

# COMING OUT FOR KIDS: RECOGNIZING, RESPECTING, AND REPRESENTING LGBTQ YOUTH

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## I. INTRODUCTION

While they may have kept them secret, adolescents have always had same-sex romantic and sexual relationships. They have always transgressed gender norms. And beginning thirty years ago,<sup>1</sup> increasing numbers of young people have “come out”<sup>2</sup>—at ever younger ages<sup>3</sup>—as lesbian, gay, bisexual, transgender, or queer. Still others question their sexual orientation and gender identity. Yet even the most thoughtful and conscientious child advocates traditionally have not acknowledged these young people or addressed the unique stressors they face.<sup>4</sup>

Building on the pioneering advocacy of attorneys from Legal Services for Children, the National Center for Lesbian Rights, and the Lambda Legal Defense Fund, I seek in this article to respond to that omission.<sup>5</sup> I argue here

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<sup>1</sup> The first-ever empirical study of gay adolescents was published in 1972. See RITCH SAVIN-WILLIAMS, *THE NEW GAY TEENAGER* 50, 52 (2005).

<sup>2</sup> I mean for this phrase, here and in the title, to connote an open declaration of self-identification.

<sup>3</sup> See, e.g., CAITLIN RYAN & DONNA FUTTERMAN, *LESBIAN AND GAY YOUTH: CARE AND COUNSELING* 10 (1998) (summarizing studies showing that the average age of self-identification as lesbian or gay has dropped); Stacey D’Erasmus, *Getting Out Early: They’re Here. They’re Queer. They’re Thirteen*, NERVE, Aug.-Sept. 2000, at 100 available at <https://www.nerve.com/Dispatches/Derasmo/gettingOut/>; Laura Kiritsy, *Young Gay Activists Making a Difference*, BAY WINDOWS ONLINE, Nov. 3, 2005, <http://www.baywindows.com/media/paper328/news/2002/07/11/LocalNews/Young.Gay.Activists.Making.A.Difference-258108.shtml> (last visited Jan. 13, 2006) (quoting lesbian organizer Sue Hyde: young people are coming out earlier and coming out stronger and more proudly, so to speak, certainly than almost everyone I know in my own age bracket, in my own generational slice of the community”).

<sup>4</sup> See, e.g., ABA & NAT’L BAR ASS’N, *JUSTICE BY GENDER: THE LACK OF APPROPRIATE PREVENTION, DIVERSION AND TREATMENT ALTERNATIVES FOR GIRLS IN THE JUSTICE SYSTEM* (2001) (omitting any reference to sexual orientation or gender identity in report arguing for “special cognizance of those gender-specific issues surrounding girls”); *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301 (1996) (calling for further study of ways in which differences in race, ethnicity, culture and class may affect lawyer-client communications but making no mention of differences in sexual orientation or gender identity).

<sup>5</sup> My thinking on these issues has been particularly influenced by Shannan Wilber of Legal Services for Children and Jody Marksamer of the National Center for Lesbian Rights. See

that zealous advocacy for children and adolescents mandates an acknowledgment of<sup>6</sup> and explicit engagement with the realities of the lives of young people who publicly identify as lesbian, gay, bisexual, transgender, queer, or questioning (“LGBTQ”), as well as those whose sexual behaviors and attractions, and/or feelings about their gender identity, place them outside the heterosexual and gender-conforming norm, no matter how they publicly identify. Specifically, lawyers should acquire basic information about these young people; understand the ways in which they are uniquely vulnerable to abuse, violence, and discrimination; and support them through sensitive advocacy strategies.

Part One addresses what might be thought of as the threshold issues of this topic: How do we know which young people are LGBTQ, and what causes them to be that way? I note the lack of consensus among experts and youth on how to define these terms. This Part then discusses the fact that fewer young people embrace LGBTQ identities than engage in associated behaviors and suggests reasons for this phenomenon. I conclude that we lawyers cannot always know with certainty which clients are lesbian, gay, bisexual, transgender, queer or questioning. This Part therefore urges lawyers to focus less on ferreting out the LGBTQ clients for special treatment—an impossible task—than on adopting practice strategies sensitive to and supportive of youth of all sexual orientations and gender identities.

Part One then considers the debate over what causes people to be gay, lesbian, bisexual, or transgender, which has loomed large in the public imagination. I trace the development of the various theories of etiology and the implications of each. This Part then steps back and reflects on the nature and effects of the debate about the causes of alternative sexual identity and considers why some groups and individuals appear to be fixated on determining the root of minority, non-mainstream sexual orientation and gender identity. I conclude that, although there may be a variety of effects at work, at least some of these efforts appear to stem from an underlying belief that being lesbian, gay, bisexual or transgender is bad or wrong. I suggest in this Part that this underlying pejorative message is apparent to the young people themselves, and that accordingly even the very act of engaging in this debate can be harmful to LGBTQ youth.

Part Two fleshes out the concrete manifestations of negative and hostile attitudes toward homosexual and transgender identities, describing the

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SHANNAN WILBER, THE MODEL STANDARDS PROJECT: CREATING INCLUSIVE SYSTEMS FOR LGBTQ YOUTH IN OUT-OF-HOME CARE (on file with the author); JODY MARKSAMER & DYLAN VADE, TRANSGENDER AND GENDER NON-CONFORMING YOUTH RECOMMENDATIONS FOR SCHOOLS, [http://www.hawaii.edu/hivandaids/Transgender\\_and\\_Gender\\_Nonconforming\\_Youth\\_Recommendations\\_for\\_Schools.pdf](http://www.hawaii.edu/hivandaids/Transgender_and_Gender_Nonconforming_Youth_Recommendations_for_Schools.pdf); see also Jenny Casciano et al., *Client-Centered Advocacy on Behalf of At-Risk LGBTQ Youth*, 26 N.Y.U. REV. L. & SOC. CHANGE 221, 231 (2001); Colleen A. Sullivan, *Kids, Courts, and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 L. & SEXUALITY 31 (1996); AM. COUNCIL OF CHIEF DEFENDERS, NAT’L JUVENILE DEFENDER CTR., TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH INDIGENT DEFENSE DELIVERY SYSTEMS (2005), [http://www.njdc.info/pdf/10\\_Principles.pdf](http://www.njdc.info/pdf/10_Principles.pdf).

<sup>6</sup> For an argument that adults deny the existence of—or ignore—lesbian and gay youth, see Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, 8 YALE J.L. & FEMINISM 269, 323 (1996).

problems LGBTQ youth most typically face at home and in school. I examine the ways in which the adaptive—if sometimes self-destructive—behaviors engaged in by LGBTQ youth in the face of conflict and stress render them vulnerable to involvement in the child welfare and juvenile justice systems. I then focus on their unique struggles in those systems.

In Part Three, I argue that lawyers must overcome any personal anxiety we may have about LGBTQ youth and move beyond ambivalence and mere tolerance toward genuine acceptance and respect. I offer guidelines for effective and zealous representation of LGBTQ youth.

## II. THE ABCs OF LGBTQ

### A. Definitions

How do we know that a young person is lesbian, gay, bisexual, transgender, queer, or questioning? It is often impossible to be certain. While some young people will reveal to lawyers their sexual orientation<sup>7</sup> or gender identity,<sup>8</sup> many will not, leaving us to make educated guesses. Lawyers would do well, therefore, to focus less on determining who is, and who is not, LGBTQ than on developing sensitive advocacy strategies.

### B. Sexual Orientation

In considering sexual orientation, we might ask how we would categorize a thirteen-year-old girl who has persistent crushes on and fantasies about her girl friends, doesn't like boys, and is sexually inexperienced. Is she a lesbian? What of a sixteen-year-old girl who is romantically—but secretly—involved with another girl, while her friends think she wants to date boys? Is she a lesbian, bisexual, straight, or just questioning? What about a seventeen-year-old boy who has oral sex with a football teammate but was elected prom king, with his girlfriend by his side? Or an eighteen-year-old who self-identifies as a lesbian but who unintentionally becomes pregnant?<sup>9</sup>

Sexuality researchers do not agree about whether sexual attraction, sexual behavior, or self-identification is most relevant in assessing sexual orientation. Adolescents have their own viewpoints, which do not necessarily coincide with those of any researchers.<sup>10</sup> When asked in one study for their opinions on

<sup>7</sup> In this article, I use “sexual orientation” to refer to one’s understanding of his or her emotional and sexual attractions and behaviors: specifically, whether one is primarily attracted to people of the same biological sex (gay or lesbian), of the opposite sex (straight), or to both sexes equally (bisexual).

<sup>8</sup> In this article, I use “gender identity” to refer to one’s understanding of oneself as being either male, female, a combination of both, or neither. This identity may or may not be consistent with the sex that one has been assigned at birth. Gender identity is typically understood as being separate from sexual orientation.

<sup>9</sup> Girls who self-identify as lesbian, bisexual or questioning have been found to be at increased risk of unintended pregnancy as compared with heterosexual peers. Elizabeth M. Saewyc et al., *Sexual Intercourse, Abuse and Pregnancy Among Adolescent Women: Does Sexual Orientation Make a Difference?*, FAM. PLANNING PERSP., May-June 1999, at 127, 127-131, <http://www.guttmacher.org/pubs/journals/3112799.html>.

<sup>10</sup> See, e.g., SAVIN-WILLIAMS, *supra* note 1, at 37 (“Estimating a single number for the prevalence of homosexuality is a futile exercise because it presupposes assumptions that are

which factor is most relevant, young people responded that attraction to someone of a particular gender, and a desire to be in a relationship with that person, were more significant in determining sexual orientation than sexual behavior or self-labeling.<sup>11</sup> Owing in part to the absence of agreement on which are the most salient factors in measuring sexual orientation, studies of the numbers of lesbian and gay youth reveal results from as low as one percent to as many as twenty percent of young people.<sup>12</sup> Typically, the number of young people who identify as lesbian, gay or bisexual is lower than the number of young people who report same-sex sexual desire and experiences.<sup>13</sup>

This discrepancy exists for several reasons. Young people may be unsure of whether their same-sex desires and sexual behaviors are indicative of a fixed identity as opposed to a temporary or experimental phase.<sup>14</sup> They may be actively fighting their same-sex desires and in denial about their sexual behavior. Alternatively, they may be sure that they are sexually oriented toward people of the same sex but nevertheless feel culturally alienated from the terms "gay," "lesbian," and "bisexual."<sup>15</sup> They may also feel that identifying as gay, lesbian, or bisexual does not adequately account for the fact that they understand themselves, relate to the world, and experience oppression on the basis of a multiplicity of identities, including their race, class, age, ethnicity or relig-

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patently false: that homosexuality is a uniform attribute across individuals, that it is stable over time, and that it can be easily measured.") (citation omitted); Elizabeth Saewyc et al., *Measuring Sexual Orientation in Adolescent Health Surveys: Evaluation of Eight School-Based Surveys*, 35 J. ADOLESCENT HEALTH 1 (2004), available at <http://www.mcs.bc.ca/SaewycMeasOrient.pdf>. The desire for clearly delineated categories is a peculiarly contemporary obsession; only in the last one hundred years or so has sexual behavior constituted a discrete identity. See, e.g., JOHN D'EMILIO, *MAKING TROUBLE: ESSAYS ON GAY HISTORY, POLITICS AND THE UNIVERSITY* (1992); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (1978).

<sup>11</sup> SAVIN-WILLIAMS, *supra* note 1, at 26.

<sup>12</sup> In Vermont, a 2003 study revealed that three percent of the more than 8000 eighth-through twelfth-grade respondents reported engaging in "same-sex sexual intercourse." VT. DEP'T OF HEALTH DIV. OF ALCOHOL AND DRUG ABUSE PROGRAMS AND DEP'T OF EDUC. COMPREHENSIVE SCH. HEALTH PROGRAMS, *THE 2003 VERMONT YOUTH RISK BEHAVIOR SURVEY*, <http://www.healthyvermonters.info/adap/pubs/2003/yrebs2003report.pdf>. In the 2003 Massachusetts Youth Risk Behavior Survey, four percent of the 3,624 ninth- through twelfth-grade youth surveyed described themselves as gay, lesbian, or bisexual, and six percent described themselves as gay, lesbian or bisexual and/or reported same-sex sexual contact. MASS. DEP'T OF EDUC., *2003 YOUTH RISK BEHAVIOR SURVEY RESULTS* (2004), <http://www.doe.mass.edu/hssss/yrebs/03/results.pdf>. The 1991 National American Indian Adolescent Health Survey found that, of more than 13,000 seventh- through twelfth-grade respondents, 1.6 % identified as gay, lesbian, or bisexual; 1.3 % reported a same-sex sexual experience, and 4.4 % reported same-sex attraction. THE SAFE SCH. COAL. OF WASH., *EIGHTY-THREE THOUSAND YOUTH: SELECTED FINDINGS OF EIGHT POPULATION-BASED STUDIES* (1999), <http://www.safeschoolscoalition.org/83000youth.pdf>. A long-time researcher of gay/lesbian youth estimates that between 15 and 20 percent of all adolescents have "some degree of same-sex orientation." SAVIN-WILLIAMS, *supra* note 1, at 44. The actual numbers, of course, are only valid if one accepts the premise of these studies: namely, that young people are completely honest when asked about some of the most intimate and private matters about which it is possible to imagine being asked.

