the abortion itself was in the child's interest); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992) (rejecting a challenge to the requirement of the informed consent of one parent where an adequate judicial bypass procedure was provided); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510 (1990) (finding that the state's bypass procedure met the requirements the Court had previously established for parental consent statutes, but leaving open the question of whether parental notification statutes required bypass procedures); *Hodgson v. Minnesota*, 497 U.S. 417, 448-49 (1990) (upholding a forty-eight hour waiting period and a two-parent notice requirement with a sufficient bypass procedure); *H.L. v. Matheson*, 450 U.S. 398, 411, 413 (1981) (upholding a parental notice statute because, unlike consent, requiring notice did not give the parent veto power over the minor's decision and, thus, no bypass was required); *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (holding that a minor should be able to utilize a mechanism for judicial bypass without first giving notice to her parents); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (rejecting a blanket provision requiring parental consent because the state had no constitutional authority to give any third party, even a parent, absolute veto power over a decision made by a patient and her doctor).

Relying on their state constitutions, supreme courts in California and Florida have held that minors' rights to an abortion are co-extensive with adults. See, e.g., *Am. Acad. of*

rights of children is demonstrated by this nation's unique failure to ratify the United Nations Convention on the Rights of the Child.⁶¹ Conservatives argue that recognition of constitutional rights for children is antithetical to family values.⁶² However, a more liberal perspective advances the credible argument that children have a constitutional right to maintain a relationship with "parent-like" individuals⁶³ and further, that the Constitution should be amended to include children, just as it was amended to protect the rights of former slaves and to grant suffrage to women.⁶⁴ Certainly, we are in

Pediatricians v. Lungren, 940 P.2d 797, 816 (Cal. 1997) (concluding that the abortion decision is a protected privacy interest "so central to the preservation of her ability to define and adhere to her ultimate values regarding the meaning of human existence and life, and . . . is a decision that cannot be postponed until adulthood"); *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (explaining the Florida Constitution extends to "every natural person"). For an argument that the Montana statute regulating a minor's access to abortion, held to be constitutional by the United States Supreme Court in *Lambert*, violates the Montana state constitution's explicit privacy provision, see Matthew B. Hayhurst, Comment, *Parental Notification of Abortion and Minors' Rights Under the Montana Constitution*, 58 MONT. L. REV. 565, 574, 586 (1997).

Interestingly, there has been no discernable litigation or scholarship concerning a minor's right to have HIV-testing without parental notification or consent as a constitutional matter. Perhaps this is because a large number of states statutorily authorize testing and treatment for HIV and/or sexually transmitted diseases. See Roger J.R. Levesque, *The Peculiar Place of Adolescents in the HIV-AIDS Epidemic: Unusual Progress & Usual Inadequacies in "Adolescent Jurisprudence"*, 27 LOY. U. CHI. L.J. 237, 261-62, nn.97-99 (1996) (noting that the general requirement that children have parental consent prior to receiving health care has some exceptions and that states are increasingly listing HIV testing among those exceptions); cf. William Adams, *"But Do You Have to Tell My Parents?" The Dilemma for Minors Seeking HIV-Testing and Treatment*, 27 J. MARSHALL L. REV. 493, 495 (1994) (noting that, as of 1994, only eleven states, by statute, allowed minors to consent for HIV testing). For a comprehensive summary of state legislation related to HIV and AIDS as of 1998, see Staff of Volume 8, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary (1999 Edition)*, 8 LAW & SEXUALITY 1 (1998).

⁶¹ See Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 1 (1999) (noting this "U.N. Convention has been adopted by every nation in the world community except the United States").

⁶² See *id.* at 2 ("[M]any conservatives reject the concept of rights for children as a threat to family values."); see also Lynn D. Wardle, *The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children*, 27 LOY. U. CHI. L. J. 321, 322-23, 348 (1996) (arguing that, although the recognition of the constitutional rights of children is important for children and society, the "cult of rights" is misplaced in the context of family law and that "[p]arents—a mother and a father—who are committed to their marriage can best protect children's rights").

⁶³ See, e.g., Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410 (1994) (encouraging courts to recognize a "child's liberty interest in a child-parent relationship" which would promote stable relationships that are beneficial to the child).

⁶⁴ See Charles D. Gill, *A Constitutional Amendment for Children*, 5 GEO. J. ON FIGHTING POVERTY 273, 273 (1998) (suggesting that "using children's rights as a vehicle, as a political strategy, may well be a double-barreled shotgun that can help children and alleviate poverty with one pull of the trigger").

the midst of a cultural and legal disagreement regarding our understandings of children.⁶⁵

Nevertheless, even if our notion of children's right to the companionship of their parents, regardless of sexual orientation or gender identification, is not grounded in the Constitution, we should not allow the "best interest of the child" standard to function as a hollow sentiment, deployed to validate discrimination against sexual minority parents and their children. Such discrimination is predicated on the fear that children of sexual minorities will become sexual minorities. From a legal reform standpoint, the appropriate strategy is to remove legal barriers and install legal safeguards that will assist young people in surviving a "queer adolescence."

III. SURVIVING A QUEER ADOLESCENCE

"It's always open season on gay kids."⁶⁶ Whether conservatives proceed from an essentialist (biological and immutable) basis for sexuality, a constructionist (psychological and environmental) basis for sexuality, or some combination of the two,⁶⁷ the message is one of exclusion and hostility. Theorist and judge Richard Posner, for example, discusses the different theories on the cause of homosexuality, but argues that regardless of its cause, homosexuality should be discouraged.⁶⁸ Regarding the theory that the basis of homosexuality is biological, Posner states,

Maybe we should just be patient; science, which has worked so many wonders, may someday, perhaps someday soon, discover a "cure" for homosexuality. . . . [I]f the hypothetical cure for homosexuality were something that could be administered—costlessly, risklessly, without side effects—

⁶⁵ See Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 347-50 (1997) (explaining how the law relies on two different and simultaneously existing models with regard to children: a nineteenth-century model of children within families and a late twentieth-century model of children as autonomous individuals).

⁶⁶ Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 69, 69 (Michael Warner ed., 1993).

⁶⁷ See RICHARD A. POSNER, SEX AND REASON 295 (1992) (noting that three theories as to the cause of homosexuality are: 1) that homosexuality is biologically determined, 2) that it is a choice of lifestyle, and, 3) that it is influenced by developmental factors, such as a child's relationship with his parents).

