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A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth

by

SONIA RENEE MARTIN*

I was given the conditions of my return: 1. Give up my lifestyle. 2. Like Girls. 3. Give up all past friends. . . . Dad escorted me to the garage where I was harassed. "You fucking queer, you goddamn faggot . . . Sissy . . . Do you actually have sex with your lover??" "I don't think it's any of your business." Grabbing my throat, Dad shouted, "It is my fucking business."

The rights of parents to oversee the development of children is a long established principle. Who is to dictate that parents may not try to raise their children in a manner that maximizes the possibility of a heterosexual outcome?

Introduction

Queer youth comprise the most invisible segment of the population. "They inhabit a sociological no man's land. They live in heterosexual families and school settings where they are either rejected or unrecognized. They have little access to the adult lesbian and gay

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1. ONE TEENAGER IN TEN, 43 (A. Heron ed., 1983).
3. The term "queer" is used as an umbrella expression for gay, lesbian, bisexual, transgender, transsexual, and questioning individuals.
4. Census data estimates that as many as 7.2 million Americans below the age of 20 are lesbian or gay. BENNETT L. SINGER & DAVID DESCHAMPS, GAY & LESBIAN STATS: A POCKET GUIDE OF FACTS AND FIGURES 76 (1994) (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (1992)).
community, and rarely do they know other lesbian and gay youth.”

In high school, the harassment of queer students and teenagers goes unchecked by teachers and administrators. The media and popular culture bombard young adults with negative images of homosexuality on a daily basis. Finally, the gay and lesbian community has tragically failed to address the needs of queer youth, due largely to the community’s fear of the stereotype that it “recruits” teenagers to homosexuality.

In this type of political and legal climate, queer youth are under enormous stress from the outside world, making it imperative that they receive support from their families. Unfortunately, their families are shaped by the same societal forces, and often fail to provide the necessary comfort to queer children. In contrast, “[m]any families that are members of racial or ethnic minorities prepare their children for the harassment they may face in the world and provide support when their children encounter oppressive treatment.” Queer teens may not only endure painful harassment from their parents, but are also denied the familial support that is essential to coping in a society that refuses to accept them. “If parenting means to nurture and prepare a child to function in the world with a positive identity, most


6. See generally Kelli Kristine Armstrong, Note, The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools, 24 GOLDEN GATE U. L. REV. 67, 72-78 (1994) (discussing the failure of the American education system to deal effectively with issues of sexuality and sexual orientation that gay and lesbian teens face). A study by the Hetrick-Martin Institute found that 45% of gay males and 20% of lesbians experience verbal or physical assault in high school. SINGER & DESCHAMPS, supra note 4, at 78 (citing FACTFILE: LESBIAN, GAY AND BISEXUAL YOUTH, HETTRICK-MARTIN INSTITUTE (1992)). In addition, 28% of abused queer youth feel forced to drop out due to such harassment. Id.

7. Taylor, supra note 5, at 46.


parents of lesbians and gays are either incompetent or unwilling to perform their parental tasks.\textsuperscript{10} The law which should step in when parents fail to care for their children has turned away from the issue of emotional abuse.

Psychological abuse from family members affects queer youth more than any other group of adolescents.\textsuperscript{11} “[D]uring the period of adolescence, the difficulties involved in completing developmental tasks are compounded by the young person’s attention to concealing her or his sexual feelings and identity, to the conflicts around the expression of those feelings, and to coping with issues of self-image and self-esteem.”\textsuperscript{12} Consequently, the vast majority of queer youth experience severe feelings of isolation.\textsuperscript{13} In a study conducted by the National Gay Task Force, thirty-three percent of gay and lesbian teens reported verbal abuse from their families because of their sexual orientation.\textsuperscript{14} Another study by the Hetrick-Martin Institute found that half of all queer youths reported that their parents rejected them because of their sexual orientation.\textsuperscript{15} Although empirical studies have failed to provide an accurate estimate of the rate of abuse of queer teens,\textsuperscript{16} studies clearly demonstrate that the rate of psychological abuse among queer teens is higher than that among heterosexual teens.\textsuperscript{17} Because parental rejection and abuse are generally coupled


\textsuperscript{12} Dennis D. Durby, Gay, Lesbian, and Bisexual Youth, in HELPING GAY AND LESBIAN YOUTH: NEW POLICIES, NEW PROGRAMS, NEW PRACTICE 1, 2 (Teresa DeCrescenzo ed., 1994).

\textsuperscript{13} Singer & Deschamps, supra note 4, at 77 (citing FACTFILE: LESBIAN, GAY AND BISEXUAL YOUTH, HETTRICK-MARTIN INSTITUTE (1992)) (finding that 80% of lesbian and gay youth surveyed in 1987 experienced severe isolation). See also Hetrick & Martin, supra note 8, at 31 (finding that emotional isolation among queer adolescents is especially high with regard to their families).

\textsuperscript{14} Gibson, supra note 11, at 127.

\textsuperscript{15} Singer & Deschamps, supra note 4, at 77 (citing FACTFILE: LESBIAN, GAY AND BISEXUAL YOUTH, HETTRICK-MARTIN INSTITUTE (1992)).

\textsuperscript{16} “Antigay victimization in families is probably even less visible than are other forms of antigay hate crimes because crimes that occur in a family or home setting are generally less likely to be reported.” Patricia J. Falk, Lesbian Mothers: Psychological Assumptions in Family Law, 44 AMERICAN PSYCHOLOGIST 941, 952 (1989) (quoting R.M. O’Brien, CRIME AND VICTIMIZATION DATA (1985)).

\textsuperscript{17} Gibson, supra note 11, at 127. Studies also suggest that the rate of physical abuse among queer teens may be higher than the heterosexual population. See Hetrick & Martin, supra note 8, at 33 (finding that one third of their clients had suffered violence because of their sexual orientation and in 49% of these cases, the violence came from within the family).
with the discovery of a teen's sexual orientation, the rate appears to be highest for teens that are openly queer. The high visibility of these teens and the way they are treated warns closeted teens of the risks involved in coming out.

Familial abuse may be most severe for queer adolescents from minority racial groups. These youths are most at risk for abuse because they encounter additional challenges not facing white queer youth: "(a) developing and identifying both a strong gay identity and a strong ethnic identity; (b) potential conflicts in allegiance, such a preference group identity within one's gay and ethnic community; and (c) experiencing both homophobia and racism." This paper argues that it is imperative for the legal system to help queer youth by recognizing the severity of emotional abuse directed at a child's sexual orientation. Part II explores the causes and effects of such maltreatment on queer youth. Part III addresses the legal system's denial of the abuse of queer youth. Part IV argues that the legal system's denial of the abuse of queer youth is a result of several factors: (1) a general disregard in the legal system for psychological child abuse; (2) the dominance of heterosexuality; (3) the belief that a child's sexual orientation is changeable; and (4) the parental rights doctrine. These factors work together to deny abused teens legal protection. Finally, Part V suggests statutory recognition of the psychological abuse of queer teens in order to help represent the interests of these youths generally and in the contexts of custody litigation, guardianship and adoption proceedings, and emancipation.

I. Causes of Parental Rejection of Queer Youth

Parents of queer youth who abuse their children do so as a result of a myriad of forces. This section discusses the reasons that some parents psychologically abuse their children upon discovering that they are not heterosexual. Beginning with the traditional approach to understanding parental psychological behavior, this section explains why traditional theories regarding emotional abuse are incapable of encompassing the facets of the abuse experienced by queer teens. It then explores the way that homophobia and the belief in mutability interact and cause some parents to verbally abuse queer youth.