<sup>13</sup> See *supra* note 12.

<sup>14</sup> RYAN & FUTTERMAN, *supra* note 3, at 9.

<sup>15</sup> See SAVIN-WILLIAMS, *supra* note 1, at 215 (notion that a "gay identity" remains constant in all contexts is distinctly Western idea).

ion.<sup>16</sup> Finally, they may want to claim a gay, lesbian, or bisexual identity but fear rejection and discrimination if they do so.

### C. Gender Identity

Universal agreement on what “transgender” means is similarly lacking. Most would describe as transgender a fourteen-year-old whose biology led doctors to declare him a boy at birth, but who insists on wearing dresses; refuses to use masculine pronouns to self-describe; wants to be and identifies as a girl; and plans to take medication and undergo surgical procedures as soon as medically possible in order to more closely physically resemble a biological female. Less clear is the status of a fifteen-year-old who was born with female genitalia, has always looked, dressed, and acted “like a boy,” who doesn’t want to take hormones or have surgery but who doesn’t feel comfortable as a girl. Is she a girl because of her female genitalia? Do the appearance, clothes and behavior traditionally associated with maleness make him a boy? Is s/he someone who is simply gender non-conforming? Or is this person transgender, either because her gender doesn’t match her physiological characteristics, because s/he feels literally between genders, or because s/he feels himself/herself to be a gender other than male or female?

Consensus on this question is elusive. Nevertheless, transgender activists, feminists, and gender-studies scholars would insist that the fifteen-year-old be allowed to claim whatever gender identity—girl, boy, transgender, or some other gender entirely—feels most comfortable.<sup>17</sup> They would urge us further, as we seek a label for this fifteen-year-old, to critique what they view as a polarized and oppressive system of gender, which creates an unreasonably narrow range of acceptable public expressions of “male” and “female”<sup>18</sup>—to consider the possibility of a gender that is neither exclusively “male” nor “female,” but some of both, or something else—such as a third gender—entirely.<sup>19</sup> They would encourage us to re-assess the fact that we traditionally have vested exclusive decision-making power about a person’s gender in doctors, who

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<sup>16</sup> See, e.g., Audre Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 114, 120 (1984) (“As a Black lesbian feminist comfortable with the many different ingredients of my identity, and a woman committed to racial and sexual freedom from oppression, I find I am constantly being encouraged to pluck out some one aspect of myself and present this as the meaningful whole, eclipsing or denying the other parts of self.”); Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of “Sexual Orientation”*, 48 *HASTINGS L.J.* 1293, 1338-40 (1997) (urging scholars to analyze the relationship between racism, sexism and heterosexism as one of mutually-reinforcing oppressions).

<sup>17</sup> Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 *MICH. J. GENDER & L.* 253, 287 (2005) (“Gender should be self-determined, period.”).

<sup>18</sup> See, e.g., RIKI ANNE WILCHINS, *READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER* 67 (1997) (“I’d also like us to investigate the means by which categories like *transgender* are produced, maintained, and inflicted . . . It is only within a system of gender oppression that transgender exists in the first place.”) (emphasis added).

<sup>19</sup> See, e.g., Unitarian Universalist Association, Office of Bisexual, Gay, Lesbian, and Transgender Concerns, *Transgender 102*, <http://www.uua.org/obgltc/resource/tg102.html> (last visited Feb. 12, 2006).

decide a person is “male” or “female” based entirely on examination of genitalia at birth.<sup>20</sup>

Most doctors would likely describe this person as transgender, having been assigned the sex “female” at birth but now apparently identifying most closely with a male gender.<sup>21</sup> Some legal scholars interpret “transgender” more narrowly, including in the category only individuals who are uncomfortable with their outward appearances and have a strong desire to medically and/or surgically alter them.<sup>22</sup> Others interpret the term more broadly, “in its most inclusive sense, as an umbrella term encompassing the following: pre-operative, post-operative and non-operative transsexual people; cross-dressers; feminine men and masculine women; intersexed persons; and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity.”<sup>23</sup>

To date no one has completed a study assessing the number of transgender youth.<sup>24</sup>

#### D. *Making it Queer*

For many people who use the term to describe themselves, “queer” is intended to be a term inclusive enough to overcome the thorny theoretical problems surrounding the labels of lesbian, gay, bisexual, and transgender. Beginning only in the last twenty years, a growing number of activists and scholars have used “queer” as an all-encompassing term to describe sexual ori-

<sup>20</sup> See, e.g., Vade, *supra* note 17, at 281 (“The baby’s genitalia are measured by a ruler, and different doctors use different rulers. If the clitoris/penis is below a certain length, it is a clitoris and the child a girl; if the clitoris/penis is above a certain length, it is a penis and the child a boy. If the clitoris/penis falls between the two marks, the child is called intersex, a medical emergency [which] must be ‘corrected’ immediately, ‘corrected’ with a knife, for the child’s own good.”); see also Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 52 (1995) (providing examples of how the custom of allowing the medical attendant at a birth to declare a baby’s sex deprives transgender people of right to determine their own gender). An estimated 1 in 100 babies are born with reproductive or sexual anatomy that does not conform to standard definitions of male and female. Doctors quite literally assign gender, through hormone treatments and/or genital surgeries, to a portion of these babies each year. See Intersex Society of North America, *Frequently Asked Questions*, <http://www.isna.org/faq/frequency> (last visited Feb. 12, 2006); see also ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000).

<sup>21</sup> Barbara L. Frankowski, *Sexual Orientation and Adolescents*, 113 PEDIATRICS 1827, 1827-32 (2004), available at <http://pediatrics.aappublications.org/cgi/content/full/113/6/1827> (“Transgendered individuals feel themselves to be of a gender different from their biological sex; their gender identity does not match their anatomic or chromosomal sex.”).

<sup>22</sup> See, e.g., Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J. 265, 289 n.1 (2005) (defining “transgender” as “those ‘who desire to change their gender, are in the process of changing their gender, or have completed the process of changing their gender’”) (citation omitted).

<sup>23</sup> Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 37 n.1 (2000).

<sup>24</sup> HUMAN RIGHTS WATCH, *HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS IN U.S. SCHOOLS* (2001), <http://www.hrw.org/reports/2001/uslgbt/toc.htm>.

entation, gender identity, and personal politics.<sup>25</sup> They mean for the term to constitute a celebratory reclaiming of a historic epithet,<sup>26</sup> as well as a theoretical move. Queer theorists reject the view that there is a discrete group of people who are, at their essence, gay or lesbian; dispute the idea that an unchanging homosexual or heterosexual identity has existed over time and in every culture; argue that sexuality and gender are social constructs instead of biological givens; and suggest that these categories are more fluid than the straight/gay divide would allow.<sup>27</sup> Some people who are only attracted to, and intimate with, members of the opposite sex even identify as queer, because they reject the dichotomous categories of “straight” and “gay.” Many of those who self-identify as queer are drawn to the term because “it’s the one that leaves the most for discovery . . . . It’s not really limiting. I can date a woman or a man. I can date someone who’s transgender.”<sup>28</sup>

How do we know that a young person is lesbian, gay, bisexual, transgender, queer, or questioning? We don’t know, not with certainty. Lawyers for children and adolescents will represent all of the following: young clients who are open and out as LGBTQ in all facets of their lives; young people who experience same-sex desire, engage in same-sex sexual behaviors and diverge from, defy, and reject gender norms, but do not personally identify as LGBTQ; young people who identify as LGBTQ but do not disclose those identities to their lawyers; young people who come out as LGBTQ to their lawyers but ask that they not reveal those identities to anyone else; young people who are not LGBTQ but are perceived to be so by their peers, families, or communities; and young people who are questioning their sexual orientation or gender identity. As elaborated in Part Three, *infra*, since *any* of their clients may be experiencing the stressors typically faced by LGBTQ young people, good lawyers should focus less on ferreting out clients for special treatment than on practicing in such a way that is sensitive and supportive to clients of *all* sexual orientations and gender identities.

### E. Causation

The causation question is as confounding and complex as the definitional one. What makes people gay, lesbian, bisexual or transgender—nature, nurture, some of each, or something else entirely? Doctors, lawyers, activists, and LGBTQ individuals disagree passionately on the answers to this question. The intense interest in causation, I argue below, stems at least in part from the widespread underlying belief that being lesbian, gay, bisexual or transgender is bad. I suggest in this Part that this underlying pejorative message is apparent to

<sup>25</sup> A useful history of the development of queer theory, politics and identities is contained in Brent Pickett, *Homosexuality*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2002), available at <http://plato.stanford.edu/archives/fall2002/entries/homosexuality>.

<sup>26</sup> *Id.*

<sup>27</sup> See *id.*; see also Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002).

<sup>28</sup> Rona Marech, *Nuances of Gay Identities Reflected in New Language: “Homosexual” is Passé in a “Boi’s” Life*, SAN FRANCISCO CHRON., Feb. 8, 2004, available at <http://sfgate.com/cgi-bin/article.cgi?f=/C/a/2004/02/08/MNGKO4RNJP1.DTL&hw=Homosexuals+Passq+Bois+Life&sn=009&sc=312>.

young people themselves. Accordingly, even the very act of engaging in this debate can be harmful to LGBTQ youth.

### 1. Etiology of Sexual Orientation

The mainstream mental-health establishment advises that while the exact cause is unknown, a person's sexual orientation is likely formed through an interaction between environmental and biological factors.<sup>29</sup> In 1973, the American Psychiatric Association abandoned its earlier position that a gay or lesbian sexual orientation results from an underlying mental illness, removing homosexuality from the Diagnostic and Statistical Manual of Mental Disorders.<sup>30</sup> The current position of mainstream mental-health organizations is that psychological distress lesbian, gay and bisexual youth and adults experience relative to heterosexuals arises not because homosexuality is psychopathological, but because a social stigma still attaches to lesbian, gay, and bisexual identities.<sup>31</sup>

Partly in response to this stigma, many gay men and lesbians and their allies have seized on studies reporting a difference in the hypothalamus of gay men—a “gay brain”<sup>32</sup>—and a similar genetic marker on the X chromosome of gay brothers—a “gay gene”<sup>33</sup>—to argue that gay and lesbian people are biologically different from heterosexuals.<sup>34</sup> While these studies are inconclusive,<sup>35</sup>

<sup>29</sup> See Frankowski, *supra* note 21 (“Sexual orientation probably is not determined by any one factor but by a combination of genetic, hormonal, and environmental influences.”); APA Online, *Answers to Your Questions About Sexual Orientation and Homosexuality*, <http://www.apa.org/pubinfo/answers.html> (last visited Feb. 12, 2006); American Psychiatric Association, *Gay, Lesbian and Bisexual Issues*, <http://healthyminds.org/glbissues.cfm> (last visited Feb. 12, 2006) (“No one knows what causes heterosexuality, homosexuality, or bisexuality.”).

<sup>30</sup> The APA deleted homosexuality from the DSM after extensive internal debate, prompted by studies showing no significant differences in the psychological functioning of adult homosexuals relative to heterosexuals. See, e.g., Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, J. PROJECTIVE TECHS. 18 (1957), cited in APA Online, *Guidelines for Psychotherapy with Lesbian, Gay and Bisexual Clients*, <http://www.apa.org/pi/lgbcc/guidelines.html> (last visited Feb. 12, 2006). Gay and lesbian activists who recognized the link between the classification of homosexuality as a disorder and their own oppression had lobbied intensely for this move. ELISE CHENIER, *AVERSION THERAPY, GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER AND QUEER CULTURE*, [http://www.glbtc.com/social-sciences/aversion\\_therapy.html](http://www.glbtc.com/social-sciences/aversion_therapy.html).

<sup>31</sup> See, e.g., AM. PSYCHOLOGICAL ASS'N, *PROMOTION AND PROTECTION OF HUMAN RIGHTS, WRITTEN STATEMENT SUBMITTED TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS* (2004), [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.NGO.259.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.NGO.259.En?Opendocument).

<sup>32</sup> Simon LeVay, *A Difference in Hypothalamic Structure Between Homosexual and Heterosexual Men*, 253 SCIENCE 1034 (1991).

<sup>33</sup> Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 26 SCIENCE 320 (1993).

<sup>34</sup> For a good overview of recent scientific research on a biological basis for homosexuality, see Neil Swidey, *What Makes People Gay?* BOSTON GLOBE, Aug. 14, 2005, available at [http://www.boston.com/news/globe/magazine/articles/2005/08/14/what\\_makes\\_people\\_gay/](http://www.boston.com/news/globe/magazine/articles/2005/08/14/what_makes_people_gay/).