⁶⁸ See *id.* at 295-97 ("The more that homosexuality can be persuasively depicted as a biologically determined condition like sickle-cell anemia or male pattern baldness, the less sense it makes to place it under restrictions designed to protect children from succumbing to its allures. If, however, it is merely a vicious choice of life-styles, it ought to be repressed as firmly as possible.").

before a child had become aware of his homosexual propensity, you can be sure that the child's parents would administer it to him, believing, probably correctly, that he would be better off, not yet having assumed a homosexual identity.⁶⁹

Yet, as is made clear by the passage's continuation, Posner does not fully subscribe to an immutable preference. According to Posner, there is a possibility parents can prevent the "formation of homosexual preference . . . by discouraging gender-nonconforming behavior *at its outset* (later is too late)," by not "condoning 'sissyish' behavior in infancy."⁷⁰

Whatever the genesis, the fact remains that many adolescents are sexual minorities. When I was a teenager, we existed in a far less "gay-friendly" (though perhaps less conservative) era, and, long before I was a teenager, there were sexual minority adolescents. For one conservative law professor, however, preventing sexual minority youth from existing (by preventing sexual minority parents from parenting) is important because "[h]omosexual behavior . . . is associated with suicidal behavior, prostitution, running away from home, substance abuse, HIV infection, highly promiscuous behavior with multiple sex partners, and premature sexual activity."⁷¹ This logic argues for a stigmatizing regime and then concludes that the results from the stigmatization prove the inadequacy of those being stigmatized. Such circular reasoning would support an annihilation of Native youth based on a finding that "Native Americans have the highest suicide rate of any adolescent group in the country."⁷² This logic also fails to address the legal and social conditions that make alternatives such as suicide and other self-destructive behaviors attractive. Nor can it account for the reality that the chances of suicide, homelessness, or substance abuse, for a sexual minority or sexually questioning adolescent, vary with the tolerance for sexual variation within the home.⁷³ The overwhelming majority of youths

⁶⁹ *Id.* at 308.

⁷⁰ *Id.* at 309. Supporting his advice that parents discipline an infant for displaying "sissyish behavior" is Posner's underlying thesis: while a person's sexual preference is given, not chosen, the decision to engage in a particular act is a rational choice made in light of pertinent costs and benefits. *Id.* at 308-09.

⁷¹ Wardle, *supra* note 5, at 854 (citation omitted).

⁷² Kunesh, *supra* note 49, at 30.

⁷³ See, e.g., Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual, and Transgendered Youth*, 1 J. GENDER, RACE & JUST. 429, 439-440 (1998) (relating both anecdotal and statistical evidence of the propensity for these misunderstood youths to attempt suicide or be kicked out of their homes); Scott Hershberger, et al., *Predictors of Suicide Attempts Among Gay, Lesbian, and Bisexual Youth*, 12 J.

who leave their homes do not go because they are ready to have adult lives of independence and adventure; they are evicted or constructively evicted by their parents or guardians because of the adults' intolerance.⁷⁴

Some parents have forced psychiatric treatment on their children because of the minors' sexual variance. As Daphne Scholinski relates, she spent four years institutionalized in a psychiatric hospital, "sentenced to an adolescence spent surrounded by white walls and lab coats—quite a punishment for a 14-year-old who was showing the typical signs of growing up gay in a heterosexist society."⁷⁵ Her situation is not unique.⁷⁶ It is imperative that parents not be legally permitted to institutionalize youth because of sexual or gender identity.⁷⁷ Moreover, "therapists" who engage in "conversion therapy," which attempts to change a person's sexual

ADOLESCENT RES. 477, 479 (1997) (discussing studies suggesting that sexual minority youth who attempt suicide are less likely to have supportive friends and parents).

⁷⁴ See Ritch C. Savin-Williams & Eric M. Dubé, *Parental Reactions to Their Child's Disclosure of Gay/Lesbian Identity*, 47 FAM. REL. 7, 9 (1998) (noting some parents react to a child's disclosure of sexual minority identity with rage, physical abuse, or ejection from the home). As the Gay, Lesbian & Straight Teachers Network (GLSTN) reports, "19% of gay men and 25% of lesbians report suffering physical violence at the hands of a family member[] . . . 11.5% of gay youth report being physically attacked by family members," and "26% of adolescent gay males report having to leave home as a result of conflicts with their family over their sexual orientation." *Just the Facts: On Gay, Lesbian, and Bisexual Students and Schools*, at <http://www.uncg.edu/edu/ericcass/diverse/docs/gayfacts.htm> (last updated May 6, 1997) (reporting statistics on self-realization, school climate, the family, and anti-gay violence and harassment). This is not to imply, however, that the majority of parents reject their children upon disclosure of sexual minority status or behaviors. "Although parents often react in a less than ideal fashion after learning of their child's same-sex attractions, limited research indicates that most eventually arrive at tolerance or acceptance of their son's or daughter's sexual orientation." Savin-Williams & Dubé, *supra*, at 7.

⁷⁵ Daphne Scholinski, *After-Wards*, 48 HASTINGS L.J. 1195, 1197 (1997).

⁷⁶ See *id.* at 1196 (stating that "the United State's mental health system remains an extremely hostile environment for [lesbian, gay, bisexual and transgendered] youth, who are routinely viewed by child and adolescent psychiatrists as being 'emotionally disturbed' and in need of aggressive psychiatric treatment 'to prevent adult homosexuality'" in spite of the fact that the "American Psychiatric Association removed homosexuality from its official list of mental disorders in 1973").

⁷⁷ For further discussion, see generally Miye A. Goishi, *Unlocking the Closet Door: Protecting Children from Involuntary Civil Commitment Because of Their Sexual Orientation*, 48 HASTINGS L.J. 1137 (1997), discussing the institutionalization of sexual minority youth and proposing a reform of the psychiatric admissions process for sexual minority youth. Cf. Samuel M. Leaf, Note, *How Voluntary is the Voluntary Commitment of Minors? Disparities in the Treatment of Children and Adults Under New York's Civil Commitment Law*, 62 BROOK. L. REV. 1687 (1996) (discussing New York's procedures and proposing a revised voluntary commitment statute that would afford due process protections for the growing number of adolescents placed in psychiatric institutions by their parents for troublesome adolescent behavior rather than for serious mental illness).

identity, should be held legally liable and the practice should be condemned by respectable psychological organizations.⁷⁸