19. Id. at 267.
Even though psychological abuse leaves no physical marks on a child, it may result in the most enduring harm. "Rather than casting psychological maltreatment as an ancillary issue, subordinate to other forms of abuse and neglect, we should place it as the centerpiece of efforts to understand family functioning and to protect children." A psychologically abused child "has not only the burden of his distress to bear, but that of being left with extremely inadequate mental resources to cope with a degree of pain which would overwhelm the most favorably brought up child."

Psychological theories that attempt to explain general parental abuse of adolescents are inadequate in explaining the abuse of queer adolescents. Psychological theorists have tended to focus their attention on uncovering the reasons why adolescents experience psychological abuse in a different context than younger children. One reason for this unique position is the sexual/emotional/physical maturing process of the child.

One psychological theorist in the area of child neglect and emotional maltreatment, James Garbarino, identifies several patterns of adolescent psychological abuse which illuminate how an adolescent's developmental state impacts the likelihood that verbal abuse will occur in a parent-child relationship. First, the parents of a teenager might reject their child by failing to acknowledge the child's changing social role towards autonomy. A parent may also terrorize the adolescent by publicly humiliating him/her. Alternatively, a youth may be ignored by his/her parent or be kept isolated from the rest of society. Often, abuse of teens results from increased feelings of frustration and impotency on the part of parents in trying to influence and control adolescent children.

The second factor that psychologists have identified as contributing to the unusual experience of adolescents with parental abuse is parents' mid-life crises. Psychologists Garbarino and Gilliam argue that, contrary to the abuse of younger children, adolescent abuse may be linked more heavily to intra-familial relationships than to socio-

24. GARBARINO, supra note 22, at 25.
25. Id.
26. Id. at 26.
27. Id. at 25-27.
28. JAMES GARBARINO & GWEN GILLIAM, UNDERSTANDING ABUSIVE FAMILIES 141, 147 (1980).
29. Id. at 143-45.
The physical, intellectual and social development of adolescents coincides with equally disruptive mid-life changes taking place in parents' lives. These changes often strain the relationship between youths and their parents, resulting in subsequent abuse.

Strictly applying Garbarino's theory of adolescent psychological abuse, queer youth are abused largely as a result of (1) parental feelings of impotency in controlling their child's development, combined with (2) parents' mid-life crises. Of these two factors, the former applies exceptionally well to the experience of queer youth. Like heterosexual adolescents, queer adolescents must endure the mid-life crises of their parents. Compounding this dilemma for queer youth, however, is the high likelihood that upon learning of their children's sexual orientation parents will feel out of control of the sexual development of their queer adolescents. But this explanation alone is inadequate for revealing all the dimensions of homophobic abuse. An analysis of parental rejection of queer teens must include a discussion of how the combination of homophobia and the belief that sexual orientation in adolescents is changeable results in the feelings of frustration and anger that lead to abuse.

A. Homophobia

One of the primary causes of parental rejection of queer children is homophobia, as indicated by the overwhelmingly negative response of parents to the discovery of their children's sexual orientation. Empirical data demonstrates that upon learning of their children's homosexuality, parents overwhelmingly respond in a negative way. One study found that when first learning of their child's homosexuality, 64% were sad, 49% were depressed, 44% were guilty, 37% were

30. Id. at 119. Several scholars have linked child abuse and neglect generally to joblessness, inadequate housing, and other "chronic social ills" related to poor socio-economic backgrounds. Barbara Nelson, Making an Issue of Child Abuse, in FAMILY MATTERS 232, 241 (Martha Minow ed., 1993). See also, Judith G. McMullen, Privacy, Family Autonomy, and the Maltreated Child, 75 MARQ. L. REV. 569, 595 (1992) (arguing that current adverse conditions can consume parents' energies more for survival than for emotional nourishment of the child); Judith Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 75 GEO. L.J. 887, 889 n.7 (1975).

31. GARBARINO & GILLIAM, supra note 28, at 143-145.

32. Id.

33. Erik F. Strommen, Ph.D., "You're a What?: Family Member Reactions to the Disclosure of Homosexuality, 1 J. HOMOSEXUALITY 37, 39-40 (1989). See also, Deborah Zera, Coming of Age in a Heterosexual World: The Development of Gay and Lesbian Adolescents, 27 (108) ADOLESCENCE 849, 851 (1992) (arguing that adolescents' fear of disclosing their sexual preference to their parents is a result of the anticipated negative reaction).
shocked, 22% were angry, 14% were sick, and 9% were disgusted.\footnote{Bryan E. Robinson et al., \textit{Response of Parents to Learning That Their Child is Homosexual and Concern Over AIDS: A National Survey}, 1 J. HOMOSEXUALITY 59, 67 (1989).} Extreme emotions such as anger, disgust, and sickness occurred in nearly a quarter of those parents surveyed.

Similarly, a study conducted by Dr. Gary Remafedi found that 43\% of male teenagers encountered strong negative attitudes from their parents when they disclosed their sexual orientation, placing the teenagers at high risk for psychological dysfunction.\footnote{Gary Remafedi, \textit{Male Homosexuality: The Adolescent's Perspective}, 79(3) PEDIATRICS 326, 328 (1987) (finding that the process of coming out “was typically painful for all parties involved”).} Strong feelings regarding children's behavior such as anger and disgust are often precursors for parental emotional abuse.\footnote{\textit{National Research Council, Understanding Child Abuse and Neglect} 115 (1993).}

A survey conducted by Dennis Anderson, found that parents of queer youth tend to go through a multi-stage process of a variety of emotions upon learning of their children’s sexual orientation.\footnote{Dennis Anderson, \textit{The Family and Peer Relations of Gay Adolescents}, in \textit{Gay Adolescents} 162, 166 (1987); \textit{see also}, Strommen, \textit{supra} note 33, at 40-41 (describing studies where patterns of family reaction to a child’s disclosure of homosexuality were analyzed).} A stage of shock and denial precedes one of anger and guilt.\footnote{Anderson, \textit{supra} note 37, at 167-9.} Finally, those families that learn to cope successfully with their child’s homosexuality may reach a stage of acknowledgment.\footnote{\textit{Id.} at 170.} Anderson’s study also found a direct link between parents’ reaction to their children’s sexual orientation and parents’ preconceived notions regarding homosexuality.\footnote{\textit{Id.} at 166.} “Parents who view homosexuality as totally repugnant may suddenly see their child as a completely different person and feel the complete loss of the child they had known.”\footnote{\textit{Id.}} In such circumstances, verbal abuse of queer youth is not an unusual response on the part of parents to their feelings of anger and frustration.\footnote{\textit{See Zera, \textit{supra} note 33, at 851.}}

Parental anger and frustration result from the institutionalized dominance of heterosexuality. Parents often perceive their children’s deviant sexual orientation as caused by their own failure in raising their children in conformity with the heterosexual norm. “For many years, parents have been misinformed that it was their role modeling and behavior, including parenting style, that determined whether or
not their child would grow up to be gay or lesbian." Internalizing and conforming to societal homophobia, parents may treat their children with the animosity that society promotes.

B. Belief in Mutability

Compounding homophobia is the belief that children’s sexual orientation is changeable—if parents had raised their children differently then their queer children would have turned out heterosexual. “Where there is choice, there is reason and responsibility, and therefore this belief rationalizes limited conceptions of homosexuality as sin. Whereas an immutable condition is something the individual cannot be held responsible for, a chosen course of action does not escape judgment.” That parents believe in mutability is manifest in the large number seeking psychiatric therapy or institutionalization for their queer children, as if therapy could ‘fix’ their sexuality. The legal system passively enforces the belief that sexual orientation is mutable when it refuses to acknowledge homophobic and hateful verbal abuse from parents as a form of psychological abuse. This concept will be explored further in Parts IV and V.