<sup>35</sup> See, e.g., Frankowski, *supra* note 17 (noting “controversy and uncertainty” about genesis of sexual orientation); Matthew Brelis, *The Fading Gay Gene*, BOSTON GLOBE, Feb. 7, 1999, at C1 (citing Dean Hamer's admission that “there is a lot more than just genes going on,” after extensive criticism that the link between a gene and the complexity of sexual behavior was overly simplistic); “*Gay Gene*” *Theory Is Second-Guessed: New Study Finds No*



the many proponents of the biological view believe that it best explains their own sexual identities.<sup>36</sup> They also recognize the strategic value of the biological view. For if lesbian and gay people are born that way—if they literally can't help being gay—they believe they can more convincingly make the case that it is anti-gay discrimination, rather than homosexuality itself, that is morally wrong.<sup>37</sup> Gay and lesbian civil rights lawyers could also use evidence of the immutability of homosexuality to make more persuasive legal claims under the Equal Protection Clause of the U.S. Constitution.<sup>38</sup>

Other LGBTQ people oppose the search for proof of a biological basis of homosexuality for several reasons. First, contemporary technological advances make real the possibility that a gay gene, if found, could lead toward a new quest to prevent, or cure, homosexuality through selective abortion, genetic

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*Maternal Link*, NEWSDAY, Apr. 27, 1999, at C3; Council for Responsible Genetics, *Do Genes Determine Whether We Are Lesbian, Gay, Bisexual, or Straight?*, <http://www.genewatch.org/programs/privacy/gene-sexuality.html> (last visited Feb. 12, 2006) (critiquing studies by LeVay and Hamer). Interest in finding a biological basis for homosexuality persists. The National Institutes of Health is currently funding a five-year, \$2.5 million genetic study of gay brothers. The Gay Gene: On-going Studies, <http://members.aol.com/gaygene/pages/studies.htm> (last visited Feb. 12, 2006).

<sup>36</sup> See Swidey, *supra* note 34 (quoting a gay Massachusetts man: "I think it's important for the public—especially the religious right—to know it's not a choice for some people . . . I feel I was born this way"). In one of the presidential debates, Senator John Kerry expressed this view when referencing Mary Cheney, daughter of the vice-president: "I think if you were to talk to Dick Cheney's daughter, who is a lesbian, she would tell you that she's being who she was, she's being who she was born as," Kerry said, "I think if you talk to anybody, it's not choice. I've met people who struggled with this for years, people who were in a marriage because they were living a sort of convention, and they struggled with it." Ex-Gay Watch: News and Analysis of Exgay Politics, Ex-gays Claim Kerry 'Born Gay' Remark Insults Them, [http://www.exgaywatch.com/blog/archives/2004/10/exgays\\_claim\\_ke.html](http://www.exgaywatch.com/blog/archives/2004/10/exgays_claim_ke.html) (last visited Feb. 12, 2006). *But see* Sheryl Swoopes, as told by LZ Granderson, *Outside the Arc*, ESPN THE MAGAZINE, Oct. 26, 2005, available at <http://sports.espn.go.com/wnba/news/story?id=2204322> (quoting Houston Comets basketball standout Sheryl Swoopes upon her coming out as a lesbian: "I didn't always know I was gay. I honestly didn't. Do I think I was born this way? No. And that's probably confusing to some, because I know a lot of people believe that you are.").

<sup>37</sup> See, e.g., Neela Banerjee, *Methodist Court Removes Openly Lesbian Minister*, N.Y. TIMES, Nov. 1, 2005, available at <http://www.nytimes.com/2005/11/01/national/01methodists.html> (discussing efforts by California-Nevada conference of the United Methodist Church to discourage bias and discrimination against gay men and lesbians in the Church by persuading the Church's Judicial Council to rule that sexual orientation is innate); Jeff Walsh, *Queer Science: Is it in Your Genes?*, OASIS, Apr. 1997, available at <http://www.oasismag.com/Issues/9705/cover.html> (quoting gene researcher Simon LeVay: "There is no question that people who think sexuality is inborn are, in general, much better disposed towards gay people and gay rights than people who think it's some kind of lifestyle choice . . . . Since I've published my work, I've run into many people whose minds have been changed due to the science").

<sup>38</sup> The federal courts have never found the equal-protection claims of gays and lesbians to merit strict or heightened scrutiny; their claims have always been evaluated pursuant to the lower, rational-basis standard. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *High Tech Gays v. Def. Indus. Sec. Clearance Off.*, 895 F.2d 563, 570-571 (9th Cir. 1990); *Ledesma v. Block*, 825 F.2d 1046, 1050 (6th Cir. 1987); *Cervantes v. Guerra*, 651 F.2d 974, 979 (5th Cir. 1981); see Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 876-77 (2002) ("Two criteria the courts employ when determining whether a classification merits heightened scrutiny are the immutability and the visibility of the trait on which the classification is based.").

engineering, and the like.<sup>39</sup> Second, the long history of discrimination and bias based on other biological traits that their owners “can’t help”—sex and skin color, for example—undercuts the notion that a proven biological basis for fundamental difference would suffice to eliminate prejudice.<sup>40</sup> Third, the discovery of a biological basis for homosexuality is by itself unlikely to persuade conservative and religious opponents of equal rights for LGBTQ people that they are wrong. Such individuals believe same-sex sexual *behavior* is immoral and must be suppressed. For them, the biological origins of same-sex sexual impulses would be irrelevant and would in no event justify a gay person acting on his desires.<sup>41</sup> Finally, when made by lesbians and gay men, the biological argument appears at least somewhat rooted in self-hatred. As one activist argues, “To justify a behavior by saying ‘I can’t help it’ is to imply that if you *could* help it, you would. *Who cares* what causes it? Homosexual relations should be accepted for the same reasons as any other consensual form of sexual expression: as an affirmation of our human freedom.”<sup>42</sup>

Ultimately, a collective re-appraisal of why the etiology of gay and lesbian sexual orientation seems so endlessly fascinating is more important to the nurturance of LGBTQ youth than arriving at a definitive answer to the question of what causes people to be lesbian or gay. For the question of what causes people to be lesbian and gay simply would not seem so interesting or significant if LGB sexuality were normalized. No one ever considers what makes people straight, because heterosexuality is seen as normal, natural, and a given. Yet as a society, thirty-two years after the de-classification of homosexuality as a mental disorder, we remain intrigued by the etiology of gay and lesbian sexuality and identity. Why? Because in spite of unprecedented visibility of lesbians and gay men,<sup>43</sup> legal victories in the realm of gay and lesbian civil rights,<sup>44</sup> and

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<sup>39</sup> See, e.g., Chandler Burr, *Why Conservatives Should Embrace the Gay Gene*, THE WKLY. STANDARD, Dec. 9, 1996, <http://members.aol.com/gaygene/pages/standard.htm>; COUNCIL FOR RESPONSIBLE GENETICS, DO GENES DETERMINE WHETHER WE ARE LESBIAN, GAY, BISEXUAL OR STRAIGHT?, <http://www.gene-watch.org/programs/privacy/gene-sexuality.html>; Katha Pollitt, *It's a Bird, It's a Plane, It's . . . Superclone?*, THE NATION, July 23, 2001, available at <http://www.thenation.com/docprint.mhtml?i=20010723&s=POLLITT>.

<sup>40</sup> COUNCIL FOR RESPONSIBLE GENETICS, *supra* note 39.

<sup>41</sup> See Joe Sartelle, *Rejecting the Gay Brain (and Choosing Homosexuality)*, BAD SUBJECTS, May 1994, <http://bad.eserver.org/issues/1994/14/sartelle.html> (last visited Feb. 12, 2006).

<sup>42</sup> *Id.*

<sup>43</sup> Popular culture is awash with LGBTQ characters and themes. On television, there are “Queer Eye for the Straight Guy,” “The ‘L’ Word,” “Queer as Folk,” “Will and Grace,” MTV’s “Real World,” “Road Rules,” and “True Life,” along with the cancelled “Buffy the Vampire Slayer” and “My So-Called Life.” *The New York Times* features same-sex couples in its wedding announcements section; the September-October 2003 issue of *Bride* included its first feature on same-sex weddings.

<sup>44</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (finding that a Texas statute criminalizing same-sex sodomy violated the Due Process Clause of the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620 (1996) (ruling a Colorado amendment prohibiting the inclusion of homosexuals in antidiscrimination laws unconstitutional because it bore no rational relationship to a legitimate governmental purpose, as required by the Equal Protection Clause); *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the refusal of the Commonwealth of Massachusetts to issue marriage licenses to same-sex couples was unlawful because the same-sex marriage ban had no rational basis under either the due process or equal protection guarantees of the state constitution); *State v. Limon*, 122

growing acceptance—particularly among young people—of legal protections for same-sex unions,<sup>45</sup> homosexuality is still viewed as deviant, unnatural, and an aberration. LGB youth internalize this society-wide view, as do their peers, parents, teachers, doctors, coaches, and religious leaders. It creates the stage for a uniquely difficult adolescent drama.

## 2. Etiology of Transgender Identity

How does a young person's gender identity develop? As with gay and lesbian sexual orientation, the question of etiology of gender identity provokes at least two, sometimes conflicting, sets of opinions. One, medical perspective posits that gender identity derives from biology; specifically, from brain structure, hormones, and the interaction between the two.<sup>46</sup> Some young people whose sense of their own gender identity varies from the gender that others ascribe to them are diagnosed with "gender identity disorder" ("GID"). This diagnosis—created after the removal of homosexuality from the DSM in 1973—is to be given by psychiatrists to those children and adolescents who experience "a strong and persistent cross-gender identification . . . persistent discomfort with [their] sex or sense of inappropriateness in the gender role of that sex . . . [and] clinically significant distress or impairment in social, occupational, or other important areas of functioning."<sup>47</sup>

The conceptualization of transgender identity as manifestation of a psychological disturbance has allowed some transgender people to obtain important benefits.<sup>48</sup> For example, attorneys for transgender youth diagnosed with GID have relied on the diagnosis to win for their clients the right to wear the clothes of their choice when state actors had prevented them from doing so. In *Doe v. Bell*,<sup>49</sup> a New York trial court ruled that the Administration for Children's Services (New York's child-welfare agency) could not lawfully prohibit a seventeen-year-old in a residential facility designated for males from wearing

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P.3d 22 (Kan. 2005) (holding unconstitutional under equal-protection provisions of the federal and state Constitutions statute that punished sodomy between adults and children of the opposite sex less severely than sodomy between adults and children of the same sex).

<sup>45</sup> Charisse Jones, *Poll: Young Adults Back Gay Marriages*, USA TODAY, June 30, 2003, available at [http://www.usatoday.com/news/nation/2003-06-30-gaypoll-usat\\_x.htm](http://www.usatoday.com/news/nation/2003-06-30-gaypoll-usat_x.htm) (detailing results of a poll that showed that more than sixty percent of Americans between eighteen and twenty-nine support the legalization of same-sex marriage).

<sup>46</sup> See, e.g., ANNE VITALE, NOTES ON GENDER ROLE TRANSITION: RETHINKING GENDER IDENTITY DISORDER TERMINOLOGY IN THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (2005), <http://www.avitale.com/hbigdataalkplus2005.htm> (summarizing studies of "physiological data that propose that much of an individual's gender identity may depend on biological events outside of anyone's control").

<sup>47</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed. 2000).

<sup>48</sup> For example, the diagnosis is typically considered by doctors to be a prerequisite before they will perform sex-reassignment surgery for transgender people who wish to more closely anatomically resemble their chosen gender. See, e.g., THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 18 (6th ed. 2001), available at <http://www.hbigda.org/soc.htm>. For a thorough and thoughtful exploration of the strategic usefulness yet theoretically problematic nature of using GID as a basis on which to make claims for transgender people, see Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 34-37 (2003).

<sup>49</sup> 754 N.Y.S.2d 846 (2003).

skirts or dresses.<sup>50</sup> The plaintiff had been designated a boy at birth, but identified as a girl and had been diagnosed with GID.<sup>51</sup> Two doctors deemed by the court to be experts in transgender issues testified that the plaintiff's treatment plan was consistent with being allowed to dress in "feminine" attire.<sup>52</sup> The court ruled that because GID is a disability, allowing Doe to dress in "girls'" clothes was a reasonable accommodation mandated by the state's disability anti-discrimination statute.<sup>53</sup> In *Doe v. Yunits*,<sup>54</sup> a Massachusetts trial court similarly ruled that a transgender girl<sup>55</sup> considered a boy by her school could proceed with a disability claim against the school in challenging the dress-code policy that prohibited her from wearing "girls'" clothes.<sup>56</sup> Again, a GID diagnosis was crucial to the court's ruling.<sup>57</sup>

Many transgender people and their allies offer an alternative conceptualization of transgender and gender non-conforming identities. In its most basic form, this perspective is that, whether or not transgender identity has some physiological basis, it should not be treated as a psychological disorder.<sup>58</sup> Under this view, being able to live according to one's own sense of gender identity is an essential form of expression. Transgender theorist and attorney Dean Spade elaborates: "I reject the narrative of a gender troubled childhood. My project would be to promote sex reassignment, gender alteration, temporary gender adventure, and the mutilation of gender categories, via surgery, hormones, clothing, political lobbying, civil disobedience, or any other means available."<sup>59</sup>

While it has allowed for favorable judicial rulings for some transgender people, the model of transgender identity as a manifestation of a psychological disorder can create many problems. A GID diagnosis can provide a basis on which parents can enlist unscrupulous mental health professionals in their efforts to enforce gender conformity in their children.<sup>60</sup> As attested by trans-

<sup>50</sup> *Id.* at 856.

<sup>51</sup> *Id.* at 848.

<sup>52</sup> *Id.* at 848-49.