Some parents who object to their children's sexuality turn to the courts rather than to psychiatry for assistance, often with equally destructive results. A parent can seek court intervention if a teenager is sexually active. For example, in *In re Lori M.*,⁷⁹ a mother sought to have her child declared a "person in need of supervision" under a New York statute.⁸⁰ The fifteen-year-old child, Lori, was associating with a twenty-one-year old lesbian.⁸¹ Lori was fortunate in that the judge found her mature enough to express her sexuality and denied the petition, even while admonishing Lori that, because she was a minor, any sexual actions with an adult could violate New York law.⁸² One could hope that Lori M. is not an anomaly,⁸³ but although there are few reported cases in this area, minority sexuality is certainly an area that can lead a parent to juvenile court, resulting in a judgment adjudicating the sexual minority adolescent as delinquent. As one commentator on female

⁷⁸ For further discussion, see Laura A. Gans, *Inverts, Perverts and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 245, 249 (1999), arguing that the tort of intentional infliction of emotional distress should be applicable to the outrageous conduct involved when a conversion therapist's "sole aim . . . is to eradicate homosexuality," and that the American Psychiatric and Psychological Associations should issue an unconditional ban on the practice. Cf. David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1345-48, 1361-63 (1999) (discussing conversion therapy in epistemological terms and concluding that at a minimum, informed consent is necessary).

⁷⁹ 496 N.Y.S.2d 940 (Fam. Ct. 1985).

⁸⁰ *Id.* at 940; see N.Y. Fam. Ct. Act § 712(a) (McKinney 1999), amended by 2000 N.Y. Laws 596 (McKinney) (effective Nov. 1, 2001) (defining a person in need of supervisions as one who is "incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority"); see also Jonathan C. Juliano, *Detention of Persons in Need of Supervision: The Dilemma in Grounding the Flight of the Fleet-footed Status Offender*, 13 J. SUFFOLK ACAD. L. 95, 106-116 (1999) (discussing the legality of detention for persons in need of supervision under section 720 of the Family Court Act).

⁸¹ *Lori M.*, 496 N.Y.S.2d at 940.

⁸² See *id.* at 942-43 (noting that the child had "given a great deal of thought to her decision and its possible ramifications," although she should be aware that because she is a minor "she is not free to act entirely as she wishes"). The court also found that Lori's rights fell "within the constitutionally protected zone of privacy." *Id.* at 942. See also N.Y. Penal Law § 130.40 (McKinney 1997), amended by 2000 N.Y. Laws 1 (providing that it is a Class E felony for a person over twenty-one years of age to engage in "deviate" sex with someone younger than seventeen).

⁸³ As Colleen Sullivan notes in her discussion of this case, if Lori had been younger than fifteen years of age, had expressed hostility to her mother for bringing the case, had stated conclusively that she was a lesbian, or if there had been a different judge exercising his or her broad discretion in a different manner, Lori could have been declared as a "person in need of supervision" and remanded to state custody. See Colleen A. Sullivan, *Kids, Courts, and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31, 42-43 & nn.70-71 (1996).

juvenile delinquency notes, "[w]hen young women 'get caught' exploring lesbian desire, the social stigma and marginalization arising from homophobia" may lead them to "troubles with the juvenile justice system."⁸⁴

Parents can also trigger child welfare laws unintentionally. In another New York case, a family court judge adjudicated a fourteen year old boy as abused by both his parents based upon his father's "unrelenting torrent of verbal abuse" directed at the child's "sexual identity," specifically the father's taunts of "fag," "faggot," and "queer," despite the boy's denial of his homosexuality.⁸⁵ The family court judge rejected the father's justification of a right to discipline his child for the boy's "girlie" behavior and noted that the courts must intervene in the parent child relationship, despite the parents' constitutional rights, because "children have constitutional rights which must be respected by all, including their parents."⁸⁶ As a result of the court's finding, Shane was removed from his parents and placed in foster care.⁸⁷

It is arguable whether the foster care system would be more hospitable to Shane T. than his homophobic father. As one juvenile rights attorney has commented, there are two things a young person in the foster care system does not want to be: "gay and an arsonist."⁸⁸ There are very few placements that are specifically designed for sexual minority youth, although in recent years there have been some programs in larger cities such as Los Angeles, Washington, D.C., Boston, and New York.⁸⁹ Sexual minority youth

⁸⁴ Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice*, 9 HASTINGS WOMEN'S L.J. 1, 18 (1998). On the other hand, Schaffner also suggests that many young women come into contact with the juvenile justice system for criminal acts because of involvement with an older boyfriend. *Id.* at 17-18.

⁸⁵ *In re Shane T.*, 453 N.Y.S.2d 590, 591 (Fam. Ct. 1982).

⁸⁶ *Id.* at 593 (noting the comments of Shane's father, who stated he would be embarrassed if his son were homosexual).

⁸⁷ *See id.* at 594 (detailing the court order, including the remanding of the child to the Commissioner of Social Services). The court found that Shane's mother was culpable because she had "failed to protect her son from an ongoing, serious abuse." *Id.*

⁸⁸ *See Sullivan, supra* note 83, at 46 & n.93-94 (quoting Samuel Dulberg, Deputy Attorney in Charge at the Juvenile Rights Division of the Legal Aid Society in Bronx, New York). Mr. Dulberg noted that placing sexual minority youth is difficult, because he knew of no placements in New York providing programming specifically for gay or lesbian youths in the family court system. *Id.* at 47.

⁸⁹ *See* Nancy D. Polikoff, *Resisting "Don't Ask, Don't Tell" in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth*, 48 HASTINGS L.J. 1183, 1189-90 (1997) (stating that cities are places where one would expect to find such programs); Sullivan, *supra* note 83, at 58-61 (explaining that California, New York, and Massachusetts have programs that are "beginning to serve the needs of gay and lesbian youth" and that these programs should be used as models for other states).

in foster care have recently become more visible,⁹⁰ and their struggle to be heard remains ongoing.⁹¹ Often, sexual minority youth struggle for a safe environment not only in their homes, whether familial or state, but also in their schools. Many young people have endured from teachers and classmates treatment similar to the judicially declared abuse that Shane T. suffered from his father. Sexual minority students are now attempting to hold educators legally responsible for the violence perpetrated against them.