II. The Effects of Parental Abuse of Queer Youth

The clearest indications of psychological abuse within the home are the outward behavioral patterns of queer teens. It is difficult to know precisely whether such behavior is the direct result of parental maltreatment, peer harassment, or wider societal rejection. Most likely, it is a combination of all three forces that causes queer adolescent behavioral problems. Nevertheless, if parents provide an accepting and loving environment, it is less likely that queer adolescents’ interactions with peers and society at large would be as dysfunctional.

This section explores the situation of queer youth compared to heterosexual youth with regards to suicide, homelessness, substance

45. See generally Shannon Minter, How Psychiatry Pathologizes Lesbian, Gay, Bisexual and Transgender Youth, in GENDER IDENTITY DISORDER: AN ATTACK ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH 1 (1995), on File at National Center for Lesbian Rights, San Francisco, CA (stating that Gender Identity Disorder is used by psychiatric professionals to enforce socially proscribed gender roles).
46. See Tenney, supra note 9, at 1611.
abuse, prostitution, and HIV status. It links domestic verbal abuse of queer teens with their disproportionate representation in each of these categories. In doing so, this section lays a foundation for a policy of legal intervention in domestic situations where queer youth are abused.

A. Suicide

Suicide is one of the most dramatic signs of the pain experienced by queer youth. Family problems contribute heavily to the disproportionate number of gay and lesbian teen suicide attempts and deaths. These youths are 2 to 3 times more likely to attempt suicide than other kids their age and constitute 30 percent of the country’s completed suicides. A study by the Department of Health and Human Services found that in 1981, 53% of transsexual youths had attempted suicide at least once.

Verbal abuse directed at a child’s sexual orientation is a strong precursor for suicide attempts among queer youth. A study conducted by T.L. Hammelman found that rejection from family members constitutes one of the four main criteria for predicting which gay and lesbian are at risk for attempted suicide. A survey conducted by Dr. Gary Remafedi, et al., found that family troubles were the most often reported cause for suicide attempts in queer youth. “When you have been told that you are sick, bad, and wrong for being who you are, you begin to believe it. Gay youth have frequently internalized a negative image of themselves.” Queer youth suicide is a well-documented phenomenon that must be addressed on various levels, including through the prevention of psychological abuse by parents.

47. See generally, Durby, supra note 12, at 26-32 (reviewing numerous studies on the suicide rates among lesbian and gay youths).
48. See Gibson, supra note 11, at 127.
49. Id. at 110; Gary Remafedi et al., Risk Factors for Attempted Suicide in Gay and Bisexual Youth, 87(b) PEDIATRICS 869, 873 (1991). See also, Hetrick & Martin, supra note 8, at 33 (finding that 20% of the clients presently at Institute for the Protection of Lesbian and Gay Youth had either attempted suicide or had strong inclinations toward suicide).
50. Singer & Deschamps, supra note 4, at 77 (citing U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT OF THE SECRETARY’S TASK FORCE ON YOUTH SUICIDE (1989)).
51. T.L. Hammelman, Gay and Lesbian Youth: Contributing Factors to Serious Attempts or Considerations of Suicide, 2(1) J. GAY & LESBIAN PSYCHOTHERAPY 78, 84-85 (1993) (cited in Durby, supra note 12, at 31). The other three factors Hammelman identifies as placing queer youth at risk for suicide were (1) the discovery of their sexual orientation early in adolescence; (2) the experience of violence associated with their sexual orientation; and (3) the use of drugs or alcohols in order to cope with their sexual orientation. Id.
52. Remafedi et al., supra note 49, at 874.
53. Gibson, supra note 11, at 113.
B. Homelessness

Many abused queer youth escape abuse by running away from home. Another portion of them are kicked out of home because of their sexual orientation.\textsuperscript{54} As one teenager explained, "We've only talked about it once—and he told me to get out of the house. I left, but I came back 'cause I couldn't make it on my own."\textsuperscript{55}

Studies suggest that approximately one out of every four queer youth are forced out of their homes because of conflicts with families over their sexual orientation or gender identity.\textsuperscript{56} Consequently, queer youth comprise a drastically disproportionate number of the homeless youth in this country. Gary Remafedi found that nearly one half of bisexual and gay young men in one study had run away from home at least once.\textsuperscript{57} Yates, et al., conducted a survey that determined that about 13\% of the 620 homeless youth that they interviewed were gay, lesbian, bisexual or undecided.\textsuperscript{58} Gibson found that as many as 25\% of all youth living on the streets in this country are gay or lesbian.\textsuperscript{59} However, this figure varies, and is especially higher in urban settings.\textsuperscript{60} Abby Abinati, in an interview with the Larkin Street Youth Center in San Francisco, found that of 2,000 homeless teenagers who had contact with the Center, approximately half were gay or lesbian.\textsuperscript{61} In Seattle, it is estimated that 40\% of street youths are gay, lesbian or bisexual, and in Los Angeles the estimate is 30\%.\textsuperscript{62}

\textsuperscript{54} See Hetrick & Martin, supra note 8, at 35 ("We have seen several instances where a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street."); Gerald P. Mallon, Counseling Strategies with Gay and Lesbian Youth, in HELPING GAY AND LESBIAN YOUTH: NEW POLICIES, NEW PROGRAMS, NEW PRACTICE 75, 83 (Teresa De Crescenzo ed., 1994).

\textsuperscript{55} Remafedi, supra note 35, at 328.

\textsuperscript{56} HUMAN RIGHTS COMMISSION, FACT SHEET: LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER & QUESTIONING YOUTH (San Francisco, 1996) (citing NATIONAL GAY AND LESBIAN TASK FORCE, ANTI-GAY/LESBIAN VICTIMIZATION (New York, 1984). See also Falk, supra note 16, at 952 (stating that family violence often forces gay and lesbian youth on to the streets, leading to further victimization).

\textsuperscript{57} Gary Remafedi, Adolescent Homosexuality: Psychosocial and Medical Implications, 79(3) PEDIATRICS 352 (1987), cited in Savin-Williams, supra note 18, at 264.

\textsuperscript{58} Gary L. Yates et al., A Risk Profile Comparison of Homeless Youth Involved in Prostitution and Homeless Youth Not Involved, 12 J. ADOLESCENT HEALTH 545 (1991), cited in Durby, supra note 12, at 21.

\textsuperscript{59} Gibson, supra note 11, at 114.

\textsuperscript{60} See Savin-Williams, supra note 18, at 264 (citing studies that found larger percentages of lesbian, gay, and bisexual runaways in Seattle and Los Angeles).

\textsuperscript{61} Abby Abinati, Legal Challenges Facing Lesbian and Gay Youth, in HELPING GAY AND LESBIAN YOUTH: NEW POLICIES, NEW PROGRAMS, NEW PRACTICE 149, 168 n. 22 (Teresa DeCrescenzo ed., 1994).

\textsuperscript{62} Savin-Williams, supra note 18, at 264 (citing ORION CENTER, SURVEY OF STREET YOUTH (1986); J.W. Peterson, In Harm's Way: Gay Runaways are in More Danger Than Ever and Gay Adults Won't Help, THE ADVOCATE, April 11, 1989, at 8-10.
Life on the streets often leads directly to other types of harmful activity for queer youth. "For many street youth, their struggle for survival becomes the fulfillment of a 'suicidal script' which sees them engaging in increasingly self-destructive behaviors including unsafe sexual activity and intravenous drug use." One study estimates the percentage of homeless youth with HIV to range from 20-25% of the homeless youth population. Homelessness is one of the clearest manifestations that the home environment is the source of pain in runaways' lives.