<sup>53</sup> The plaintiffs' attorneys had also argued that Doe's first amendment right to free expression was violated by the clothing policy; the court did not reach that claim. Sylvia Rivera Law Project, *Victory for Trans Teen in Foster Care*, <http://www.srlp.org/newsletter/v1n1/fostercare.html> (last visited Feb. 12, 2006).

<sup>54</sup> 15 Mass. L. Rptr. 278, 2001 WL 664947 (Mass. Super. 2001).

<sup>55</sup> A "transgender girl" is a transgender individual who identifies as female; a "transgender boy" identifies as male.

<sup>56</sup> *Doe*, 2001 WL 664947 at \*1.

<sup>57</sup> *Id.* at \*5.

<sup>58</sup> Katherine G. Wilson, *The Disparate Classification of Gender and Sexual Orientation in American Psychiatry*, <http://www.priory.com/psych/disparat.htm> (last visited Feb. 12, 2006).

<sup>59</sup> Spade, *supra* note 48, at 21.

<sup>60</sup> See, e.g., Ellen K. Feder, *Regulating Sexuality*, in *HAVING AND RAISING CHILDREN: UNCONVENTIONAL FAMILIES, HARD CHOICES, AND THE SOCIAL GOOD* 163-76 (Uma Narayan & Julia J. Bartkowiak eds., 1999) (critiquing subjection of young people diagnosed with GID to psychiatric intervention, including hospitalization); GID Reform Advocates, <http://www.transgender.org/gidr/index.html#what> (last visited Feb. 12, 2006) (asserting that the creation of GID has meant that "a widening segment of gender nonconforming youth and adults are potentially subject to diagnosis of psychosexual disorder, stigma and loss of civil liberty"); cf. CATHERINE TUERKE ET AL., *IF YOU ARE CONCERNED ABOUT YOUR CHILD'S BEHAVIORS: A GUIDE FOR PARENTS* (2003), <http://www.dcchildrens.com/dcchildrens/about/subclinical/>

gender adults subjected as young people to doctors and therapists who counseled them to be more “feminine” or “masculine,” efforts to force a child to alter gender identity are experienced by the young person as painful and oppressive.<sup>61</sup> Second, GID is often used by parents and mental health practitioners alike as a subterfuge for what is really at stake—prevention of homosexuality. A member of the DSM-IV Subcommittee on Gender Identity Disorders concedes that parents who bring children to doctors for treatment of gender disorders do so, in the main, “because they don’t want their kid to be gay.”<sup>62</sup> Third, the GID diagnostic criteria do not allow for the possibility that a transgender or gender non-conforming young person experiences “clinically significant distress or impairment” *not* because of his or her gender transgression per se, but because of discrimination and abuse from people who object to divergence from—and defiance and rejection of—strict gender categories. Fourth, when GID is a necessary prerequisite for the attainment of legal rights and sensitive medical care for transgender people, those individuals who identify as transgender, but who do not experience “clinically significant” resulting impairment or distress, will face the dilemma of having to either misrepresent their experiences or find themselves without recourse in their quest for equality and proper medical treatment.<sup>63</sup> In other words, transgender youth can be forced to identify as sick in order to have the right to express their gender identity in their own way. Finally, medical sanctioning of the notion that deviation from extremely narrow gender roles is a sickness ultimately reifies those narrow roles, thereby limiting the full and free development of all children, LGBTQ or not.

Part Two fleshes out some of the concrete manifestations of the still-prevalent negative and hostile attitudes about homosexuality and gender non-conformity revealed in the above consideration of causation. It describes problems

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subneuroscience/subgender/guide.aspx (providing guidance to parents on how to find mental-health providers who will support children with “gender-variant behaviors” without trying to change those behaviors or adding to the stigma and isolation they already feel).

<sup>61</sup> Describing the commitments to multiple psychiatric hospitals and residential treatment facilities that subsumed most of her adolescence, Daphne Scholinski (who now uses the name Dylan) states:

I still wonder why I wasn’t treated for my depression, why no one noticed I’d been sexually abused, why the doctors didn’t seem to believe that I came from a home with physical violence.

Why the thing they cared the most about was whether I acted the part of a feminine young lady.

The shame is that the effects of depression, sexual abuse, violence: all treatable. But where I stood on the feminine/masculine scale: unchangeable. It’s who I am.

DAPHNE SCHOLINSKI, *THE LAST TIME I WORE A DRESS* 197 (1997).

<sup>62</sup> PHYLLIS BURKE, *GENDER-SHOCK: EXPLODING THE MYTHS OF MALE AND FEMALE* 100 (1996) (quoting Dr. Kenneth Zucker, who runs “childhood gender identity clinic” in Canada); *see also* Feder, *supra* note 60, at 169-70 (citing GID researchers and proponents who describe one of the treatment goals for GID as “prevention of . . . homosexuality”). In 1995, Richard Green, psychiatrist and author of *The Sissy Boy Syndrome and the Development of Homosexuality*, pithily described the putative link between early gender nonconformity and later homosexuality: “Barbies at five, sleeps with men at twenty-five,” in BURKE *supra*, at 59.

<sup>63</sup> Dean Spade explains this dilemma: “The medical approach to our gender identities forces us to rigidly conform ourselves to medical providers’ opinions about what ‘real masculinity’ and ‘real femininity’ mean, and to produce narratives of struggle around those identities that mirror the diagnostic criteria of GID.” Spade, *supra* note 48, at 28-29.

LGBTQ youth face at home and in school. I then examine the ways in which the adaptive—if sometimes self-destructive—behaviors engaged in by LGBTQ youth in the face of conflict and stress render them vulnerable to involvement in the child welfare and juvenile justice systems. I conclude this Part with a focus on their unique struggles in those systems.

### III. LGBTQ LIFE: INTERNAL AND EXTERNAL STRUGGLES

Many LGBTQ young people come of age in homes<sup>64</sup> and schools where their sexual orientation and gender identity create enormous conflict. They must contend with unsupportive parents and teachers and bullying classmates. At least half of LGBTQ adolescents experience negative reactions from family members upon coming out; one study found that approximately thirty percent of them are physically abused.<sup>65</sup> Many parents compare the sense of loss and devastation they feel upon learning their child is gay or lesbian to mourning a death.<sup>66</sup> Their child feels lost to them, and they become estranged.<sup>67</sup> While LGBTQ youth might in theory find nurturing role models in adults whose sexual orientation and gender identity are the same as their own, LGBTQ adults historically have shied away from young people. With the myth<sup>68</sup> of the homosexual predator dominating our collective consciousness, we LGBTQ adults have worried that any good intentions we may have will be misinterpreted, and that we will be accused of trying to “swell the ranks,” or, worse, of eyeing

<sup>64</sup> Gay academic Wayne Koestenbaum refers to “home” as having “grim meanings for the gay kid or the kid on the verge of claiming that ambiguous identity. Home is the boot camp of gender; at home, we are supposed to learn how to be straight.” WAYNE KOESTENBAUM, *THE QUEEN’S THROAT: OPERA, HOMOSEXUALITY, AND THE MYSTERY OF DESIRE* 47 (1993).

<sup>65</sup> COLLEEN SULLIVAN ET AL., *YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE* (2001), [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/25.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/25.pdf).

<sup>66</sup> RYAN & FUTTERMAN, *supra* note 3, at 68 (summarizing national study of parents of lesbian and gay people). For some, their children are effectively dead to them when they come out. Teemu Ruskola recounts two examples. One nineteen-year-old gay youth said, “My parents couldn’t deal with it. My mother said, ‘You are dead to me. How can you be queer?’” Another mother nursed her son, who had AIDS, along with his lover. His lover’s own parents had abandoned him, saying “You made your own bed; now go lie in it.” Ruskola, *supra* note 6, at 322 nn. 254-255 (citation omitted).

<sup>67</sup> Reflecting on the early years of ACT-UP, the grass-roots direct-action group that erupted in the early 1980s to fight the AIDS epidemic, activist and author Sarah Schulman writes:

I remember feeling accountable to others and responsible to intervene on their behalf. I felt this way as a person who doesn’t have a family in a community of many gay people of my generation who don’t have families or institutions of permanence. I felt that I needed such institutions, and I felt deeply responsible to other gay people who needed me—especially because they had no one else.

Artery: The Aids-Arts Forum, *Gentrification of the Mind*, [http://www.artistswithaids.org/artery/symposium/symposium\\_schulman.html](http://www.artistswithaids.org/artery/symposium/symposium_schulman.html) (last visited Feb. 12, 2006).

<sup>68</sup> See, e.g., Carole Jenn et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, *PEDIATRICS* 1 (July 1994) cited in Appellant’s Reply Br. on Reh’g, *Kansas v. Matthew R. Limon*, No. 00-85898-A, at 2 (on file with author) (finding risk that a child will be molested by a relative’s heterosexual partner is over 100 times greater than risk of molestation by someone gay).

young people as sexual prey.<sup>69</sup> Deprived of parental and family support, and guidance from the adult LGBTQ community, lesbian, gay, bisexual, transgender and questioning young people must learn to negotiate their stigmatized minority identities entirely on their own. Unlike heterosexual young people of racial and ethnic minorities who can often draw on love from their families and access rich traditions of culture and history,<sup>70</sup> LGBTQ youth of all races and ethnicities tend to experience isolation from their families.

Conflicts at home over sexual orientation and gender identity can lead to disastrous results for LGBTQ youth. Some parents actively seek to change their children's gender identity and/or sexual orientation, by sending them to gender clinics or "reparative" therapy, the aim of which is to convert people from gay to straight.<sup>71</sup> Despite the fact that every major mental health organization has condemned this therapy,<sup>72</sup> its practice survives, fueled by religious conservatives.<sup>73</sup> Other parents force their LGBTQ children from the home, or make life so difficult that they feel they have no choice but to leave. Still others abuse or neglect their children, leading to their removal by child-welfare agencies. As a result, as shown by numerous studies, the homeless youth popu-

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<sup>69</sup> When WNBA basketball star Sheryl Swoopes came out publicly as a lesbian in an interview with ESPN Magazine, she stated, "My biggest concern is that people are going to look at my homosexuality and say to little girls—whether they're white, black, Hispanic—that I can't be their role model anymore." Granderson, *supra* note 36. In a good example of activism aimed at debunking the myth of the recruiting LGBTQ adult in order to provide accurate information on LGBTQ lives to young people, the New York-based Lesbian Avengers in 1992 distributed three hundred lavender balloons emblazoned with the message "Ask About Lesbian Lives" to elementary-school students in Queens. The impetus for the action was the growing influence of religious conservatives over curriculum. Letters from CAMP Rehoboth, *PAST Out: The Fire-Eating Lesbian Avengers*, [http://www.camprehoboth.com/issue06\\_13\\_03/pastout.htm](http://www.camprehoboth.com/issue06_13_03/pastout.htm) (last visited Feb. 12, 2006). For a more detailed discussion of the tendency of LGBTQ adults to avoid LGBTQ young people, see LINNEA DUE, *JOINING THE TRIBE* (1995).

<sup>70</sup> See RYAN & FUTTERMAN, *supra* note 3, at 14.

<sup>71</sup> For a discussion of the therapeutic practice of working to change a person's sexual orientation, see generally JOSEPH NICOLOSI, *REPARATIVE THERAPY OF THE MALE HOMOSEXUAL* (1991); Joseph Nicolosi, *Let's Be Straight: A Cure Is Possible*, *INSIGHT* 24, Dec. 6, 1993; National Association for Research and Treatment of Homosexuality, <http://www.narth.com/docs/consequences.html> (last visited Feb. 12, 2006); see also Eartha Melzer, *Tenn. Probes 'Ex-Gay' Camp*, WASHINGTON BLADE ONLINE, June 24, 2005, <http://www.washblade.com/2005/6-24/news/national/tenprobe.cfm> (discussing Tennessee's investigation of allegations of child abuse at "ex-gay" camp run by Love in Action, which runs a Memphis facility aimed at converting young people from gay to straight). For a critical perspective on the practice, see generally David Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999); Laura Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion*, 8 B.U. PUB. INT. L. J. 219 (1999).

<sup>72</sup> Gay, Lesbian & Straight Education Network, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators & School Personnel*, [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/123-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/123-1.pdf) (last visited Feb. 12, 2006) (quoting statements by the American Academy of Pediatrics, the American Counseling Association, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers critical of the tenets of reparative therapy); see also Yoshino, *supra* note 38, at 800 n.147 (listing organizations that oppose conversion therapy).

<sup>73</sup> See, e.g., Mark Benjamin, *Turning off Gays*, SALON.COM, July 18, 2005, <http://www.salon.com/news/feature/2005/07/18/ungay/> (last visited Feb. 12, 2006) (exposing links between the movement of "ex-gays" and the religious right).

lation and the foster-care system are both disproportionately comprised of LGBTQ young people.<sup>74</sup> On the street, LGBTQ youth have next to nowhere to turn. New York City, by one estimate, is home to nearly 7000 homeless LGBTQ youth; only twenty-six beds are allocated specifically to LGBTQ individuals, a small number that is problematic because the NYC public shelter system is historically unwelcoming and hostile to LGBTQ individuals.<sup>75</sup> Studies document some of the other effects of mistreatment. Lesbian and gay youth were found by one researcher to be more likely to attempt suicide than other young people.<sup>76</sup> Another study reported higher rates of substance abuse for lesbian and gay youth than for their heterosexual peers.<sup>77</sup> One state-wide study found that students who either identified as gay, lesbian, or bisexual or reported any same-sex sexual contact were significantly more likely than other students to have been involved with gangs.<sup>78</sup> For youth of color, these issues are compounded because they also face race-based discrimination and marginalization.