In the ground-breaking case of *Nabozny v. Podlesny*,⁹² the Seventh Circuit held that Jamie Nabozny stated a claim under the Equal Protection Clause of the Fourteenth Amendment for discrimination based upon sex and sexual orientation because of the school district's failure to enforce its anti-harassment policies.⁹³ Beginning in the seventh grade, Nabozny's "classmates regularly referred to him as 'faggot,' and subjected him to various forms of physical abuse, including striking and spitting on him."⁹⁴ Despite Nabozny's complaints to school officials and a temporary reprieve, the violence continued and intensified, escalating to an incident in a classroom where Nabozny was pushed to the floor by two students and subjected to a "mock rape" while twenty other students looked on and laughed.⁹⁵ When Nabozny went to the office of Principal Mary Podlesny, she told him "that if he was 'going to be so openly gay,' he should 'expect' such behavior" from other students.⁹⁶ Nabozny's years in the eighth, ninth, and tenth grades were no better, although his parents repeatedly sought the cooperation of school

⁹⁰ For example, a recent issue of Foster Care Youth United, a publication of Youth Communication/New York Center, ran a cover feature entitled *Out on the Inside: Gay Teens Struggle to Survive in Foster Care*, with pieces by transgendered, lesbian, and gay youth. FOSTER CARE YOUTH UNITED, Jan/Feb. 2000 (on file with *Albany Law Review*).

⁹¹ For instance, sexual minority youth in foster care in New York City were plaintiffs in a motion to intervene in the lawsuit *Marisol v. Giuliani*, 929 F. Supp. 662, 669, 693 (S.D.N.Y. 1996), *aff'd*, 218 F.3d 132 (2d Cir. 2000), which alleged "systemic deficiencies of gross proportions" in the New York City Administration for Children's Services. *Id.* at 669. The court granted class certification to the plaintiffs, defining the class represented as "children who are or will be in the custody of the New York City Administration for Children's Services ('ACS'), and those children who, while not in the custody of ACS, are or will be at risk of neglect or abuse and whose status is known or should be known to ACS." *Id.* at 693.

⁹² 92 F.3d 446 (7th Cir. 1996).

⁹³ *Id.* at 460-61 (concluding a reasonable finder of fact could find the defendants violated Nabozny's equal protection rights through sexual orientation or gender discrimination). Additionally, the court held "the law . . . was sufficiently clear to inform the defendants . . . that their conduct was unconstitutional." *Id.*

⁹⁴ *Id.* at 451 (noting that the guidance counselor to whom the student first went for help took action, but was subsequently replaced).

⁹⁵ *Id.* (noting the offending students exclaimed that Nabozny should enjoy the mock rape).

⁹⁶ *Id.*

officials.⁹⁷ Nabozny attempted suicide, ran away, and refused to go to school until ordered to do so by the State Department of Social Services.⁹⁸ After a particularly vicious beating, a school official again told Nabozny that he deserved such treatment because of his sexuality.⁹⁹ Finally, in the eleventh grade, school administrators told Nabozny and his parents that they were "unwilling to help him" and that their son should "seek educational opportunities elsewhere."¹⁰⁰

Reversing the trial court's granting of summary judgment for the school district and officials, the Seventh Circuit stated that it was "impossible to believe that a female lodging a similar complaint [to a mock rape] would have received the same response."¹⁰¹ The court further held that the officials were not entitled to qualified immunity.¹⁰² On remand, a jury found the school district and officials liable and the case was settled for almost a million dollars.¹⁰³

In addition to constitutional claims, sexual minority students who are harassed by peers with the tacit approval of school officials can seek redress under a federal statute known as Title IX.¹⁰⁴ The Supreme Court has recently interpreted Title IX as allowing a private claim for damages against a school district¹⁰⁵ for peer harassment if the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the [student's] access" to educational opportunities and if the school district has acted with "deliberate indifference" to known harassment.¹⁰⁶ Although the Court was considering a situation of sexual harassment perpetrated by a male student against a female student, the same standard should be operative in a situation of same-sex harassment, based on

⁹⁷ *Id.* at 451-52 (noting that after each incident the perpetrators were reported to the principal who promised to take action but failed to do so).

⁹⁸ *Id.* at 452.

⁹⁹ *Id.* (noting that Nabozny's beating resulted in internal bleeding, from which he collapsed several weeks later).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 454-55 (noting the court's belief that Nabozny was treated unfairly and differently because of his gender).

¹⁰² *Id.* at 455-56 (holding that the defendants were not eligible for qualified immunity because the law requiring equal protection of the genders is clearly established).

¹⁰³ *See Gay Man Wins \$900,000 in School-District Case*, WALL ST. J., Nov. 21, 1996, at B14 (noting the suit was the first federal case against a school district for not protecting sexual minority students, and was settled for \$900,000 prior to the jury reaching a verdict on damages).

¹⁰⁴ 20 U.S.C. §§ 1681-85 (1994).

¹⁰⁵ Title IX only applies to school districts that receive federal funds. *Id.* § 1681.

¹⁰⁶ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

the Court's unanimous decision in *Oncale v. Sundowner Offshore Services, Inc.*,¹⁰⁷ which held that same-sex harassment was within the purview of Title VII.¹⁰⁸ Nevertheless, the substantial obstacle of the deliberate indifference and severe harassment requirements for students seeking protection from their school districts for peer violence¹⁰⁹ limits the efficacy of Title IX.¹¹⁰

Furthermore, remedies for past acts of violence are an unsatisfying solution. The focus should be on preventing such acts from occurring. Suggestions for preventing the harassment of sexual minority students include creating student groups that support sexual minorities and instituting official diversity, tolerance, or curricular programs that include sexual minority issues. However, these solutions have created their own legal controversies. For example, tremendous contention erupted in the school system in Salt Lake City, Utah, when students tried to form a student interest group on sexual minority issues. In 1995, high

¹⁰⁷ 523 U.S. 75 (1998).

¹⁰⁸ *Id.* at 79. The Court stated,

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id. at 79-80 (second alteration in original). For a discussion of *Oncale* in the context of peer sexual harassment, pre-*Davis v. Monroe County Board of Education*, see Joan E. Schaffner, *Approaching the New Millennium with Mixed Blessings for Harassed Gay Students*, 22 HARV. WOMEN'S L.J. 159 (1999).

¹⁰⁹ One commentator has proposed a model statute that not only addresses the problems with the "because of sex" language in federal sexual harassment statutes, but also requires the school district "to take reasonable steps to remedy the harassment" if it "knows or reasonably should know" of the harassment or abuse. See Amy Lovell, *"Other Students Always Used to Say, 'Look at the Dykes'": Protecting Students from Peer Sexual Orientation Harassment*, 86 CAL. L. REV. 617, 643-44 (1998) (providing the text of the model statute, which lists examples of harassment, including "name-calling, references to sexual activity or practices, 'joke'-telling, and physical assault").