C. Prostitution

Queer youth that leave or are pushed from home by parental abuse are often forced into prostitution because of a lack of other alternatives. "Many youths report that they became prostitutes to survive and to escape physical, sexual, and emotional abuse in their homes and schools." The Hetrick-Martin Institute found that up to half of the gay or bisexual young men that are forced out of their homes because of their sexual orientation engage in prostitution to support themselves.

A study by Coleman found that approximately two-thirds of adolescent male prostitutes are gay. A study by Freiberg found that 75% of male "street hustler" youths in Minneapolis are gay. Finally, Yates, et al., found that prostitutes under age 18 were five times as likely to be gay, lesbian or bisexual. "Among their fellow prostitutes, they found camaraderie and kinship that substituted for the neglect or rejection they received from their biological families and peers." Prostitution and running away from home are both ways that queer youth replace the lack of emotional support at home with surrogate sources from the streets.

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63. Gibson, supra note 11, at 114. See also, Durby, supra note 12, at 22 (noting the high rates of prostitution, survival sex and substance abuse among homeless youth).
64. Savin-Williams, supra note 18, at 264.
65. Durby, supra note 12, at 22; Ritch C. Savin-Williams, *Theoretical Perspectives Accounting for Adolescent Homosexuality*, 9(2) J. ADOLESCENT HEALTH CARE 95, 102 (1988) (finding that up to half of gay and bisexual youth that are kicked out of their homes engage in prostitution to support themselves).
66. Savin-Williams, supra note 18, at 265.
67. Singer & Desshamp, supra note 4, at 77 (citing Factfile: Lesbian, Gay, and Bisexual Youth, HETRICK-MARTIN INSTITUTE (1992)).
70. Yates et al., supra note 58, at 547, quoted in Durby, supra note 12, at 22.
71. Savin-Williams, supra note 18, at 266.
D. Substance Abuse

Self-destructive feelings that result from parental verbal abuse have also led to a higher level of substance abuse among queer youth.72 Some researchers estimate that as many as 60% of gay and lesbian youth are substance abusers.73 Alcohol and drug abuse among these teens results from “attempts to fog an increasing awareness that they are not heterosexual, to defend against the painful realization that being lesbian or gay means a difficult life lies ahead, and to take revenge against parents and society for rejecting them.”74 For many young people, substance abuse is linked directly to the depression that comes from living with constant verbal abuse from their parents because of their sexual orientation. Alcoholism and drug abuse are especially hazardous problems for queer teens because of their connection with suicide and AIDS transmission.75

E. HIV

Recently, researchers have discovered a correlation between the psychological abuse of queer teens and HIV status. In general, the rate of HIV among queer adolescents is doubling each year.76 A report released from the Department of Public Health’s 1995 San Francisco HIV Prevention Plan, also found that 45% of the homeless gay and lesbian youths in San Francisco are HIV positive.77 The report indicated that several of the risk factors associated with HIV, such as drug use, behavioral problems, and self-destructiveness, are prevalent among emotionally abused children.78 “[B]ecause of social rejection and denial of opportunity in the environment for developing a positive, affirming gay or lesbian identity, gay and lesbian adolescents are at even greater risk for HIV infection.”79

72. Id. at 267.
73. Id. at 265 (citing Gary Remafedi, Adolescent Homosexuality: Psychosocial and Medical Implications, 79 PEDIATRICS 331, 334 (1987)).
74. Id. at 265 (citing N. Hammond, Chemical Abuse in Lesbian and Gay Adolescents, Paper Presented at the Symposium on Gay and Lesbian Adolescents, Minneapolis, MN (May 1986)).
75. See infra discussion of HIV, and supra discussion of suicide, at p. 175.
77. Ellen McGarrahan, City of the Night, S.F. WEEKLY, February 21, 1996, at 10-11 (discussing the high risk of acquiring HIV among homeless S.F. gay youth). See also, Renee M. Cunningham et al., The Association of Physical and Sexual Abuse with HIV Risk Behaviors in Adolescence and Young Adulthood: Implications for Public Health, 18(3) CHILD ABUSE & NEGLECT 233, 244 (1994).
78. Savin-Williams, supra note 18, at 234.
III. Judicial Treatment of the Emotional Abuse of Queer Youth

The greatest indication that courts deny the existence of the emotional maltreatment of queer youth is the noticeable lack of reported cases that discuss the issue. However, when faced with homophobic harassment of queer youth, the most common response of courts is to ignore the abuse. In *Catherine W. v. Robert F.*, Robbie’s father called him “faggot” and told him more than once that he “act[ed] like a queer.” The father brought a motion to be relieved of child support obligations because his children refused to visit with him. The court in *Catherine W.* held that if a parent’s conduct toward his/her child is found to be “inimical to [the child’s] physical or emotional well-being” then the parent no longer must make support payments if the child refuses to see him/her.

Although the court stated that the homophobic statements made by Robert F. to his son “should never have been made, particularly to a boy of Robbie’s sensitivity,” it nonetheless concluded that the harassment did not constitute “conduct inimical to [the child’s] physical or emotional well-being.” In so doing, the court implied that a parent’s hostile rejection of a child’s sexual orientation is not abusive. Indeed, the decision suggests that a queer child should be forced to endure the maltreatment, or survive without his/her parents’ financial support.

In contrast to *Catherine W. v. Robert F.*, the court in *In the Matter of Shane T.* openly discussed the detrimental impact of parental psychological abuse on queer teens. In this case, the father constantly taunted his gay son, abusively using words such as “faggot” and “queer.” The court found that the father’s behavior constituted emotional abuse and terminated the father’s parental rights.

The *Shane T.* court, however, hinged much of its decision on Shane T.’s report of physical manifestations that resulted from the abuse, such as stomach pains. While the presence of such physical side effects worked in favor of the child in *In the Matter of Shane T.*, such physical manifestations are often not present. Courts must not

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80. My research revealed only two cases in which the emotional abuse of a queer youth was addressed by a court.
81. 455 N.Y.S.2d 519 (1982).
82. Id. at 521.
83. Id. at 520.
84. Id. at 521.
85. Id.
86. 453 N.Y.S.2d 590 (1982).
87. Id. at 591.
88. Id. at 594.
89. Id. at 592-93.
insist on physical signs of abuse and must focus instead on the repetition or severity of emotional harm. The insistence on physical manifestations indicates the court's uncertainty as to what type of emotional maltreatment is severe enough to warrant court action. However, if courts acknowledge the pain and anguish that necessarily result from homophobic harassment of queer youth, physical manifestations should no longer be necessary.

As noted, sociological and psychological research clearly indicates that many queer youth are emotionally abused by their parents. Furthermore, this abuse has severely detrimental impacts on children. There is an enormous gap, however, between what the research reveals and how the law interprets the issue. The disproportionate number of queer teens who are substance abusers, runaways, suicide victims, and prostitutes should send a red flag to the legal system that these young people are experiencing severe emotional trauma. While much of this trauma results from widespread societal homophobia, it's also clear from the research that these behavior patterns are directly linked to parental abuse. Why isn't the legal system intervening in cases of abuse severe enough to force gay and lesbian youths to engage in self-destructive behavior?