Schools can be equally difficult. A 2003 national survey of self-identified LGBTQ youth ages thirteen through twenty found that ninety percent of respondents heard homophobic remarks in their schools frequently or often; nearly twenty percent heard homophobic remarks from faculty or staff at least some of the time; three quarters of youth reported feeling unsafe in their schools, primarily because of their sexual orientation or gender expression; nearly twenty percent reported some experience of physical assault because of sexual orientation; more than ten percent describe physical assault because of their expressed gender identity; and over half of the students surveyed reported that their property had been deliberately damaged or stolen in the past year.<sup>79</sup>

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<sup>74</sup> See, e.g., SULLIVAN ET AL., *supra* note 65 (summarizing research on LGBTQ homeless youth and youth in foster care); Casciano et al., *supra* note 5, at 231 (“Of the nearly 20,000 kids who are living on the streets of New York, who sleep under the bridges and on the piers and on the subways every night, between forty and fifty percent of them self-identify as lesbian, gay or bisexual. That is a statistic . . . that is repeated in every city that has ever done such a study.”); National Radio Project, *Queer Youth Challenges*, April 6, 2005, <http://www.radioproject.org/archive/2005/1405.html>; The Safe Schools Coalition, *Homeless LGBT Youth And LGBT Youth in Foster Care*, <http://www.safeschoolscoalition.org/RG-homeless.html#STATISTICS> (last visited Feb. 12, 2006) (summarizing studies showing that, in major urban areas, the percentage of the homeless/runaway population is between twenty-five and forty percent LGBTQ).

<sup>75</sup> Deena Guzder, *Gay, Young and Homeless*, N.Y. BLADE, July 8, 2005, available at <http://nyblade.com/2005/7-8/locallife/main/>.

<sup>76</sup> PAUL GIBSON, US DEP'T OF HEALTH & HUMAN SVCS., REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE: PREVENTION AND INTERVENTIONS IN YOUTH SUICIDE (1989).

<sup>77</sup> See, e.g., Michael Resnick et al., *Protecting Adolescents From Harm: Findings from the National Longitudinal Study on Adolescent Health*, J.A.M.A. 823, 823-832 (Sept. 1997). One researcher critiques much of the research cited in this section for its focus on the “dramatic, rather than the normative” and concentration on problems rather than the capacity to remain resilient, recounting the story of a young man he interviewed in the 1990s, who questioned whether he qualified to participate in the research, because, as he said, “I don’t think I’m gay. . . . I haven’t tried to kill myself yet.” SAVIN-WILLIAMS, *supra* note 1, at 68.

<sup>78</sup> ELIZABETH SPINNEY, EXEC. OFFICE OF PUB. SAFETY, MASSACHUSETTS JUVENILE JUSTICE DATA AND INFORMATION (2004), <http://www.burnsinstitute.org/dmc/ma/massdata.pdf>.

<sup>79</sup> GAY, LESBIAN & STRAIGHT EDUC. NETWORK, 2003 NATIONAL SCHOOL CLIMATE SURVEY, [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/300-3.PDF](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF).



Transgender youth face harassment and hostile questions when trying to use public restrooms.<sup>80</sup> Almost half of those who experienced harassment or assault never reported the incidents to anyone.<sup>81</sup> Of those students who reported difficulties to their parents or guardians, twenty percent reported that their parents or guardians had not intervened on their behalf with school officials.<sup>82</sup> Not surprisingly, the National Mental Health Association reports that nationwide, twenty-eight percent of lesbian and gay teens drop out of school annually—three times the rate of heterosexual students.<sup>83</sup>

Things are improving for some LGBTQ students, particularly those in urban areas and on both coasts. “Gay-Straight Alliances” (GSAs), the first of which was formed in a Massachusetts private school in 1989,<sup>84</sup> now provide forums in nearly 3000 schools nationwide in which students who identify as LGBTQ or are LGBTQ allies come together for mutual support.<sup>85</sup> Under federal law,<sup>86</sup> if a school maintains any student groups unrelated to the curriculum, it must also provide equal access and treatment to student groups created for LGBTQ students.<sup>87</sup> These school-based groups supplement the many commu-

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<sup>80</sup> See, e.g., Emily Grossman, *Transgender Bathrooms* (Columbia Radio News, Radio Workshop broadcast Mar. 3, 2003) (transcript available at <http://www.jrn.columbia.edu/studentwork/radio/261/2003-03-28/1981.asp>) (quoting female-to-male transgender lawyer and activist Dean Spade: “I have been kicked out of both men’s and women’s rooms, leaving me with the idea, that I look, whatever my appearance is, at least at some points in my life, has clearly been to a lot of people, not sufficiently male or female to use a bathroom.”).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* For every GLBT youth who reported being targeted for anti-gay harassment, four heterosexual youth reported harassment or violence for being perceived as gay or lesbian.

<sup>83</sup> National Mental Health Association, *Bullying in Schools: Harassment Puts Gay Youth At Risk*, <http://www.nmha.org/pbedu/backtoschool/bullyingGayYouth.cfm> (last visited Feb. 12, 2006). In Massachusetts, a state with a relatively large number of services for LGBTQ students and legal rights and protections for queer adults, students who self-identified as LGBTQ were five times more likely to have attempted suicide in the past year, three times more likely to have missed school in the past month because they felt unsafe, and three times more likely to have been injured or threatened by a weapon at school. THE MASS. GOVERNOR’S COMM’N ON GAY AND LESBIAN YOUTH, THE 2003 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY, <http://www.mass.gov/gcgly/yrbs03.pdf>.

<sup>84</sup> Carol A. Snively, *Gay-Straight Alliances*, [http://www.glbtc.com/social-sciences/gay\\_straight\\_alliances.html](http://www.glbtc.com/social-sciences/gay_straight_alliances.html) (last visited Feb. 12, 2006).

<sup>85</sup> See Gay, Lesbian & Straight Education Network, <http://www.glsen.org/cgi-bin/iowa/student/student/index.html> (last visited Feb. 12, 2006). In recognition of the difficulty that openly LGBTQ students traditionally have in schools, the Institute for the Protection of Lesbian and Gay Youth formed in New York City in 1979. It operates the Harvey Milk School, a specialized school focused on youth at risk because of their sexual orientation or gender identity. See The Hetrick-Martin Institute, Home of the Harvey Milk High School, <http://www.hmi.org> (last visited Feb. 12, 2006).

<sup>86</sup> 20 U.S.C. §§ 4071-4074 (2000).

<sup>87</sup> See *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (where public secondary school maintains any non-curriculum related student group, it has created a limited open forum under the Equal Access Act and may not deny recognition to other non-curriculum related groups without running afoul of the provisions of the Act); *Colin v. Unified Orange Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000). For a helpful overview of legal issues pertaining to LGBTQ students and teachers, see NAT’L SCH. BD. ASS’N, DEALING WITH LEGAL MATTERS SURROUNDING STUDENTS’ SEXUAL ORIENTATION AND SEXUAL IDENTITY, <http://www.nsba.org/site/docs/34600/34527.pdf>.

nity-based organizations that have sprung up in the last twenty-five years.<sup>88</sup> Additionally, some students who have faced abuse and harassment based on their sexual orientation, gender identity, or perceptions of their orientation or identity, have successfully sued their school districts under section 1983,<sup>89</sup> Title IX,<sup>90</sup> and the First Amendment,<sup>91</sup> where they have been able to show that the abuse and harassment occurred with the knowledge and tacit approval or indifference of school administrators.

In spite of the advent of LGBTQ youth organizations in some areas, and the possibility of raising legal claims to combat school-based abuse and discrimination, the overall state of legal protections for LGBTQ youth in schools is dismal. Alabama,<sup>92</sup> Arizona,<sup>93</sup> South Carolina,<sup>94</sup> and Texas<sup>95</sup> have laws that specifically prohibit any positive portrayal of LGBTQ people or issues in schools. Mississippi requires that its schools "teach[ ] the current state law related to . . . homosexual activity."<sup>96</sup> Oklahoma law requires that HIV educa-

<sup>88</sup> See National Youth Advocacy Coalition, <http://www.nyacyouth.org/nyac/programs.html> (last visited Feb. 12, 2006). The National Youth Advocacy Coalition is a national organization that advocates for LGBTQ youth; its website links to some of the many LGBTQ-youth-serving organizations around the country.

<sup>89</sup> *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003) (denying summary judgment to school administrators in claim by students that they were discriminated against because they were, or were perceived to be, gay, lesbian, or bisexual); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (denying summary judgment to school administrators in gay student's equal protection claim that school administrators failed to follow their non-harassment policy because of his gender and sexual orientation).

<sup>90</sup> *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (affirming damages award by jury against school district where it acted with deliberate indifference to pervasive student-on-student sexual harassment); see also NAT'L SCH. BDS. ASS'N, *supra* note 87, (citing U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001) (stating that "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX").

<sup>91</sup> *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (holding that a student states a claim under the First Amendment where he was repeatedly harassed by other students and, when he complained, was told by school administrators to keep his sexual orientation to himself).

<sup>92</sup> ALA. CODE § 16-40A-2(c)(8) (1992) ("Course materials and instruction that relate to sexual education or sexually transmitted diseases should include all of the following elements: . . . An 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.").

<sup>93</sup> ARIZ. REV. STAT. ANN. § 15-716(C) (1991) ("No district shall include in its course of study instruction which . . . (1) [P]romotes a homosexual life-style; (2) [p]ortrays homosexuality as a positive alternative life-style; (3) suggests that some methods of sex are safe methods of homosexual sex.").

<sup>94</sup> S.C. CODE ANN. § 59-32-30 (1988) (describing health education program and ordering that "[t]he program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases").

<sup>95</sup> TEX. HEALTH & SAFETY CODE ANN. § 85.007 (Vernon 1991) ("The materials in education programs intended for persons younger than 18 years of age must . . . state that homosexual conduct is not an acceptable lifestyle.").

<sup>96</sup> MISS. CODE ANN. § 37-13-171 (1998).

tion include a declaration that homosexual activity is primarily responsible for contact with the HIV virus.<sup>97</sup> Only a handful of states provide any legal protections for students based on their sexual orientation.<sup>98</sup> A smaller number include protections based for students based on their gender identity.<sup>99</sup> The absence of LGBTQ-friendly organizations, policies and laws in most areas makes life more difficult for LGBTQ students. A 2004 state-by-state study<sup>100</sup> revealed that LGBTQ students who either did not have access to, or did not know of, policies protecting them from violence and harassment were forty percent more likely to report skipping school out of fear for their safety.<sup>101</sup>

<sup>97</sup> OKL. STAT. ANN. tit. 70, § 11-103.3 engaging in homosexual activity, promiscuous sexual activity, intravenous drug use or contact with contaminated blood products is now known to be primarily responsible for contact with the AIDS virus”).

<sup>98</sup> See, e.g., CAL. WELF. & INST. CODE § 14504.1 (2003) (“School-based programs that include sexuality education shall comply with the requirements of Section 220 of the Education Code, which prohibits discrimination in schools based on sexual orientation.”); CAL. EDUC. CODE § 233.5 (2003) (“Each teacher is . . . encouraged to create and foster an environment that encourages pupils to realize their full potential and that is free from discriminatory attitudes, practices, events, or activities, in order to prevent acts of hate violence.”); MD. CODE ANN., EDUC. § 7-424 (West 2005) (Department of Education required to maintain and report statistics on school-based intimidation or harassment “[m]otivated by an actual or a perceived personal characteristic such as . . . sexual orientation”); MASS. GEN. LAWS ANN. ch 76, § 5 (1993) (“No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of . . . sexual orientation.”); N.J. STAT. ANN. § 18A:37-14 (West 2002) (proscribing harassment, intimidation or bullying “motivated by any actual or perceived characteristic, such as . . . sexual orientation”); R.I. GEN. LAWS § 28-5-14 (2004) (“In order to eliminate prejudice among the various ethnic groups in this state and to further good will among those groups, the commission and the state department of elementary and secondary education are jointly directed to prepare a comprehensive educational program, designed for the students of the public schools of this state and for all other residents of the state, calculated to emphasize the origin of prejudice based on . . . sexual orientation.”); 16 VT. STAT. ANN. tit. 16, § 11 (2003) (proscribing harassment “based on or motivated by a student’s or a student’s family member’s sexual orientation”); WIS. STAT. § 118.13 (1997) (“No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extra-curricular, pupil services, recreational or other program or activity because of the person’s . . . sexual orientation.”).