¹¹⁰ A recent lawsuit instituted by Derek Henkle, a student in the Reno, Nevada school system, who faced a situation similar to that of Jamie Nabozny, does not make any Title IX claims, but instead argues on the basis of Equal Protection (as in *Nabozny*), the First Amendment (based on school officials requiring Henkle to conceal his sexual identity and failing to protect him when he revealed it), and state law claims of negligence and intentional infliction of emotional distress. See *Complaint Henkle v. Gregory*, at 2-3,8, available at <http://www.lambdalegal.org> (last visited January 28, 2001) (alleging the plaintiff was continually harassed, beaten, and humiliated for several years by his peers, while school administrators failed to provide him with aid or protection).

school senior Kelli Peterson met with official disapproval when she decided to form a gay/straight alliance at East High.¹¹¹

School officials' desire to ban or otherwise discriminate against a particular student group can run afoul of the First Amendment.¹¹² Interpreting the First Amendment in a suit by a conservative Christian student group, the Supreme Court held that a university could not deny funding to a student group because it was "religious."¹¹³ Likewise, the Court disapproved of a public school's denial of access to its facilities by a Christian organization that wanted to show a family values program.¹¹⁴ Most recently, a unanimous Court rejected a First Amendment challenge to a university's mandatory student activity fee because the university allocation was viewpoint neutral.¹¹⁵ Thus, it is clear that a public educational institution cannot engage in content or viewpoint-based restrictions of expression.

In addition to the First Amendment, the Equal Access Act¹¹⁶ may thwart a school district's inclination to ban a particular club. Congress passed the Equal Access Act in 1984 in response to disputes regarding religious organizations' access to public school facilities.¹¹⁷ The Act provides that

[i]t shall be unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the

¹¹¹ See Doni Gewirtzman, *"Make Your Own Kind of Music": Queer Student Groups and the First Amendment*, 86 CAL. L. REV. 1131, 1132 (1998) (stating that Ms. Peterson's efforts were met with hostility and the school attempted to minimize her chances of implementing the group by effectively banning all student groups on campus that were non-curricular in nature).

¹¹² See John A. Russ IV, *Creating a Safe Space for Gay Youth: How the Supreme Court's Religious Access Cases Can Help Young Gay People Organize at Public Schools*, 4 VA. J. SOC. POL'Y & L. 545, 552 (1997) (noting that beginning in the 1970s, "gay students at the college level consistently won First Amendment victories against efforts to deny their organizations funding, benefits, and recognition").

¹¹³ *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 825, 837 (1995).

¹¹⁴ See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (finding that the school's denial of access to the organization violated the First Amendment because the school's reasoning for the denial was based solely upon the organization's religious perspective).

¹¹⁵ See *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000). ("When a university requires its students to pay fees to support the extracurricular speech of other students, all in the interest of open discussion, it may not prefer some viewpoints to others.").

¹¹⁶ 20 U.S.C. §§ 4071-74 (1994).

¹¹⁷ See S. REP. NO. 98-357, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2349 (stating that the purpose of the Equal Access Act was to "clarify and confirm the First Amendment right[] of . . . free exercise of religion").

religious, political, philosophical, or other content of the speech at such meetings.¹¹⁸

While the initial intent and usage of the Act benefited religious groups, it is also applicable to sexual minority student groups.¹¹⁹

Constrained by the First Amendment and the Equal Access Act, the Salt Lake City school board prohibited all extra-curricular clubs rather than allow the Gay/Straight Alliance.¹²⁰ In reaction to the situation at East High, the Utah legislature passed a statute requiring school boards to deny access to any organization whose program or activities involved human sexuality.¹²¹ Somewhat inconsistently, the Utah Administrative Code provides that educators shall not exclude any student from participating in any program on the basis of sexual orientation and may not encourage a student to develop prejudice on this ground.¹²²

¹¹⁸ 20 U.S.C. §4071(a). *See id.* § 4071(b) (defining a "limited open forum" as being any public secondary school that grants an opportunity "for one or more noncurriculum related student groups to meet on school premises during noninstructional time").

¹¹⁹ For arguments about the efficacy of the Equal Access Act for sexual minority student groups, see Susan Broberg, Note, *Gay/Straight Alliances and Other Controversial Student Groups: A New Test for the Equal Access Act*, 1999 BYU EDUC. & L.J. 87, 116 (discussing evolving uses of the Equal Access Act for sexual minority students in educational settings, and stating that, although religious and gay rights groups disagree ideologically, they may need to work together to protect the constitutional rights of all high school students); Regina M. Grattan, Note, *It's Not Just for Religion Anymore: Expanding the Protections of the Equal Access Act to Gay, Lesbian, and Bisexual High School Students*, 67 GEO. WASH. L. REV. 577, 578-79 n.8 (1999) (explaining that, although envisioned for the protection of religiously based student groups, the Act also protects sexual minorities, and noting that Senator Hatfield, one of the Act's sponsors, conceded during floor debates that sexual minority students would be protected under the Act).

¹²⁰ *E. High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1168 (D. Utah 1999). The school board also denied the Rainbow Club, a student group "whose subject matter was to include the 'impact, contribution and importance of gay, lesbian, bi-sexual and transgender individuals,'" approval as a "curriculum-related" student group. *Id.* at 1196.

¹²¹ The statute states,

The Legislature finds that certain activities, programs, and conduct are so detrimental to the physical, emotional, psychological, and moral well being of students and faculty, the maintenance of order and discipline on school premises, and the prevention of any material and substantial interference with the orderly conduct of a school's educational activities, that local school boards shall deny access to any student organization or club whose program or activities would materially and substantially:

- (i) encourage criminal or delinquent conduct;
- (ii) promote bigotry; or
- (iii) involve human sexuality.

UTAH CODE ANN. § 53A-3-419(2)(a) (Supp. 2000). *See also* Adrienne Goldsmith, *Recent Legislative Developments in Utah Law: Education: Limitations Regarding Student Clubs and Responsibilities of School Employees*, 1996 UTAH L. REV. 1374, 1377-78 (noting the Utah legislature reasoned that since Utah laws prohibited all sexual activity outside of marriage, a student club for gays would be encouraging criminal conduct).