IV. Reasons Behind the Law's Denial of the Abuse of Queer Youth

Similar to the reasons behind parental rejection of queer youth, the legal system's denial of this abuse is the result of a coalescence of forces. Understanding the way that these forces interact is central to dismantling the law's denial of the abuse and formulating legal remedies. This section asserts that the factors which are particularly involved in cases of abused queer adolescents include: (1) the general hesitancy of the law to recognize the psychological abuse of children; (2) homophobia; (3) the belief that an adolescent's sexual orientation is changeable; and (4) parents' rights doctrine.

A. General Judicial Treatment of Emotional Abuse

How the legal system chooses to address the emotional maltreatment of queer youth is largely dictated by its overarching conception of the broad category of emotional abuse. This section generally explores the law's perception of the emotional abuse of children. It begins by examining the current state of research into the causes and effects of psychological maltreatment. It then discusses the historical development of emotional abuse as a legally recognized category of child abuse, with emphasis on the mental health profession's influence on the law in this area. Finally, this section reviews the statutory
schemes that have been implemented to address emotional maltreatment and the deficiencies inherent in such approaches.

Current child emotional abuse statistics are difficult to assess.90 In 1992, the U.S. Department of Commerce found that there were 48,928 reported cases of emotional maltreatment in the United States, constituting 5.3% of the total reported incidents of child abuse.91 The National Committee for the Prevention of Child Abuse reported that of the verified cases of child abuse in 1993, 4% were emotional abuse cases.92 It also found that child abuse reporting in general has increased more than four-fold since 1976.93 Emotional abuse, however, is hard to detect because it leaves no physical signs, often resulting in under reporting.

Psychological research has uncovered that the failure to provide adequate nurturing to a child through emotional support can cause serious problems in adolescent children, including: depression, low self-esteem, suicidal tendencies, and substance abuse.94 These effects of emotional abuse vary according to an individual child's personality, vulnerability, and defense mechanisms.95 Studies have also demonstrated that emotional abuse does not occur in isolated incidents, but rather is a pattern of interactions between a child and adult.96 In addition, emotional abuse may occur alone or in conjunction with sexual and/or physical abuse.97 Furthermore, the psychological, as opposed to physical, damage that results from any sort of child abuse is the most enduring sort of harm.98 While bodily injuries will normally heal, emotional scarring will not. The State clearly has a strong interest in eliminating and preventing emotional harm to children.99 Difficulty lies, however, in detecting abuse and creating concrete and understandable statutory definitions of psychological abuse.

90. This is partly due to the low rate of reporting of child abuse as well as the low rate of investigation. See Murray A. Straus & Carrie L. Yodanis, Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children, 2 U. Chi. L. Sch. Roundtable 35, 35 n.4 (1993).
92. Stephen Conley, Child Abuse: Growing Problem in the USA, USA TODAY, Apr. 17, 1994, at 8A.
93. Id.
95. Id. at 496.
96. Id. at 495-96.
97. Id. at 495.
98. Id.
The psychological abuse of children went unrecognized by the medical and legal communities for many decades after the "discovery" of physical child abuse. It took until the mid-twentieth century for an emotional form of child abuse to be recognized by the mental health profession. Initially, psychological maltreatment was not recognized as a justiciable form of child abuse. When scholars and lawmakers first attempted to define the problem in the 1960s, their definitions were limited to physical abuse. This resulted both from the medical community's slow process of recognition as well as a general hesitancy among the legal community to interfere in the family sphere. However, once emotional abuse gained respect in the mental health profession, the legal system followed by establishing a "plethora of laws" specifically attacking the new category of abuse.

Current legal definitions of emotional abuse draw heavily on the psychological profession's views. Dr. Garbarino, describes psychological maltreatment as taking five forms: rejecting, isolating, terrorizing, ignoring and corrupting. Relying upon distinctions drawn by Garbarino, legal scholars Karp and Karp have broken the broad category of emotional abuse into three subgroups: emotional abuse, emotional neglect and psychological maltreatment. Emotional abuse is defined as "verbal or emotional assault, close confinement and threatened harm." Emotional neglect is defined as "inadequate nurturing/affection, knowingly permitting maladaptive behavior, and refusal to provide essential care." Finally, psychological maltreatment is defined as "a concerted attack by an adult on a child's development of self and social competence, a pattern of psychologically destructive behavior."

There is a widely held belief among lawmakers that "psychological injuries are "nebulous and insignificant." Judith McMullen identifies three types of statutes designed to address emotional child

100. BARBARA NELSON, MAKING AN ISSUE OF CHILD ABUSE 11-13 (1984).
101. Id.; Kincanon, supra note 21, at 1045-47.
102. NELSON, supra note 100, at 11-12; Kincanon, supra note 21, at 1045-46.
103. Kincanon, supra note 21, at 1043-44.
104. McMullen, supra note 94, at 488. See also NELSON, supra note 100, at 11-12 (noting that the issue of child abuse gained greater attention as a result of the civil rights movement and the ensuing legislative actions).
105. Garbarino, supra note 22, at 8.
106. McMullen, supra note 94, at 494.
107. LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 3.07 (quoted in id. at 494).
108. McMullen, supra note 94, at 494.
109. Id.
abuse. The first type of emotional abuse statute addresses psychological child abuse, but does not refer specifically to emotional child abuse. For example, McMullen includes under this category the New York statute, which prohibits the “impairment of [a child’s] emotional health.” McMullen explains that although the statute appears to recognize emotional harm to a child, its language “seems to limit intervention for emotional impairment to those cases where the impairment is a direct result of inflicted physical injury or neglect.”

The inherent problem with such a statute is that judges are free to disregard the emotional abuse of children if they choose. The contrary outcomes of In the Matter of Shane T. and Catherine W. v. Robert F., both New York cases, exemplify the fact that judges are given wide latitude in their decisionmaking under such a statute. Moreover, judges who wish to hold parents liable for emotional abuse are not provided with a firm statutory basis for such a finding.

The second type of emotional abuse statute specifically references emotional abuse, but provides no guidance to courts on how to ascertain when a child has been emotionally abused. For example, the California statute arguably falls under this category. It includes under its definition of child abuse both “wilful mental injury” to a child and “[a]ny condition which results in the violation of the . . . mental . . . welfare of a child or jeopardizes the child’s present or future health, opportunity for normal development or capacity for independence.”

The deficiency with this approach is also that judges are given too much discretion. Influences such as homophobia, the belief in the mutability of a child’s sexual orientation, and parents’ rights, can sway judges away from concluding that the verbal abuse of queer youth constitutes emotional abuse.

Finally, the third type of emotional abuse statute prohibits emotional abuse and provides “a standard for ascertaining when such mal-

111. McMullen, supra note 94, at 486-93. McMullen also notes that states usually have two broad statutory approaches to addressing child abuse: criminal abuse statutes and child protective services statutes. Id. at 487. This paper’s analysis will focus only on the latter.

112. Id. at 488-89 (citing ILL. ANN. STAT. ch. 23, para. 2354 (Smith-Hurd 1988)).


114. McMullen, supra note 94, at 488-89.

115. McMullen explains that statutes of this type are usually construed “quite literally.” Cf. People v. Vandiver, 283 N.E.2d 681 (Ill. 1971) (concluding that the use of the word “health” is not unconstitutionally vague) (cited in id. at n. 35).


117. CAL. WELF. & INST. § 18951(e)(4) (West 1995).

118. CAL. WELF. & INST. § 18951(e)(5) (West 1995).
treatment is likely to have occurred." Because it specifically identifies emotional maltreatment as a form of child abuse, this third type of statute legitimates emotional abuse, and is thus more capable of protecting the health of psychologically abused children. One of the main problems inherent in this type of statutory scheme is that many such statutes require an element of demonstrable harm in abuse cases. For example, according to the Wisconsin child abuse statute: "‘Mental harm’ means substantial harm to a child’s psychological or intellectual functioning which may be evidenced by a substantial degree of certain characteristics of the child including, but not limited to, anxiety, depression, withdrawal or outward aggressive behavior." Such a showing of harm, as required by the Wisconsin statute, is often not possible because the effects of emotional maltreatment are usually not perceptible until long after the actual verbal abuse occurs.