<sup>99</sup> See, e.g., CAL. EDUC. CODE § 233.5 (2003) (“Each teacher is . . . encouraged to create and foster an environment that encourages pupils to realize their full potential and that is free from discriminatory attitudes, practices, events, or activities, in order to prevent acts of hate violence.”); MD. CODE ANN., EDUC. § 7-424 (2005) (Department of Education required to maintain and report statistics on school-based intimidation or harassment “[m]otivated by an actual or a perceived personal characteristic such as . . . gender identity”); N.J. STAT. ANN. § 18A:37-14 (2002) (proscribing harassment, intimidation or bullying “motivated by any actual or perceived characteristic, such as . . . gender identity”); R.I. GEN. LAWS § 28-5-14 (2004) (“In order to eliminate prejudice among the various ethnic groups in this state and to further good will among those groups, the commission and the state department of elementary and secondary education are jointly directed to prepare a comprehensive educational program, designed for the students of the public schools of this state and for all other residents of the state, calculated to emphasize the origin of prejudice based on . . . gender identity or expression.”).

<sup>100</sup> Gay, Lesbian & Straight Education Network, <http://www.glsen.org/cgi-bin/iowa/all/about/index.html> (last visited Feb. 7, 2006).

<sup>101</sup> Gay, Lesbian & Straight Education Network, *2004 State of the States Report*, <http://www.glsen.org/cgi-bin/iowa/chapter/library/record/1687.html>. (last visited Feb. 7, 2006).

Running away from home, dropping out of school and other adaptive—if sometime self-destructive—behaviors render LGBTQ youth vulnerable to involvement in the child welfare and juvenile justice systems. These systems are ill-equipped to address the underlying bias and hostility that create conflicts at home and at school. For example, a transgender girl whose parents refuse to support or even acknowledge her gender identity may stay away from home as much as possible—missing curfew, spending the night with friends—because home is a site of misery for her. Fed up, her parents may turn to the local juvenile or family court, where they will be counseled by the probation department on how to bring a petition to have her adjudicated as a “stubborn” or “incorrigible” child—one of the status offenses that can subject children to the jurisdiction of a family or juvenile court.<sup>102</sup> Courts have a variety of options for handling status offenders—they can order individual counseling for the child, family counseling, or removal of custody from the parents.<sup>103</sup> However, because the typical response of the family or juvenile court is to treat the symptom, rather than the cause, of misbehavior or defiance by a child,<sup>104</sup> courts are extremely unlikely to directly engage with the families on their negative feelings toward their openly transgender—or gay, lesbian, or bisexual—child. Against a jurisprudential backdrop of near-complete deference to the right of parents to inculcate their values in their children,<sup>105</sup> courts have little incentive to create sensitivity and tolerance in parents for sexual-minority issues. While they could in theory provide home-based, preventive services to a family experiencing conflict over a child’s sexual orientation or gender identity, they are powerless to restrict the ability of parents with financial means to send their

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<sup>102</sup> The New York and Massachusetts statutes regulating status offenses are illustrative. In New York, a “person in need of supervision” (“PINS”) is defined as a “person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child’s care, or other lawful authority, or who [unlawfully possesses marijuana for the first time].” N.Y. FAM. CT. ACT § 712 (a) (McKinney 1999). *In re Lori M.*, 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985) is a PINS case that was initiated by a mother for the sole reason that her daughter was associating with a twenty-year-old lesbian. See generally Ruthann Robson, *Our Children: Kids of Queer Parents and Kids Who are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 915 (2001); Sullivan, *supra* note 5. In Massachusetts, a “child in need of services” (“CHINS”) is defined as “a child below the age of seventeen who persistently runs away from the home of his parents or legal guardian, or persistently refuses to obey the lawful and reasonable commands of his parents or legal guardian, thereby resulting in said parent’s or guardian’s inability to adequately care for and protect said child, or a child between the ages of six and sixteen who persistently and wilfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.” MASS. GEN. LAWS ANN. ch. 119, § 21 (2003).

<sup>103</sup> See, e.g., MASS. GEN. LAWS ANN. ch.119, § 39G (2003).

<sup>104</sup> For a critical appraisal of the status-offense jurisdiction of the juvenile and family court, see generally ABA & NAT’L BAR ASS’N, *supra* note 4, at 83.

<sup>105</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (in holding that an Amish father may withdraw his fifteen-year-old daughter from school notwithstanding the state’s compulsory education law, the Court relied on Yoder’s religious liberty as well as the primary role of the parents in raising children, which the Court found to be an indisputable part of tradition); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (striking down Oregon statute requiring children to attend public schools).

children to a psychoanalyst who practices reparative therapy or to a “gender clinic” for treatment of a child’s “gender identity disorder.”<sup>106</sup> They can, of course, remove a child from the home when a parent’s phobias and fears result in abuse that imperils the child’s safety.<sup>107</sup> But a legal process that terminates in being removed from home is not an empowering one. The child attempting to negotiate an LGBTQ identity feels herself, rather than the prejudice, to be the problem.

Many LGBTQ youth who find themselves in foster care—whether for reasons directly related to their sexual orientation or gender identity or not—face intolerance, abuse and violence as bad as or worse than that which they faced at home.<sup>108</sup> While federal law requires that states develop for every child in state custody a plan to assure “safe and proper care consistent with the child’s best interest and special needs,”<sup>109</sup> child-welfare agencies typically have not explicitly considered the best interest and needs of LGBTQ youth.<sup>110</sup> Studies document instances of staff in group-care settings belittling and mistreating LGBTQ youth based on their sexual orientation or gender identity and failing to intervene to stop harassment and abuse of LGBTQ youth by their peers.<sup>111</sup> When they do step in, their response is often to place LGBTQ youth in isolation, without their request or consent,<sup>112</sup> rather than confronting the abusive behavior and creating policies that would foster tolerant and safe environments. They also do not honor the requests of LGBTQ youth to be housed in units where they would feel most comfortable, typically insisting that transgender youth be placed with those whose gender matches their biological sex rather than the gender with which they identify.<sup>113</sup>

<sup>106</sup> For an argument that the state should intervene when parents attempt to change a child’s sexual orientation or gender identity, see Feder, *supra* note 60, at 172-76; Sonia Renee Martin, *A Child’s Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167 (1996).

<sup>107</sup> See, e.g., *In re Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982) (where father repeatedly called his son a “fag,” “faggot,” and queer, resulting in the son suffering severe stomach pains, son was an abused child under New York law and was remanded to the state child protective agency).

<sup>108</sup> See generally TERESA DECRESCENZO & GERALD P. MALLON, *SERVING TRANSGENDER YOUTH: THE ROLE OF CHILD WELFARE SYSTEMS* (2000); TERESA DECRESCENZO & GERALD P. MALLON, *CHILD WELFARE LEAGUE OF AMERICA, SERVING GAY AND LESBIAN YOUTHS: THE ROLE OF CHILD WELFARE AGENCIES* (1991); GERALD P. MALLON, *WE DON’T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN CHILD WELFARE SYSTEMS* (1998) (study of fifty-four LGBTQ adolescents in foster-care placements); SULLIVAN ET AL., *supra* note 65.

<sup>109</sup> 42 U.S.C. §§ 671(a)(16), 675(1)(B), and 675(5)(A).

<sup>110</sup> The California legislature recently enacted an anti-discrimination law for LGBTQ young people in state child-welfare systems. CAL.WELF. & INST. CODE § 16001.9(22) (2001). There is no corresponding federal legislation. See generally Anne Tamar-Mattis, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 L. & SEXUALITY 149 (2005) (discussing first-of-its-kind legislation prohibiting discrimination on the basis of sexual orientation or gender identity).

<sup>111</sup> WILBER, *supra* note 5; see also The National Center for Lesbian Rights, *LGBTQ Youth in the Foster Care System*, <http://www.nclrights.org/publications/lgbtqfostercare.htm> (last visited Feb. 12, 2006).

<sup>112</sup> WILBER, *supra* note 5; see also The National Center for Lesbian Rights, *supra* note 111.

<sup>113</sup> National Center for Lesbian Rights, *Legal Translations: LGBTQ People and the California Foster Care System*, <http://www.nclrights.org/publications/lgltrnslnfostercare.htm> (last

Furthermore, many child-welfare agencies do not work to cultivate foster homes that are welcoming to LGBTQ youth.<sup>114</sup> Without suitable placements, agencies sometimes inappropriately warehouse LGBTQ youth in psychiatric facilities. When they do place LGBTQ young people in private foster homes, they often fail to monitor them to ensure that foster parents are nurturing their healthy development. For example, foster parents sometimes force their LGBTQ charges to participate in “reparative” therapy, or to attend religious services designed to convince them to renounce their sexuality or gender identity.<sup>115</sup> Agency staff are not trained in the availability of community-based services and organizations that serve LGBTQ youth; or, if they do know about them, they do not refer the LGBTQ youth in their care to them. They place LGBTQ youth at risk—purposely or inadvertently—by revealing their sexuality or gender orientation to parents, other young people, or other staff without consulting with the youth first.<sup>116</sup>

Responding to these problems, several child welfare organizations have created specialized foster-care group homes that are geared to the LGBTQ youth population. Green Chimneys in New York City,<sup>117</sup> Gay and Lesbian Adolescent Social Services (“GLASS”) in Los Angeles and Oakland,<sup>118</sup> and the Waltham House in Waltham, Massachusetts<sup>119</sup> feature sensitized workers and LGBTQ-friendly policies. These specialized foster group homes allow transgender youth, for example, to dress as they wish; the homes honor the gender identification of the young person.<sup>120</sup> While specialized programs provide an answer to some LGBTQ youth, they are insufficiently expansive to cater to the many thousands of foster-care youth who identify as LGBTQ or

visited Feb. 12, 2006). When she objected to being placed on the boys’ floor in a group home, one lesbian in Denver found herself relegated to sleeping on a couch on a landing, in between the girls’ and boys’ floor—the metaphor could not have been clearer to her. National Radio Project, *Queer Youth Challenges*, <http://www.radioproject.org/archive/2005/1405.html>. (Lambda Legal Defense Fund attorney, Rudy Estrada, citing the experiences of one of the girls he interviewed for a foster-care project). One female-identified, transgender eighteen-year-old at Waltham House—a Massachusetts foster-care facility exclusively for LGBTQ youth—expresses gratitude for being able to live on the girls’ floor and dress as she wishes: “So it’s really accepting in that way and that’s like the high point for me, is that it’s really a place that I don’t have to worry about residents making fun of me or staff saying, ‘Oh well you’re not really a girl, you’re really just a guy in a dress,’” she says. “It’s like a lot less that I have to worry about.” Laura Kiritsy, *A Safe Haven for Gay Youth*, BAY WINDOWS, Nov. 21, 2002, <http://www.baywindows.com/ME2/Default.asp> (follow “Opinions/Columns” hyperlink; then follow “Archive” hyperlink; then follow “11/21/2002” hyperlink).

<sup>114</sup> SULLIVAN ET AL., *supra* note 65.

<sup>115</sup> At the 2005 National Juvenile Defender Summit in Los Angeles, CA., sponsored by the National Juvenile Defender Center, one attorney related that one of her gay young clients was anointed with oils by his foster mother in an attempt to “drive out” the forces that caused his homosexuality.

<sup>116</sup> WILBER, *supra* note 5; *see also* National Center for Lesbian Rights, *supra* note 111.

<sup>117</sup> *See* Green Chimneys, [http://www.greenchimneys.org/our\\_programs/our\\_programs.html](http://www.greenchimneys.org/our_programs/our_programs.html) (last visited Feb. 12, 2006).

<sup>118</sup> *See* Gay and Lesbian Adolescent Social Services, <http://www.glassla.org/> (last visited Feb. 12, 2006).

<sup>119</sup> *See* The Home for Little Wanderers, Waltham House, [http://www.thehome.org/site/content/programs/waltham\\_house.asp](http://www.thehome.org/site/content/programs/waltham_house.asp) (last visited Feb. 12, 2006).

<sup>120</sup> *See* Kiritsy, *supra* note 113.

who are grappling with sexual orientation and gender identity issues. Furthermore, LGBTQ activists and lawyers worry that the existence of separate LGBTQ homes relieves mainstream group-care facilities of their obligation to prevent harassment in the first instance and to create supportive environments, with immediate consequences for youth and staff who engage in homophobic and transphobic behavior and speech.<sup>121</sup>

Research consistently shows that youth who must contend with homelessness, family abandonment, school failure, and the child-welfare system are at risk for entanglement in the juvenile justice system. While no national studies have been conducted with respect to the experiences of LGBTQ youth,<sup>122</sup> one local study confirms that LGBTQ youth who face these adversities are similarly likely to become involved with the juvenile justice system.<sup>123</sup> For LGBTQ youth, leaving home is the greatest predictor of involvement in the juvenile courts. LGBTQ young people on the street may be forced to steal and work as prostitutes in order to support themselves. Additionally, a 2005 report by Amnesty International reveals that police officers target transgender youth and LGBTQ youth of color for selective enforcement of “quality of life” offenses and “morals” regulations.<sup>124</sup> These youth are vulnerable to such charges because of the dearth of age-appropriate organized activities and safe spaces for LGBTQ youth, which means that LGBTQ youth in many places are often forced to congregate in public spaces.<sup>125</sup>

Additionally, advocates argue that youth who violate age-of-consent laws with people of the same sex are criminally charged more often, and punished more harshly, than are youth who violate the same laws with people of the opposite sex.<sup>126</sup> The case of a seventeen-year-old self-identified lesbian

<sup>121</sup> Interview with Jody Marksamer, Attorney, Nat’l Ctr. for Lesbian Rights, *Queer Youth Challenges* (Nat’l Radio Project, broadcast Apr. 6, 2005), available at <http://www.radioproject.org/archive/2005/1405.html>.