¹²² The Utah Administrative Code, R686-103-6, entitled "Competent Practice Related to Students," provides:

An educator shall:

In the ensuing litigation, the district judge hearing the case initially denied the motion for a preliminary injunction filed by the Gay/Straight Alliance.¹²³ The judge later granted a partial cross-summary judgment motion on the Equal Access Act claims finding the school district did violate the Act during one school year,¹²⁴ and in the final judgment, found there was insufficient proof that an unwritten policy prohibiting “gay-positive” viewpoints existed.¹²⁵ Unsuccessful in their quest to be recognized by the school district, the students formed two additional clubs, the Rainbow Club, and the PRISM club.¹²⁶ PRISM (“People Recognizing Important Social Movements”) sought to be recognized as an extracurricular club, linking the club’s purpose to East High courses in American government, history, and sociology.¹²⁷ As such, it would be within the new policy recognizing only clubs related to the curriculum.¹²⁸ When the school district denied PRISM’s application, the students sued again.¹²⁹ On April 26, 2000, District Judge Tena Campbell issued a ruling that imposed a preliminary injunction in favor of the students, holding that the plaintiffs had a substantial likelihood of succeeding on the merits of the case.¹³⁰ The student group can now

(E) not exclude a student from participating in any program, deny or grant any benefit to any student on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, physical or mental conditions, family, social, or cultural background, or sexual orientation, and may not engage in a course of conduct that would encourage a student to develop a prejudice on these grounds or any others.

UTAH ADMIN. CODE R686-103-6(E) (2000), *available at* LEXIS U.A.C. R686-103-6.

¹²³ *East High Gay/Straight Alliance v. Bd. of Educ.*, 30 F. Supp. 2d 1356, 1364 (D. Utah 1998).

¹²⁴ *See East High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1197-98 (D. Utah 1999) (concluding that the school district did maintain a limited open forum under the Equal Access Act during the 1997-1998 school year and that the Gay/Straight Alliance was excluded from that forum). The judge further found that the school district subsequently maintained a closed forum policy and that the Equal Access Act was thus inapplicable after the 1997-98 school year. *Id.* at 1197-98.

¹²⁵ *East High Gay/Straight Alliance v. Bd. of Educ.*, No. 2:98-CV-193J, 1999 U.S. Dist. LEXIS 20254, at *6 (D. Utah Nov. 30, 1999).

¹²⁶ *See id.* at *3 (discussing whether the denial of the Rainbow club reflected the existence of an unwritten school policy); *see also East High Sch. PRISM Club v. Seidel*, 95 F. Supp. 2d 1239, 1243 (D. Utah 2000) (citing the denial of the club’s application by the defendant, who objected to the perceived focus of the club on gay and lesbian issues).

¹²⁷ *See East High Sch. PRISM Club*, 95 F. Supp. 2d at 1242 (expressly stating that the club did not advocate a certain sexual ideology but “that all students should have an equal voice and be treated with equal respect”).

¹²⁸ *See id.* at 1243.

¹²⁹ *Id.* at 1240 (stating that the issue before the court was whether the school district applied the appropriate standard in its review of the application).

¹³⁰ *Id.* at 1251.

meet, and the school board is reportedly reassessing its denials to other student groups, including a Women's Studies Club.¹³¹

Tolerance and diversity programs have also engendered legal controversies for students, teachers, and school districts. For example, *Solmitz v. Maine School Administrative District No. 59*¹³² resulted from a "Tolerance Day" at a high school and from a history teacher's invitation to a local lesbian activist to speak about gay and lesbian issues during the program.¹³³ The principal and school superintendent rejected the lesbian speaker as too controversial; some parents protested the plan for a lesbian speaker, and there were bomb threats.¹³⁴ As a result, the school board cancelled the entire "Tolerance Day" program,¹³⁵ a move reminiscent of that of the Salt Lake City School Board. The history teacher and a student brought an action in state court, arguing that their First Amendment rights had been violated.¹³⁶ The Supreme Judicial Court of Maine held that the school board had discretion to cancel the program as a safety measure, carefully noting that the school board had not simply excluded the lesbian speaker but had jettisoned the entire "Tolerance Day."¹³⁷

More difficult First Amendment issues arise when "tolerance" of sexual minority issues are not relegated to an easily cancelled separate program, but are instead part of the school's curriculum. These situations are usually conceptualized as implicating the First Amendment rights of teachers rather than those of students.¹³⁸ For

¹³¹ See Heather May, *School District to Review Veto of 2 Clubs*, SALT LAKE TRIB., April 28, 2000, at B5, available at 2000 WL 3760244 (reporting that the Salt Lake City superintendent would review at least two other club decisions).

¹³² 495 A.2d 812 (Me. 1985).

¹³³ See *id.* at 815 (emphasizing the speaker's role as a group representative who would, in keeping with the purpose of "Tolerance Day," discuss with students the issue of tolerance as it extended to her particular minority). The school principal instructed the teacher that "he should not invite a homosexual to speak at Tolerance Day." *Id.*

¹³⁴ See *id.* at 815-16 (noting that callers threatened to picket the school, to "sabotag[e] . . . the school[s] furnace," and some parents considered keeping their children home from school that day or attending the symposium as chaperones).

¹³⁵ *Id.* at 816, 820 (citing the "safety, order, and security" of the school as justification for cancellation of "Tolerance Day").

¹³⁶ *Id.* at 815-16.

¹³⁷ See *id.* at 818 (clarifying that the school board may choose, even "where first amendment rights are *directly implicated*," to take actions that "restrict protected speech" for the purpose of maintaining order and stability in the classroom). Because the board acted to "suppress" all of the viewpoints that would have been presented, it could not have targeted any specific idea. See *id.* at 820.

¹³⁸ For a discussion of the First Amendment rights of public school teachers to "teach tolerance," see Theresa J. Bryant, *May We Teach Tolerance? Establishing the Parameters of Academic Freedom in Public Schools*, 60 U. PITT. L. REV. 579 (1999).

example, in *Boring v. Buncombe County Board of Education*,¹³⁹ the Fourth Circuit narrowly split in a lawsuit spawned by an advanced drama class teacher's selection of a play that featured both a lesbian and an unwed mother-to-be.¹⁴⁰ Despite the fact that the drama students won numerous awards for their production of the play, the teacher's attempt to comply with school board policies by obtaining parental permission slips,¹⁴¹ the deletion of certain sections of the play at the state competition, and the teacher's performance evaluation after the play as "superior,"¹⁴² the teacher was transferred from her assignment teaching advanced drama in high school to teaching introductory drama in middle school due to "personal conflicts."¹⁴³ The teacher sued in state court alleging a violation of her First Amendment rights, and the defendant school officials removed the action to federal court.¹⁴⁴ The majority of the closely divided court decided that the drama production was a curricular decision in which a teacher possesses no First Amendment rights.¹⁴⁵ The court further held that even if a teacher does have a First Amendment right of expression, school officials have a "legitimate pedagogical interest" in restricting the teacher's speech.¹⁴⁶ The United States Supreme Court denied certiorari,¹⁴⁷

¹³⁹ 136 F.3d 364 (4th Cir. 1998) (7-6 decision).