A general difficulty facing courts under all three types of emotional abuse statutes is establishing causation. "[A]cts of emotional . . . maltreatment may be covert; the origins of the depression, aggression, and other behaviors that may result are difficult to identify in some settings because they could be the result of other causes." Simply put, it is often hard for courts to assume that a certain type of parental behavior will have detrimental effects on every child. The general difficulty courts encounter in determining whether to affirm emotional abuse allegations is a primary factor for judicial abstinence in cases involving the emotional abuse of queer youth because of their sexual orientation. Furthermore, even the most child-protective statute requires a showing of demonstrable harm.

B. Homophobia

The legal system’s view of teenage homosexuality is shaped by many of the same beliefs that lead parents to feel guilt or anger toward their children’s sexual orientation. Homophobia is central to the legal system’s failure to adequately protect gay teenagers in their homes. Sympathizing with the frustration of the parents of gay teens, the law permits wide discretion in dealing with the “problem.” An analysis of how and why the law is homophobic is beyond the scope of this paper. However, bias is clearly manifest in nearly

119. McMullen, supra note 94, at 491 (citing Wis. Stat. § 948.04(2) (1991)).
121. McMullen, supra note 94, at 485-86.
122. Id. at 486.
123. Id. at 508.
124. See Jackson & Sullivan, supra note 44, at 103 (explaining that “homophobia has assumed the proportions of a social pathology in our culture”).
125. For a detailed examination of how the law conflates gender and sex in order to subordinate gays and lesbians, see generally Francisco Valdes, Queers, Sissies, Dykes, and
every aspect of the law that encounters the issue of homosexuality including employment discrimination cases, criminal sodomy prosecutions, and child custody decisions. Several broad theories have been advanced explaining the factors contributing to this discrimination. One of the most cohesive theories comes from Professor Sylvia Law.

Professor Law argues that the legal system reinforces the social condemnation of homosexuality by punishing gays and lesbians more harshly than heterosexuals, as evidenced by sodomy statutes. This punishment, Law asserts, is driven by the threat that homosexuals pose to traditional gender roles. Alongside the “deep and cruel” punitive measures directed at gays and lesbians, the law also denies the existence of homosexuality by refusing gays and lesbians legal protection from discrimination. Applying Law’s theory, the legal system’s refusal to intervene in situations of emotional maltreatment of gay and lesbian youth serves to both punish and deny the existence of homosexuality. Allowing the parents of some queer youth to psychologically abuse their children reinforces the legal and social dominance of heterosexuality.

C. Belief that a Child’s Sexual Orientation is Mutable

Another belief fueling the legal system’s ambivalence toward the psychological abuse of queer youth is that a child’s sexual orientation can be changed by the way he/she is reared. The law sees a child’s sexual orientation as something that parents can shape. The law understands why a parent would want to maximize the potential that their child turns out heterosexual, indeed the law encourages it by abstaining from intervening in the homes where hostile rejection of queer youth occurs.


126. See, e.g., Juachim v. American Tel. & Tel. Info. Sys., 793 F.2d 113 (5th Cir. 1986) (without a specific contractual provision to the contrary, an employer may terminate a gay employee based solely on his sexual orientation).


128. See, e.g., id.; N.K.M. v. L.E.M., 606 S.W.2d 179 (1980) (upholding trial court’s custody order, awarding child to her mother on the condition that mother no longer associate with her lesbian lover).


130. Id. at 188-94.

131. Id.

132. Id. at 192.

133. Id. at 194-95.
For example, if a parent were to make racist comments to a child of a different racial background, a court would most likely not condone it. This is due largely to society's higher tolerance for homophobia than for racism. In addition, the legal system has recognized race as an immutable characteristic but has not done the same for sexual orientation.¹³⁴

Because of the lack of cases addressing the abuse of queer teens, one must look to other indicia for courts' belief in the mutability of adolescent sexual identity. Two such indicia are: (1) custody and adoption decisions involving gay and lesbian parents and (2) the American Psychiatric Association’s (APA) view of teenage sexuality.

(1) Child Custody & Adoption Cases

Child custody decisions provide the most vivid illustrations of the view that homosexuality is mutable as well as the belief that it is morally wrong. The dominant belief advanced in many decisions is that granting custody to gay or lesbian parents risks the inculcation of children into a homosexual lifestyle.¹³⁵

For example, in *In Re Opinion of the Justices*, the New Hampshire Supreme Court upheld a statute prohibiting gay or lesbian foster parenting, explaining that due to "the reasonable possibility of environmental influences, we believe that the legislature can rationally act on the theory that a role model can influence the child's developing sexual identity."¹³⁶ Thus, because parents are usually the foundational role models for children, they are the individuals most capable of shaping a child's sexual orientation.

In *N.K.M. v. L.E.M.*,¹³⁷ a child custody modification case, the court upheld provisions in the custody decree that required appellant mother to terminate her relationship with her lesbian lover, Betty, and forbade the custodial mother from allowing the child to have contact with Betty. In its opinion, the court stated:

Allowing that homosexuality is a permissible lifestyle—an "alternate life style," as it is termed these days—if voluntarily chosen, yet who would place a child in a milieu where she may be inclined toward it? She may thereby be condemned, in one degree or another, to sexual disorientation, to social ostracism, contempt and unhappiness.¹³⁸

Thus, it seems clear that the court feared that the lesbian parents' sexual orientation would shape the child's sexual orientation.

¹³⁷ 606 S.W.2d 179 (Mo. 1980).
¹³⁸ *Id.* at 186.
In *State Department of Health and Rehabilitative Services v. Cox,* the Florida Supreme Court upheld a statutory prohibition on adoptions by gay parents. In justifying its conclusion that homosexuals are unfit to be adoptive parents, the court stated:

Statistically the state does know that a very high percentage of children available for adoption will develop heterosexual preferences . . . [T]hose children will need education and guidance after puberty concerning relationships with the opposite sex . . . . It is in the best interests of a child if his or her parents can personally relate to the child’s problems and assist the child in the difficult transition to heterosexual adulthood.\(^{140}\)

Several assumptions are implicit in the court’s reasoning. First is the obvious belief that a parent has the ability to affect an adolescent’s sexual orientation. More importantly, the court assumes, without any empirical data in support of its conclusion, that children are better off with parents of their own sexual orientation.\(^{141}\) The court’s holding means that it will only protect the interests of heterosexual children to be raised by heterosexual adults. Under this reasoning, the court completely ignores the population of queer youth that would be affected by the Florida statute.

Implicit in the belief that gay parents will transmit homosexuality to their children is the belief that parents can shape their children’s sexual orientation—that children’s sexual orientation is changeable. Assuming that it is possible to force queer children to conform to the legally acceptable sexual orientation, it is less likely that abusive efforts by parents to do so will be perceived as abhorrent conduct rather than socially encouraged conduct.