<sup>122</sup> The U.S. Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), which keeps national statistics on juvenile delinquency trends, does not track sexual orientation or gender identity of offenders. See HOWARD SNYDER, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE ARRESTS 2002 1 (2004), <http://www.ncjrs.gov/pdffiles1/ojjdp/204608.pdf> (omitting LGBTQ youth as a category of defendants, while including girls and “minorities”); Office of Juvenile Justice & Delinquency Prevention, *Juveniles in Corrections*, <http://www.ncjrs.gov/html/ojjdp/202885/contents.html> (last visited Feb. 12, 2006) (omitting specific consideration of LGBTQ youth in analysis of young offenders in custody).

<sup>123</sup> RANDI FEINSTEIN ET AL., URBAN JUSTICE CTR., JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NY JUVENILE JUSTICE SYSTEM 15, 18 (2001), <http://www.urbanjustice.org/publications/pdfs/lesbianandgay/justiceforallreport.pdf>.

<sup>124</sup> AMNESTY INT’L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 3 (2005), <http://www.amnestyusa.org/outfront/stonewalled/report.pdf>.

<sup>125</sup> *Id.* at 34 (quoting Gabriel Martinez, FIERCE!, N.Y. as saying “If there is a group of queer youth of color hanging out in front of the subway station on Christopher Street the police will tell them they are loitering, but if it’s a group of white tourists blocking the subway entrance they don’t say anything!”).

<sup>126</sup> See, e.g., Interview with Shannan Wilber, Attorney, Legal Servs. for Children, *Queer Youth Challenges* (Nat’l Radio Project, broadcast Apr. 6, 2005), available at <http://www.radioproject.org/archive/2005/1405.html>; see also FRANKLIN E. ZIMRING, AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 52-54 (2004) (arguing based on national data that police officers under-enforce age-of-consent laws, but not analyzing

recently reported on the National Juvenile Defender Center listserve is representative of this type of differential treatment.<sup>127</sup> At a “boot camp” program for young offenders, the girl had allegedly exhibited what her probation officer had termed “sexually predatory” behavior. The offense was that she had talked with some of the boys in the program about the breasts of one of the other girls. The probation officer sought to have her placed in a residential treatment program for female sex offenders. It is difficult if not impossible to imagine a similar response to a boy who ogled girls and bragged about it. In fact, none of the boys involved in this incident were charged with anything or even reprimanded.

The recently-overturned conviction of a young man named Matthew Limon<sup>128</sup> demonstrates this differential treatment in even more stark fashion. On February 16, 2000, one week after he turned eighteen, Matthew performed oral sex on a fourteen-year-old boy who was a month shy of his fifteenth birthday.<sup>129</sup> This boy initially consented to the sexual activity, but later asked Matthew to stop, which he did.<sup>130</sup> Both boys were mildly mentally disabled and resided at a specialized residential school in Miami County, Kansas.<sup>131</sup> The police learned of the incident, and Matthew admitted his participation. Because the other boy was under the age of sixteen, the sex between them violated the law, regardless of the fact that the younger boy had voluntarily participated.<sup>132</sup> The state charged Matthew with criminal sodomy.<sup>133</sup> Matthew’s attorneys moved to dismiss the charge, arguing that the proper charge was unlawful voluntary sexual relations<sup>134</sup>—Kansas’s so-called “Romeo and Juliet law”—which mandates a much less severe penalty for the same behavior in cases where the defendant is less than nineteen years old and is fewer than four years older than the victim. While the ages of Matthew and the other boy would have otherwise rendered Matthew eligible for prosecution under the unlawful voluntary sexual relations statute, the fact that Matthew is a male excluded him. The trial court rejected Matthew’s motion to dismiss on equal-protection grounds, the case was tried on stipulated facts, and Matthew was convicted of criminal sodomy. Had the minor in the case been a girl, Matthew’s sentence range would have been thirteen to fifteen months’ imprisonment. Because the two were of the same sex, the sentence range was 206 to 228 months.<sup>135</sup> The court

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data based on the sex of the victim). There appear to be no data on arrest rates for violation of age-of-consent laws broken down according to the sex of the victim.

<sup>127</sup> This case was reported and discussed in July, 2005, on a listserve maintained by the National Juvenile Defender Center.

<sup>128</sup> *State v. Limon*, 122 P.3d 22 (Kan. 2005).

<sup>129</sup> *Id.* at 24.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *State v. Limon*, 83 P.3d 229, 232-33 (Kan. Ct. App. 2004).

<sup>133</sup> KAN. STAT. ANN. § 21-3505(a)(2) (2005) (“Criminal sodomy is . . . sodomy with a child who is 14 or more years of age but less than 16 years of age.”).

<sup>134</sup> *Id.* § 21-3522(a)(2) (2005) (“Unlawful voluntary sexual relations is engaging in voluntary . . . (2) sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender . . . are members of the opposite sex.”).

<sup>135</sup> Matthew had two previous adjudications for sexual relations with minors. *Limon*, 83 P.3d at 238.



imposed the minimum sentence of 206 months.<sup>136</sup> Matthew served over four years in prison before the Kansas Supreme Court ruled that the equal-protection principles articulated in *Lawrence v. Texas* invalidated the Kansas “Romeo and Juliet” statute and thus rendered his punishment excessive.<sup>137</sup>

Once arrested, LGBTQ youth are more likely to be detained than they would be if they had supportive parents—attorneys report that while parental involvement is lacking in most delinquency cases, it is almost nonexistent for LGBTQ kids in the juvenile justice system.<sup>138</sup> When adjudicated delinquent or convicted of a crime, LGBTQ youth may find themselves sentenced in ways more restrictive and punitive than their offenses warrant because of the dearth of LGBTQ-sensitive programs and facilities in the juvenile and criminal justice systems. When they report harassment and abuse from others based on sexual orientation or gender identity,<sup>139</sup> and sometimes even when they don’t report it, LGBTQ youth may find themselves placed by staff in segregation—ostensibly for their own protection, but in some cases because of staff fears that LGBTQ young people are hypersexual and will prey on other residents.<sup>140</sup> Just as in the child-welfare system, staff in the juvenile and criminal justice system find it

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<sup>136</sup> *Id.* at 233. The Kansas Appeals Court denied Matthew’s appeal, citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was settled law at the time. *State v. Limon*, 41 P.3d 303 (Kan. Ct. App. 2002). The U.S. Supreme Court then granted Matthew’s petition for certiorari, vacated the judgment of the Kansas Court of Appeals, and remanded the case to the Appeals Court for reconsideration in light of *Lawrence v. Texas*. *Limon v. Kansas*, 539 U.S. 955 (2003).

<sup>137</sup> *Limon*, 122 P.3d at 24.

<sup>138</sup> FEINSTEIN ET AL., *supra* note 123, at 13.

<sup>139</sup> See American Civil Liberties Union, *ACLU Asks Court to Require Immediate Action to Stop Harassment of Gay and Transgender Youth at Hawaii Juvenile Detention Facility*, <http://www.aclu.org/lgbt/youth/20123prs20051004.html> (last visited Feb. 12, 2006). On September 2, 2005, the American Civil Liberties Union filed a lawsuit, *R.G. v. Koller*, No. 05-00566 (D. Haw.), on behalf of three young people at the Hawai’i Youth Correctional Facility (HYCF) alleging: (1) A male-to-female transgender student was repeatedly verbally abused and preached to by guards who called her “wrong” and “unnatural” and threatened to cut off her hair. After she was transferred to the boys’ unit, she was physically assaulted and groped, often in front of guards who did nothing to protect her. Rather than attempting to ensure her safety, HYCF segregated her for almost two months, and did not allow her to interact at all with other wards. (2) Male wards in the facility relentlessly harassed a young man who was perceived to be gay, threatening him with rape, and once rubbed semen into his face. When the young man reported the incidents, HYCF did nothing. (3) In April, the head administrator at HYCF called a special meeting of all the girls and staff at one of the units in the facility for the specific purpose of singling out a lesbian couple to belittle them about their relationship. The administrator told the couple that their relationship was “disgusting,” then required the other wards to create a list of rules for the couple; the wards decided that the girls shouldn’t be allowed to even speak to each other under threat of disciplinary measures, including lockdown. (4) Youth correctional officers routinely told a lesbian ward and her girlfriend that their relationship was “bad” and that they were going to hell and referred to the couple’s relationship as “this butchie shit.” Other guards routinely made lewd and humiliating remarks to the couple, including, “You two eating fish earlier? At least you’re not finger-banging yourselves in the TV room.”

On February 7, 2006, a U.S. District Court judge found for the plaintiffs, issuing a preliminary injunction ordering the HYCF to refrain from harassing or abusing young wards who are or who are perceived to be LGBT and to refrain from failing to protect wards from anti-LGBT harassment and abuse. See *R.G. v. Koller*, 2006 U.S. Dist. LEXIS 21254 (2006).

<sup>140</sup> FEINSTEIN ET AL., *supra* note 123, at 30.

more convenient to isolate the LGBTQ young person than to confront the harassing individuals and work to ensure environments of safety, tolerance and respect.

#### IV. TOLERANCE IS NOT ENOUGH

By now, it should be clear that all lawyers representing children and adolescents will have on their caseloads young people who in one way or another are confronting the unique set of stressors that LGBTQ youth face, whether they are open and out as LGBTQ in all facets of their lives; experience same-sex desire, engage in same-sex sexual behaviors and diverge from, defy, and reject gender norms, but do not identify as LGBTQ; identify as LGBTQ but do not disclose those identities to their lawyers; come out as LGBTQ to their lawyers but ask that they not reveal those identities to anyone else; are not LGBTQ but are perceived by their peers, families, or communities to be so; or are questioning their sexual orientation or gender identity. It is essential, then, for lawyers to have the basic information about LGBTQ youth discussed in Part One; understand the ways in which LGBTQ youth are uniquely vulnerable to trauma, abuse, violence, and discrimination, as discussed in Part Two; and understand how to be respectful and supportive<sup>141</sup> of youth, however they define themselves. This Part offers specific suggestions for sensitive and supportive advocacy strategies.

First, and perhaps most radically, it is incumbent on us, as child-centered advocates, to respect the rights of our young clients to the expression of their sexual orientation and gender identity. For example, we should address our transgender clients with their chosen names, and use the appropriate pronouns in referring to them. In spite of civil-rights advances for lesbians and gay men, and burgeoning awareness in some areas of the existence and needs of transgender people, many of us are a long way from moving beyond tolerance to embrace all forms of gender diversity and non-heterosexual orientation, particularly in young people. And as a society, we do what we can to discourage the development of LGBTQ identities and associated behaviors.<sup>142</sup>

Selected court decisions in child-custody battles illustrate this tendency. Notwithstanding *Lawrence v. Texas*,<sup>143</sup> courts continue to decide custody cases

<sup>141</sup> RYAN & FUTTERMAN, *supra* note 3, at 10 (stating that “[t]he need for support is particularly critical to avoid isolation when adolescents begin to question their sexual identity”).

<sup>142</sup> See, e.g., RICHARD POSNER, *SEX AND REASON* 308 (1992) (“[I]f [a] hypothetical cure for homosexuality were something that could be administered—costlessly, risklessly, without side effects—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.”). For a thorough explanation of Posner’s views on the development of sexual identity, see Robson, *supra* note 102. See also Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, in *TENDENCIES* 161 (1993) (“[A]dvice on how to help your kids turn out gay, not to mention your students, your parishioners, your therapy clients, or your military subordinates, is less ubiquitous than you might think. On the other hand, the scope of the institutions whose programmatic undertaking is to prevent the development of gay people is unimaginably large.”).

<sup>143</sup> Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *COL. L. REV.* 1399, 1399-1400, 1416-17 (2004) (arguing that the reach of *Lawrence* is limited because the

against lesbian and gay parents based on their sexuality, finding such discrimination furthers the “best interest” of their presumably proto-heterosexual children. In upholding a change of custody from a lesbian mother to a heterosexual father, an Alabama appeals court<sup>144</sup> affirmed an earlier case that had approvingly cited:

evidence from which the trial court could have concluded that “[a] child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development” and that “the degree of harm to children from the homosexual conduct of a parent is uncertain . . . and the range of potential harm is enormous.”<sup>145</sup>

Similarly, in rejecting a post-*Lawrence* constitutional challenge to Florida’s ban on adoption by gay and lesbian individuals and same-sex couples,<sup>146</sup> the Eleventh Circuit Court of Appeals endorsed the proposition that the state should sanction legislation designed to encourage a child to become a heterosexual, without questioning whether children may not in many cases experience such “encouragement” as coercion.<sup>147</sup>

Facing intense discrimination, LGBTQ parents, would-be parents, and supporters have often found themselves resorting to arguments in child-custody and adoption cases that undermine the right of youth to be LGBTQ. They have based their fitness as parents on the fact that children in LGBTQ-headed households are no more likely than children in other households to grow up to be lesbian, gay, bisexual or transgender.<sup>148</sup> Even if this claim is true, it is only

Court relied on a “narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty.” She describes *Lawrence* as a “project devoted to celebrating our relationships; it is not a project of sexual rights or the politics of sexuality.” She questions whether, as some gay rights activists, lawyers and scholars have argued, it is accurate to think of the decision in *Lawrence v. Texas* as “our *Brown*.”