¹⁴⁰ *Id.* at 366.

¹⁴¹ The student whose parent complained to school officials about the content of the play had viewed a scene of the play without his parents' authorization. *Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474, 1476 (4th Cir. 1996).

¹⁴² *Id.*

¹⁴³ *Boring*, 136 F.3d at 366-67 (noting the principal attributed those personal conflicts to "actions [Boring] initiated during the course of this school year").

¹⁴⁴ *Boring*, 98 F.3d at 1476-77. Boring alleged that the school's transfer of her was done with "malice toward [her] over the ideas expressed in the play" and as a result of such oppression, she suffered damages to her reputation that resulted in lost job opportunities. *Id.* at 1477.

¹⁴⁵ *Boring*, 136 F.3d at 369-70 (noting that the doctrine of academic freedom has never been recognized to give teachers control of the public school curricula). The court concluded that because Boring's dispute with the school was related to the employment relationship, it did not qualify to receive First Amendment protection. *Id.* at 369.

¹⁴⁶ *Id.* at 369-70. The "legitimate pedagogical interest" test is derived from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). For an excellent analysis of the various opinions in *Boring*, as well as the split between the analyses in *Hazelwood* and *Pickering v. Board of Education*, 391 U.S. 563 (1968), see Kara Lynn Grice, Note, *Striking an Unequal Balance: The Fourth Circuit Holds that Public School Teachers Do Not Have First Amendment Rights to Set Curricula in Boring v. Buncombe County Board of Education*, 77 N.C. L. REV. 1960 (1999). See also Recent Case, *Constitutional Law—First Amendment—Fourth Circuit Rules That a Teacher's Selection of School Curriculum Is Not Protected Speech*—*Boring v. Buncombe County Board of Education*, 136 F.3d 364 (4th Cir.) (en banc), cert. denied, 119 S. Ct. 47 (1998), 112 HARV. L. REV. 982, 985-87 (1998) (critiquing the *Boring* decision as overly restrictive of speech).

¹⁴⁷ *Boring v. Buncombe County Bd. of Educ.*, 525 U.S. 813 (1998).

and thus the precise scope of a public school teacher's First Amendment right to introduce sexual minority material into the curriculum remains uncertain.

However, more is at issue than the content of the curriculum alone. Although First Amendment jurisprudence disfavors viewpoint restrictions on expression, controversial subjects often engender attempts to mandate the expression of particular messages. For example, statutes in Arizona and Alabama both require that discussions about sexual education or sexually transmitted diseases include the view that "homosexuality" is unacceptable.¹⁴⁸ Such statutes arguably violate teachers' First Amendment rights. Moreover, students should have a First Amendment right not to be subjected to such viewpoints.¹⁴⁹ It seems contradictory to deem school officials responsible for peer violence against sexual minority students while permitting the schools to promulgate an official message of disapproval of sexual minority youth. Moreover, the ostracism of sexual minority adolescents has an adverse affect on students, regardless of their ultimate sexual choices.

IV. THE IMPORTANCE OF ADULTS IN THE LIVES OF OUR CHILDREN

The conservative rhetoric concerning children fails to consider "our" children: the children of sexual minority parents and the children who may become lesbian, gay, bisexual, or transgendered themselves. However, an even broader statement must be made: that conservative rhetoric and actions against sexual minority adults harms children. In this brief final section, I would like to shift the focus away from conservative adults, and towards what

¹⁴⁸ The Alabama statute requires that sex education include "[a]n emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state." ALA. CODE § 16-40A-2 (8) (1995). The Arizona statute is more prohibitive, stating that:

no [school] district shall include in its course of study [about AIDS any] instruction which:

1. Promotes a homosexual life-style.
2. Portrays homosexuality as a positive alternative life-style.
3. Suggests that some methods of sex are safe methods of homosexual sex.

ARIZ. REV. STAT. ANN. § 15-7169(c) (2000).

¹⁴⁹ For an extended argument of a student's right to be free from certain viewpoints, see Nancy Tenney, Note, *The Constitutional Imperative of Reality in Public School Curricula: Untruths about Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1629-33 (1995), dividing a student's freedom of viewpoint into two categories; specifically, the right to not be compelled to embrace a certain belief and the right to receive accurate and useful knowledge.

liberal, progressive adults might do to disclaim the rhetoric and promote the reality of children and youth today.

Acts of discrimination, intolerance, and violence caused by sexual minority status, conduct, or beliefs harm children, even when those acts are not directed at them. In the context of schoolteachers, that connection is easily perceived. Although apparently not sexual minorities themselves,¹⁵⁰ high school teachers such as Mr. Solmitz, the social studies teacher from Maine and Ms. Boring, the drama teacher from North Carolina, asserted their own First Amendment rights to academic freedom in the context of educating young people about sexual minority issues.¹⁵¹ Additionally, schoolteachers and other adults, who are visible sexual minorities, are role models for younger people.¹⁵² Students will know if a schoolteacher is terminated for his or her sexuality, and that knowledge will influence them. Students will also be affected when their teachers are harassed for their sexual orientations or gender preferences.¹⁵³ This role model rationale applies with equal force to foster

¹⁵⁰ See *Solmitz v. Me. Sch. Admin. Dist. No. 59*, 495 A.2d 812, 815 (Me. 1985) (noting Mr. Solmitz planned Tolerance Day "in reaction to the tragic drowning of a Bangor homosexual by three Bangor high school students"); *Boring*, 136 F.3d at 366 (noting Ms. Boring chose the play because it "powerfully depicts the dynamics within a dysfunctional, single-parent family").

¹⁵¹ *Solmitz*, 495 A.2d at 815; *Boring*, 136 F.3d at 366.

¹⁵² The role model quality of schoolteachers is, in fact, a reason that conservatives often give when arguing that sexual minority teachers should be excluded from their profession. Consider the statement of Senator Ashcroft, a Republican senator from Missouri, in which he objected to the proposed Employment Nondiscrimination Act (ENDA), which would prohibit discrimination on the basis of sexuality:

in hiring schoolteachers, or camp counselors, or those who deal with young people, you never just hire a teacher. You are always hiring more than a teacher. You are hiring a role model. I cannot think of a single teacher in my past who was simply a teacher to me. Whether he or she liked it or not, that teacher was a role model.