(2) **Attitude of the Medical Community**

A second method of examining the law’s view that a child’s sexual orientation is mutable is through the medical community’s attitude. The medical community has a powerful influence on the legal system’s interpretation and understanding of psychological abuse. Courts, wary of their ability to create rules in the realm of psychological abuse, often rely on the psychiatric profession for guidance.\(^{142}\)

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139. 627 So. 2d 1210, 1220 (Fla. 1993).
140. *Id.*
141. This paper in no way supports the conclusion of the Florida Supreme Court that a child should be raised by parents of the same sexual orientation. The author’s discussion of the court’s reasoning is meant to point out the inconsistencies of the protected interests of heterosexual children verses queer children.
Prior to 1973, the APA viewed homosexuality as a pathological disease. In 1973, the APA retracted this view. However, the focus of mainstream psychiatric intervention has moved from "curing" homosexuality in adults to "preventing" homosexuality in children and adolescents. Thus, the APA created a new disorder, Gender Identity Disorder (GID), which is defined as: (1) "a strong and persistent cross-gender identification" and (2) "a persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.

The psychologists that specialize in treating gender identity disorder openly advance the view that early treatment in young adults can prevent homosexuality as an adult. For example, one GID specialist stated:

For many adolescents and their families, the key issue is whether one can or should change what appears to be a developing homosexual orientation . . . efforts to promote heterosexual functioning should focus on those individuals who have not yet had extensive homosexual experiences.

This statement manifests the view that although homosexuality may not be changeable in adults, adolescents constitute a population in which the development of homosexuality can be stunted. Eve Sedgewick asserts that psychologists specializing in GID emphasize the parental role in shaping children's sexual orientation. She argues that the profession believes that "the first imperative developmental task of a male child or his parents and caretakers is to get a properly male Core Gender Identity in place, as a basis for further and perhaps more flexible explorations of what it may be to be masculine—i.e., for a male person, to be human." Beliefs of the mental health profession correspond closely with the law's interpretation of psychological abuse because such professionals are often relied upon

144. Id.
145. Minter, supra note 45, at 1.
147. Id. at 533.
148. DSM IV, supra note 146, at 536. "In boys, the cross-gender identification is manifested by a marked preoccupation with traditionally feminine activities. Girls with Gender Identity Disorder display intense negative reactions to parental expectations or attempts to have them wear dresses or other feminine attire." Id. at 533.
149. Susan Bradley, Gender Disorders in Childhood: A Formulation, in GENDER DYSPHORIA (Betty Steiner ed., 1985) (cited in Minter, supra note 45, at 4).
151. Id. at 23.
by courts to help understand what causes and what constitutes emotional abuse. ¹⁵²

The belief that adolescents' sexual orientation is mutable is unsupported by scientific evidence. Empirical data has consistently failed to demonstrate that sexual orientation is mutable. On the whole, it has revealed that sexual identity is immutable in some individuals, but is affected by social environments in other individuals. ¹⁵³ Furthermore, the empirical data suggests that "both mutability and immutability, wherever they appear, are the products not only (if at all) of congenital or early childhood givens, but also (or predominantly) of the social interactions that generate social identity." ¹⁵⁴

Janet Halley suggests that it is hazardous for gay and lesbian legal activists to focus on immutability because sexual identity is a fluid concept and may never attain a blanket status of immutability. ¹⁵⁵ Unfortunately, the law in the area of adolescent abuse hinges on a notion of mutability that must be revealed as an overinclusive generalization in order for the legal system to attack the abuse. Ultimately, mutability should not matter where a child is being harmed by his/her parents. Regardless of whether one's sexual orientation is influenced by parental behavior, it does not justify hateful abuse aimed at forcing a child to be heterosexual.

D. Parents' Rights

The legal system's complacency regarding the emotional abuse of queer youth also results from notions of parents' rights. "The right of natural parents to raise their children is founded on the long tradition of history and the culture of Western civilization." ¹⁵⁶ At common law, the right to control and direct a minor child's upbringing was considered to be a "sacred right." ¹⁵⁷ Today, scholars have located this right in either the constitutional right to privacy in the family ¹⁵⁸ or in the Ninth and Fourteenth Amendments. ¹⁵⁹

¹⁵². Areen, supra note 30, at 928.
¹⁵⁴. Id. at 937.
¹⁵⁵. Id.
¹⁵⁸. See e.g., Laure A. Culbertson, Comment, Article 613 of the Louisiana Children's Code: Child Abuse Investigations in the Twilight of the Fourth Amendment, 55 LA. L. REV. 361, 362 (1994); McMullen, supra note 30, at 584-588.
¹⁵⁹. See generally Witte, supra note 157.
Francis McCarthy has explored the Supreme Court’s attempt to balance a parent’s fundamental right to direct his/her child’s upbringing with the child’s constitutional rights and the State’s interest in promoting healthy children.³⁶⁰ “[T]here seems to exist today a clearly articulated precept declaration that parental interests in the custody, care, and control of their children are constitutionally protected from unwarranted state interference to a high degree.”³⁶¹ Katharine Bartlett traces the emphasis on parental rights to the concept of a natural law, which influences much of the jurisprudence relating to lesbians and gay men.²⁶²

“[P]arental rights are deemed the very foundation of social order. Unless parents are left free to raise their own children, the entire social fabric will be destroyed: ‘man’ will be ‘denaturalized,’ the ‘instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed.”³⁶³

Generally, the Supreme Court has permitted the state to supplant parental authority only “where an important and clearly relevant governmental or societal interest was at stake.”³⁶⁴ A long line of cases have upheld parents’ interest in directing the lives of their children. Beginning with Pierce v. Society of Sisters,³⁶⁵ the Court struck down an Oregon statute that precluded parents from sending their children to private schools rather than public schools. The Court stated, “The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him.”³⁶⁶

In Parham v. J.R.,³⁶⁷ the Supreme Court declared that procedural due process was not violated when a parent commits a child to a mental institution without a formal hearing. In determining the fate of J.R., the Court unambiguously deferred to the decision of the parents. It concluded that the “natural bonds of affection lead parents to act in the best interests of their children.”³⁶⁸

In Santosky v. Kramer, the Supreme Court held that parents’ interest in directing their family life is a fundamental liberty protected

³⁶¹. Id. at 977.
³⁶³. Id.
³⁶⁴. McMullen, supra note 30, at 581.
³⁶⁵. 268 U.S. 510 (1925).
³⁶⁶. Id. at 535.
³⁶⁸. Id. at 602.
by the Fourteenth Amendment. The court stated that parents have a “fundamental liberty interest” in “the care, custody, and management of their child.” In Stanley v. Kramer, the Court stated that “[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.” Thus, courts are generally unwilling to intervene in cases of a parent’s control of a child’s life unless it can identify a “powerful, countervailing interest.”

The underlying presumption in parents’ rights doctrine is that parents will act in the best interests of their children:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Professor Judith McMullen suggests that when doubt or uncertainty exists as to the harm produced by parental actions, courts will defer to parental decisionmaking. In general, parental rights have been a barrier to the disruption of child abuse. Thus, in the current climate of disbelief surrounding the validity of emotional abuse combined with the hostility toward an adolescent’s right not to be heterosexual, it seems unlikely that courts will disregard parental judgment when a child’s sexual orientation is at issue.