<sup>144</sup> L.A.M. v. B.M., 906 So. 2d 942, 947 (Ala. Civ. App. 2004).

<sup>145</sup> *Ex parte J.M.F.*, 730 So. 2d 1190, 1196 (Ala. 1998).

<sup>146</sup> FLA. STAT. ANN. § 63.042(3) (1973) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”). The statute was passed in the wake of Anita Bryant’s anti-gay 1977 “save the children” campaign. While no other state maintains a similar blanket ban, same-sex couples may adopt a child openly and as a couple in only a handful of states. State adoption law explicitly permits second-parent or stepparent adoption by same-sex couples in California, Connecticut and Vermont; high courts in the District of Columbia, Illinois, Massachusetts and New Jersey have ruled that state adoption law permits second-parent or stepparent adoption by same-sex couples. See, e.g., SEAN CAHILL ET AL., FAMILY POLICY: ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES 80 (2003), <http://www.thetaskforce.org/reslibrary/familypolicy.cfm>.

<sup>147</sup> *Lofton v. Sec. of Dept. of Children and Family Servs.*, 358 F.3d 804 (11th Cir. 2004). In the opinion, the court conceded that the premise that a heterosexual nuclear family is superior to other arrangements is “unprovable” but ruled it “nevertheless to be a legitimate basis for legislation.” *Id.* at 819-20. The court was persuaded by the state’s emphasis on the “vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling.” *Id.* at 818. Much research supports the proposition that children in gay- and lesbian-headed households fare as well or better than those in more traditional homes. See, e.g., SEAN CAHILL ET AL., *supra* note 146 (citing studies by the American Psychological Association, the National Association of Social Workers, the American Psychoanalytic Association, and the American Academy of Family Physicians).

<sup>148</sup> See, e.g., ACLU LESBIAN AND GAY RIGHTS PROJECT, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY AND LESBIAN PARENTING (2004), <http://www.buddybuddy.com/adoption.html> (noting studies that prove that children of gay and lesbian-headed households

persuasive to those who believe that acting on same-sex desire and claiming an LGBTQ identity is bad.<sup>149</sup>

No matter how progressive and open-minded we believe ourselves to be, the transgender girl may make us—even us lesbians and gay men—uncomfortable, because we want to protect her from herself. Doesn't she know that kids will pick on her for wearing dresses? And why does she think she is a girl? What went wrong with her upbringing? Isn't this just a phase? We must confront the fact that, in a delinquency case, a transgender girl will possibly face detention, where she is likely to be placed with biological males; advise her of the realities of confinement, allow her to make her own decisions about how to dress and express herself; and then do everything possible to ensure that she is safe. Similarly, the gay youth, who may be the same age as one's own child, may make us squeamish because he forces us to acknowledge that kids are sexual beings and may make choices that make us worry for their safety. Yet, as LGBTQ youth-serving organizations make clear, it is damaging for us to try to persuade our clients that they are not gay or lesbian but are instead simply going through a phase.<sup>150</sup> It is equally problematic to try to convince our transgender clients that they are not "really" the gender with which they identify.<sup>151</sup>

Second, we should make sure that our clients know that we will work hard for them no matter what their sexual orientation or gender identity, and no matter how open they are about it. Instead of asking a teenaged boy whether he has a "girlfriend," we can ask if he is romantically involved with anyone. We should eliminate anti-LGBTQ slurs; we might display visible signs—like posters, stickers or books—that demonstrate acceptance of and respect for LGBTQ people.<sup>152</sup> An affirmative statement from us that we do not judge our clients no matter what they tell us will go a long way. We don't need for our LGBTQ

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are no more likely to be gay or lesbian than children of other households); CHARLOTTE J. PATTERSON, AM. PSYCHOLOGICAL ASS'N, LESBIAN AND GAY PARENTING (1995), <http://www.apa.org/pi/parent.html> (summarizing studies of children of gay and lesbian-headed households).

<sup>149</sup> See Robson, *supra* note 102, at 924 ("The belief that exposure to homosexuality breeds homosexuality provokes several responses . . . 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.").

<sup>150</sup> LAMBDA LEGAL DEF. FUND, GETTING DOWN TO BASICS ABOUT LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ("LGBTQ") YOUTH IN FOSTER CARE, [http://www.lambdalegal.org/binary-data/LAMBDA\\_PDF/pdf/124.pdf](http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/124.pdf); see also SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, LISTENING TO GENDER-VARIANT CHILDREN: A HUMANISTIC STRATEGY FOR ADVOCATES, <http://www.nclrights.org/publications/pubs/gvchildren.pdf> ("[I]t is very damaging for a young person to be told by a parent, 'you are not really a lesbian,' or 'you are not really gay.'").

<sup>151</sup> MARKSAMER & VADE, *supra* note 5.

<sup>152</sup> For examples of LGBTQ youth-focused brochures, booklets, and signs, see National Center for Lesbian Rights, <http://www.nclrights.org/publications/#youth> (last visited Feb. 8, 2006). See also LAMBDA LEGAL DEF. FUND, STOPPING THE ANTI-GAY ABUSE OF STUDENTS IN PUBLIC SCHOOLS: A LEGAL PERSPECTIVE (1998), <http://www.lambdalegal.org/cgi-bin/iowa/news/publications.html?record=124>; LEGAL SERVS. FOR CHILDREN, SAFETY FIRST!: A SURVIVAL GUIDE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH UNDER 18 (2004), [http://www.lsc-sf.org/publications/safety\\_first.pdf](http://www.lsc-sf.org/publications/safety_first.pdf); Gay, Lesbian & Straight Education Network, <http://www.glsen.org/cgi-bin/iowa/educator/library/record/1641.html> (last visited Feb. 8, 2006); National Youth Advocacy Coalition, <http://www.nyacyouth.org>.

clients to come out to us in order to effectively represent them. At the same time, some clients will want to talk about their sexual orientation or gender identity, and we should be willing to do so in the same way that we would discuss with them any other issues important to them.

Third, we can seek to identify whether the problems that have brought young people to our attention are related to their gender non-conformity, sexual behavior, or sexual identity, or others' perceptions of those things. The following anecdote exemplifies this kind of careful attention. An attorney was appointed as an educational advocate for a twelve-year-old boy living in a rural county, who was failing Physical Education and having tremendous behavioral problems. The school sought to suspend him. He was extremely "effeminate" in appearance. Upon inquiring, the attorney learned that he failed Physical Education because he refused to undress and change into athletic clothes in the locker room. The reasons for his apparent shyness she was able to surmise—he was afraid of being harassed or afraid that other boys would believe he was sexually interested in them. In any event, understanding without having to discuss his reluctance to be naked in the locker room, she was able to negotiate for him a switch into a music class from Physical Education. His behavioral problems abated. She did not engage with him on his sexual orientation, or his understanding of his gender identity, because he was either unable or unwilling to participate in such an inquiry. She understood that appearing to be gay, and being gender non-conforming, makes a young person a target for ridicule—whether or not s/he really "is" either of those things, and whether or not s/he is aware and comfortable enough to discuss it.<sup>153</sup> Accordingly, directly inquiring about a young person's sexual orientation or gender identity, especially early in the attorney-client relationship, is likely to be off-putting. But, where the issue of sexual orientation or gender identity appears relevant, one might, for example, gently ask whether a client's peers or family members believe that s/he is gay or lesbian.

Fourth, even when young clients do identify as LGBTQ and make those identities known to us, we should not assume that they are open and out in all areas of their lives. We must allow the child to be the gatekeeper of information about his or her sexuality or gender identity.<sup>154</sup> S/he may need us to protect that information from her parents or school. Similarly, while we may think a judge or detention facility should be informed of our client's sexual orientation or gender identity to protect her from harassment, many youth do not wish to disclose the information in court, believing it will result in them being placed in an isolated setting, or may open them to abuse from homophobic or transphobic staff.

Fifth, where our clients are victims of bias and discrimination at home, in school, in a foster placement, or while in the juvenile justice system, part of our work is to confront individuals who discriminate and seek the source of the

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org/nyac/publications.html (last visited Feb. 8, 2006); Transgender Law Center, <http://www.transgenderlawcenter.org/> (last visited Feb. 8, 2006).

<sup>153</sup> Interview with Florida defender (Aug. 11, 2005); see also HUMAN RIGHTS WATCH, *supra* note 24 (noting that straight students are often targeted in schools for homophobic harassment when they appear to be gay).

<sup>154</sup> See, e.g., VADE & MARKSAMER, *supra* note 5.

institutional bias. Unless it is what our client wants, it is not an adequate solution for our clients simply to be moved—to a different class, or school, or foster home, or to protective custody or the infirmary in a juvenile detention facility. Moving the client sends the message to the youth that something is wrong with her, and to the institution that it need not reform its practices.

Sixth, we also need to know that difference sometimes makes no difference. Some of our gender non-conforming clients are comfortable in their birth-assigned gender; some who are sexually attracted to same-sex peers identify as straight. Some of our lesbian and gay clients will need and want counseling as they deal with coming out; others will be insulted at the suggestion that they need help with something that is as basic to them as breathing. Some of our transgender clients will want to be in protective custody; others prefer to take their chances in the general population rather than endure the stigma associated with being in protective custody. Some of our clients who identify as LGBTQ may have other aspects to their identity that are more salient in our representation; for example, a young person whose entire community lives in a primarily Latino East Los Angeles neighborhood may feel tremendously uncomfortable in an LGBTQ specialized group home in a predominantly white West Hollywood neighborhood.

Seventh, we should maintain a network of local LGBTQ-sensitive providers to whom we can refer our LGBTQ young clients. If we practice in an area in which no such providers or organizations exist, we can learn what we can from on-line, national resources. Finally, while mental health services should be available to all kids who need them (particularly in the extreme conditions of congregate foster settings and juvenile detention and incarceration facilities), we need to ensure that our clients' sexualities and gender identities do not become conditions to be "treated," even by well-meaning mental-health practitioners, unless they need and want counseling and medical intervention as discussed *supra* in the discussion of gender identity disorder.

A final note on representing LGBTQ young people—the work of representing these young people cannot be the exclusive domain of LGBTQ lawyers. Many such lawyers are not out, and even those of us who are sometimes engage in a complicated dance—some judges may be homophobic, or uncomfortable around obviously LGBTQ, and we don't want to jeopardize our clients' chances by talking openly about our lives in a way that makes our sexuality clear. I've been in many casual conversations with clerks and other court personnel in which I deliberately didn't use pronouns when discussing how my partner and I spent our weekend. There is a way in which representing an out LGBTQ youth exposes us<sup>155</sup> and makes it difficult for us to downplay, or "cover," our non-mainstream identities.<sup>156</sup> Additionally, because the issues facing and circumstances surrounding today's LGBTQ youth bear little resem-

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<sup>155</sup> See, e.g., Ruskola, *supra* note 6, at 313-14 (describing this phenomenon in the context of schools: "while gay and lesbian teachers are among the few adults in the school system who might be willing to help queer students, the hounding of gay teachers and students alike results in a reign of homophobic terror where both teachers and students become afraid of each other; those who should be natural allies become enemies in a struggle for survival.").

<sup>156</sup> Kenji Yoshino has brilliantly explicated this form of assimilation. See Yoshino, *supra* note 38, at 772 ("Covering means the underlying identity is neither altered nor hidden, but is

blance to those that we negotiated as young people, it is not immediately apparent that LGBTQ lawyers are uniquely qualified to represent LGBTQ youth.

## V. CONCLUSION

IT'S HARD TO TALK ABOUT LIBERATION WHEN WE CANNOT SAFELY CROSS A PLAYGROUND, YET THAT IS EXACTLY WHAT WE MUST DO.<sup>157</sup>

Self-identified LGBTQ youth have arrived, notwithstanding the fact that parents, teachers, doctors, coaches, and clerics have for generations propagated the notion that same-sex desire and gender transgression in young people represent nothing more significant than a phase, a passing fancy. Zealous advocacy for children and adolescents mandates an acknowledgement of and explicit engagement with the realities of the lives of these young people, as well as those whose sexual behaviors and attractions, and/or feelings about their gender identity, place them outside the heterosexual and gender-conforming norm, no matter how they publicly identify. I have provided some thoughts on sensitive advocacy strategies, all of which are based on the notion that lawyers must move beyond tolerance toward acceptance and respect. Our work going forward is to insist that our LGBTQ clients be allowed to create their own paths—even when we can't be sure where that path is headed.<sup>158</sup> It is nothing less than the simple yet revolutionary task of making it safe for them to be who they are.

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downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.”).

<sup>157</sup> DUE, *supra* note 69, at 265.

<sup>158</sup> See SCHOLINSKI, *supra* note 61, at 194 (“I have made my own path and more often than not I walk in circles.”).