142 CONG. REC. S9986, 9999-10,000 (daily ed. Sept. 6, 1996) (statement of Sen. Ashcroft). For an analysis of ENDA's potential effect on public school teachers and further discussion of the debates, see Anthony E. Varona, *Setting the Record Straight: The Effects of the Employment Non-Discrimination Act of 1997 on the First and Fourteenth Amendment Rights of Gay and Lesbian Public Schoolteachers*, 6 COMM'LAW CONSPECTUS J. COMM. L. & POL'Y 25, 29 (1998), rejecting the suggestion "that gay and lesbian people are a bad influence on youth and thus should be excluded categorically from teaching positions" and emphasizing that this stance "belies the nature of homosexuality and the . . . longstanding presence of lesbian and gay teachers in the nation's schools."

¹⁵³ For example, in *Murray v. Oceanside Unified School District*, 95 Cal. Rptr. 2d 28 (Cal. Ct. App. 2000), the court considered the allegation by high school biology teacher Dawn Murray that she was subjected to "harassing and obscene graffiti" painted outside her classroom on several different occasions. *Id.* at 30-31. The court reversed and remanded the case back to the trial court to determine whether she stated a claim under the state labor code using the standards they set out. *Id.* at 44-45. However, the court declined to state whether a claim under state labor law was made out at that point of litigation, noting that Murray's complaint was sufficient under common law as it pertained to the intentional infliction of emotional distress allegation. *Id.* at 44.

parents,¹⁵⁴ social workers,¹⁵⁵ Boy Scouts,¹⁵⁶ coaches,¹⁵⁷ and all adults who interact daily with young people. For many sexual minority youths, the knowledge that sexual minority adults exist and survive can be life-saving,¹⁵⁸ but adults who form relationships with young people risk being branded as child molesters.

Discrimination against adult sexual minorities harms the children for which they care, whatever the sexual or gender identity

¹⁵⁴ See Polikoff, *supra* note 89, at 1184 (explaining that licensing gay foster parents by state agencies not only provides homes for gay teenagers, but, also, sends "a powerful message to those youth that it's okay to be gay").

¹⁵⁵ One of the few cases involving sexual minority discrimination against social workers is *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968), in which two men instituted suit after they had both passed the caseworker exam. *Id.* at 359-60. The two were refused employment because the department maintained a policy of disqualifying "homosexuals" from caseworker positions, although both men denied being homosexuals. *See id.* at 360, 364 (noting that the two men maintained there was no evidence to prove they were presently homosexuals or had ever been in the past). The City of New York had recently repealed its blanket policy against hiring homosexuals in civil service jobs, but the city retained that policy for positions involving contact with children. *See id.* at 361 (noting the defendants "[d]id not contest the proposition that a blanket policy excluding homosexuals as a class from city employment would be arbitrary, capricious and hence unconstitutional"); *see also* Rhonda R. Rivera, *Our Strait-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 50 HASTINGS L.J. 1015, 1044 n.152 (1998-99) (noting that the "New York Civil Service Commission has also been relatively progressive in recognizing the rights of homosexual employees"). The Rivera article also mentions that, in *Brass*, the city eventually entered into a settlement agreement in which it stated that its policy was not a blanket disqualification for homosexuals, and that the city would consider each case individually to determine whether the position fell within a disqualifying category, such as requiring contact with children or others who may "easily be influenced." *Id.*

¹⁵⁶ As Senator Nickles, a senator from Oklahoma, stated during congressional debate over ENDA, "I think if some organizations said they did not want to have openly gay or homosexual people as role models or mentors for young people—Boy Scouts come to mind . . . then they should not have to hire them." 142 CONG. REC. S9986-9997 (daily ed. Sept. 6, 1996) (statement of Sen. Nickles). Then-Senator Ashcroft (who was recently appointed to the position of Attorney General) agreed, stating that boyhood and adolescence "are critical times when role models are very important. I think Senator Nickles was on target when he said that we have to be careful of who we have in the Boy Scouts. I commend the sponsors of this legislation for exempting the Boy Scouts." *Id.* at S10,000.

¹⁵⁷ *See, e.g., Holt v. Rapides Parish Sch. Bd.*, 685 So.2d 501, 504 (La. Ct. App. 1996) (reversing termination of a female basketball coach and teacher where charges of an improper relationship with a female student were not supported by substantial evidence); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1281 (D. Utah 1998) (holding that termination of a volleyball coach who replied "[y]es" when a student asked her if she was "gay" violated the coach's First Amendment rights).

¹⁵⁸ The historian John D'Emilio writes movingly of his research on homosexual activists Harry Hay, Chuck Rowland, and the Mattachine Society of the 1950s:

love . . . barely touches the depth and variety of feeling that I have for them. I was three years old when they wrote the Mattachine initiation ceremony: "No boy or girl, approaching the maelstrom of deviation, need make that crossing alone, afraid, and in the dark ever again." They were talking about me.

JOHN D'EMILIO, *Dreams Deferred: The Birth and Betrayal of America's First Gay Liberation Movement*, in MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS, AND THE UNIVERSITY 17, 54-55 (1992).

of those children. This occurs not only in the child custody context, but also in less obvious areas, such as hate crimes and employment discrimination. Issues of violence and discrimination are usually theorized as affecting only the victim as an isolated individual, but many of these people are parents or caretakers of children. If a sexual minority is a victim of violence, for example, and is also a parent, that violence affects the child. Likewise, a sexual minority parent who loses a job because of discrimination has not suffered a purely individual loss; his or her children have been deprived of economic support.

Our attempts at legal reform for sexual minority adults thus affect our children. This includes both the children of sexual minority parents and the youth who are members of a sexual minority themselves. Therefore, it is imperative that our legal reforms not be narrowly directed at a select group of sexual minority members—what I have elsewhere called the whitest and brightest among us. Our children are neither predominantly white nor rich, they may be disabled, and they may not practice their sexualities as long-term, monogamous, and “traditional” in the ways our legal reform movements have often presented us. While there are some sexual minority members who have opined that “gay” politics and legal reforms should be limited to specific sexual minority issues, our children cannot afford such a constrained perspective. Instead, our legal reforms must flow from a broad conceptualization of justice, including economic and environmental justice, with attention to those who are marginalized in society. Perhaps, there is even a bit of self-interest in this: when children now are powerful adults, adults now who are still alive will be elderly and perhaps dependent. We can only hope that “our children” will afford us the justice we have fought for and earned.