Despite deference to parental rights, the potential exists under current legal standards for curtailing the right of parents to homophonically harass their children. In cases involving allegations of child support, the interests of parents in directing their children’s upbringing must be balanced with the state’s and the child’s interests. The twentieth-century legal doctrine of parens patriae holds that the state has an interest in protecting children’s welfare and therefore may intervene in the family sphere in order to protect children. Under parens patriae, “[t]he state acts as the primary protector of children from abuse or neglect.” The doctrine has generally been invoked by courts to uphold certain procedural devices furthering the state’s ability to intervene in cases of child abuse. Parens patriae

170. Id. at 754 n.7.
172. Id.
173. 442 U.S. at 602.
174. Id. at 584.
176. Areen, supra note 30, at 893.
177. For example, In re Linda “C,” 451 N.Y.S.2d 268 (N.Y. 1982), the court invoked parens patriae to uphold the use of a preponderance of the evidence standard in child
V. Policy Suggestions for Recognition of Homophobic Harassment as Emotional Abuse

*Parens patriae* should be invoked to protect the health and safety of queer adolescents through statutory provisions that prohibit the rejection of children’s sexual orientation. The state does not have an interest in protecting parents’ rights to ensure that their children are heterosexual, especially when it is clear that a significant proportion of the children in our society will not grow to be heterosexual adults. In contrast, the state has a great interest in ensuring the emotional, and thereby physical, health and safety of children. Influenced by homophobic bias and prejudice, judges are left without specific statutory guidance in abuse cases and may rely on their discretionary powers in order to ignore the abuse of queer young youth. Moreover, attorneys and advocates may not pursue such abuse allegations because of their slim chance of success in court. Therefore, in addition to invoking the doctrine of *parens patriae*, statutory remedies must be created in order to bind the judges to recognize psychological maltreatment directed at a child’s sexual identity as a form of abuse.

A primary step toward helping abused queer youth is the codification of emotional abuse as a prohibited form of child abuse. “Although laws against child abuse do not necessarily prevent it, the same justification for punishing physically abusive caretakers applies to generally and emotionally abusive caretakers.” As discussed in Part V, the main problem in this area with current child abuse statutes is the discretion and lack of guidance given to courts in determining the existence of emotional abuse. In order to overcome such deficiencies, a model statutory provision against emotional abuse would specifically include endangering the emotional health of children as a form of abuse as well as provide courts with guidance on how to recognize abuse without relying upon a showing of demonstrable harm.

The creation of explicit provisions in child abuse statutes recognizing homophobic harassment by parents as a form of psychological abuse would further protect the interests of queer youth. In order to guide judges in cases involving psychological maltreatment such a statute would provide concrete examples of such abuse, including “the

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abuse determinations in custody cases. *Id.* at 271. In Lehman v. Stephens, 148 Ill. App. 3d 538 (Ill. App. Ct. 1992), the court relied upon the doctrine to uphold the Illinois child abuse reporting statute. *Id.* at 547.

178. *Id.* at 911.


180. *Id.* at 1066.
hostile rejection of a child's sexual identity." Such explicit statutory language qualifying the psychological rejection of a youth's sexual orientation as emotional abuse would curtail judicial discretion in cases involving abuse and limit the influence of judicial notions about homosexuality, mutability, and parental rights. In so doing, this type of statute would send a powerful legislative message that adolescents have the right to be free from emotional maltreatment because of their sexuality. Symbolically, this message would be that youth have the right to be openly queer if they choose. Finally, such a statute could be applied to help queer youth escape abusive family relationships in the contexts of custody, guardianship, adoption, and emancipation cases.

A. Child Custody

The recognition of the psychological abuse of queer adolescents would have a large impact on custody and child support disputes. The majority test for child custody is the "best interests of the child" test. This consists of a balancing of several factors to determine what outcome would be in a child’s best interests.included in most of these statutes is a provision respecting the emotional interests of the child. If courts consider parental rejection of children’s sexual orientation as psychological abuse, it is more likely that these youths will be placed in the custody of more supportive parents. In child support proceedings, abused queer youth will not be financially penalized for refusing to submit to homophobic harassment, as in Catherine W. v. Robert F.

B. Guardianship & Adoption

In cases where there is not a divorce, an abused young person may want to abandon his/her family of origin altogether by seeking either a guardianship or an adoption. One of the most favorable options for queer youth seeking to escape their biological parents because of emotional abuse is through guardianships. Ideally, a queer teen that has endured homophobic abuse from his/her biological family may want to be placed with gay or lesbian guardians because presumably they would be in the best situation to support the youth in his/her coping with rejection.


Another choice for queer youths is adoption. "[A]doption, although a legal option, would not generally be utilized because, unlike the guardianship situation, it is necessary to terminate the parental rights of the parents in the family of origin." The standard of proof in adoption cases is high, requiring the party seeking the adoption to show substantial abuse, neglect or abandonment. Consequently, adoption will be a less viable option for most abused teens.

In cases of guardianship and adoption, courts will consider emotional abuse in deciding whether to grant guardianship. If courts are instructed to weight heavily the detrimental impact of parents' rejection of their children's sexual orientation, then it will be easier for abused youths to find homes with families that will not reject their sexuality.

Although statutory recognition will help children escape abusive homes, the shortage of foster families and the difficulty of adoption procedures may make this end impossible for many youths. In two states, there are explicit statutory prohibitions against allowing gay and lesbian couples to be foster parents. In more states, lesbian and gay parents are seen by courts as unfit for parenting. In addition, by the time a youth has gotten to the point of requesting complete removal from his/her biological family, he/she is often inundated with emotional problems that will be difficult for even the best of foster families to deal with.

C. Emancipation

Another option available to abused adolescents is emancipation from their natural parents. Recognizing homophobic harassment as a form of abuse will facilitate the process of minors seeking emancipation because it will provide persuasive grounds for terminating parental rights, a stage in the process of emancipation. Nearly all states have statutory or common law provisions for termination of parental rights upon a showing that the parent has "failed to provide for the child's well-being according to law." Although this usually involves

184. Id. at 153.
185. Id.
186. Id. at 152.
187. Id. at 150-51.
190. Id.
a high burden of proof, showing that a parent is no longer deserving of parental rights will indirectly help in emancipation. Such a showing could more easily be made by a queer youth if there exists a statutory basis for the assertion that a parent is unfit because he/she verbally abused a child because of the child’s sexual orientation.

However, emancipation is a problematic alternative for most adolescents. Usually emancipation requires a youth to have an independent source of income, which is rare. In addition, emancipation as a remedy generally fails to address the young person’s need for parental emotional support. More importantly, emancipation’s underlying message regarding blame and responsibility is wrong. One commentator has explained, “Why should lesbian and gay youth be deprived of a supportive adult environment because their declared sexual orientation isolates them from their family of origin? Emancipation places the burden of meeting survival needs on the youth seeking to be emancipated.” Nevertheless, despite the problems with emancipation as an alternative for queer youth, for the few youths that are fortunate enough to be financially independent, it may be an appropriate remedy.

Conclusion

Emotional abuse by parents directed at a child’s sexual orientation is one of the most traumatic aspects of coming out as a young person. Parental abuse is particularly painful because queer youth are in special need of familial support in helping them learn to cope with widespread societal rejection. For the same reasons that lead parents to mistreat these children, the legal system refuses to intervene on their behalf. Statutory recognition of psychological abuse generally, as well as specific provisions regarding the rejection of a child’s sexual orientation, are legal measures that could help queer teens end up in homes that are supportive.

The bleak reality facing queer youth is manifested by their behavior. In order to escape the pain that results from familial rejection of their sexual identities, these gay youth often resort to drugs, alcohol, street life, or suicide. They could not send a clearer message to the legal system that they need assistance. Intervening in domestic situations in which parents hostilely reject their children’s sexual identity is one way to shield youths from harassment and establish that rejecting these young people is not condoned as a matter of social policy.

Queer youth are a population severely in need of help from all segments of society. As members of the gay and lesbian legal commu-
nity, it is our responsibility to create legal structures that facilitate the process of coming out in today’s hostile climate. In addition to easing the burden on queer youth, recognition of parental emotional abuse is a powerful way to chip away at socially condoned homophobia.