

# Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist

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*I hate that I grew up thinking I was the only queer in the world, and I hate even more that most queer kids still grow up the same way.*

Anonymous Queers<sup>1</sup>

*I think many adults (and I am among them) are trying, in our work, to keep faith with vividly remembered promises made to ourselves in childhood: promises to make invisible possibilities and desires visible; to make the tacit things explicit; to smuggle queer representation where it must be smuggled and, with the relative freedom of adulthood, to challenge queer-eradicating impulses frontally when they are to be so challenged.*

Eve Kosofsky Sedgwick<sup>2</sup>

## INTRODUCTION

Gay and lesbian<sup>3</sup> youth live in a different place. That place lies beyond our

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1. *Queers Read This* (Anonymous Queers, New York, N.Y.), June 1990, reprinted in *LESBIANS, GAY MEN, AND THE LAW* 45, 46 (William B. Rubenstein, ed. 1993).

2. EVE KOSOFSKY SEDGWICK, *Queer and Now*, in *TENDENCIES* 1, 3 (1993) [hereinafter *SEDGWICK, Queer and Now*].

3. Taking my cue from Andrew Koppelman, I heed Janet Halley's caveat in the use of the term "homosexual":

In this Article I use the terms "homosexuality" and "homosexual"—and more tendentially, the terms "heterosexuality" and "heterosexual"—without any implication that they accurately describe any persons living or dead. As I try to use them here, these terms describe rhetorical categories that have real, material importance notwithstanding their failure to provide adequate descriptions of any one of us.

Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1723 (1993), quoted in Andrew Koppelman, *Why Discrimination Against Lesbians and Gays Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 198 n.1 (1994). In this Article, the term "homosexuality" generally refers to the stigmatized identity whose meaning derives from its negative contrast with "heterosexuality," whereas the terms "gay" and "lesbian" refer to the reconstruction of that identity by self-identified "homosexuals." I do not wish to ascribe a univocal meaning to either identity, and throughout this Article the terms should be read as though contained in quotation marks. Nor do I intend to imply that the world naturally divides into binary categories; as used here, the terms "homosexual/gay/lesbian" refer to the spectrum of non-heterosexual identities, including "bisexuality." For a richly textured analysis of

popular, medical, and legal understandings of homosexuality, which are premised on a central cultural fantasy that gay and lesbian youth do not exist. According to authoritative declarations by parents, teachers, preachers, psychiatrists, and courts, gay kids are not gay but merely "confused." In our received taxonomy of sexualities, there is no conceptual space for a coherently gay adolescent. The consequence of the fantasy of gay kids' non-existence is the discursive and material violence that gay kids confront in their lives.

In the words of a 1989 report by the U.S. Department of Health on gay and lesbian youth suicide, "[l]esbian and gay youth are the most invisible and outcast group of young people with whom you will come into contact."<sup>4</sup> Indeed, the odds are that you will never know that you have come into contact with them. Lacking even the comparative impunity of gay adults, there is virtually no safe space for gay kids to identify themselves publicly.

For many gay youth, the closet is the only safe home. One survey indicates that one young gay man out of four was forced to leave home when his parents found out he was gay.<sup>5</sup> According to another estimate, one quarter of the youths living in the streets in the United States are gay.<sup>6</sup> While the isolation

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the ambiguities of our contemporary practices of sexual categorization, see MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* (1995). I occasionally also use the explicitly political term "queer," which has acquired more aggressively anti-categorical connotations. See, e.g., Lisa Duggan, *Making It Perfectly Queer*, 22 *SOCIALIST REV.* 11 (1992).

4. Paul Gibson, *Gay and Lesbian Youth Suicide*, in 3 U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES YOUTH SUICIDE REPORT 110-42 (1989), reprinted in *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 1, at 163. The study was subsequently denounced by the Bush administration. See *infra* notes 17-18 and accompanying text.

At this point, I state the obvious and note that this Article does not, and cannot, provide an exhaustive illustration of the situation of gay- and lesbian-identified youth; as a group, queer kids are no more monolithic and no less complex than their adult counterparts. Race and class, for instance, color the construction of sexual identities in important ways. While my failure to capture the full complexity of queer kids' lives is no doubt a shortcoming, I hope that it is not a fatal one; rather than purporting to provide a comprehensive analysis of the situation of gay and lesbian youth, this Article seeks primarily to break the silence about gay kids in the law and to discover some of the legal implications of their existence.

I rely on the unprecedented work, primarily in sociology, that has emerged in the past several years on gay youth and apply some of its insights to legal contexts. See *GAY AND LESBIAN YOUTH* (Gilbert Herdt ed., 1989); *THE GAY TEEN: EDUCATIONAL PRACTICE AND THEORY FOR LESBIAN, GAY, AND BISEXUAL ADOLESCENTS* (Gerald Unks ed., 1995) [hereinafter *THE GAY TEEN*]; *HELPING GAY AND LESBIAN YOUTH* (Teresa DeCrescenzo ed., 1994); *GILBERT HERDT & ANDREW BOXER, CHILDREN OF HORIZONS: HOW GAY AND LESBIAN TEENS ARE LEADING A NEW WAY OUT OF THE CLOSET* (1993); *RITCH C. SAVIN-WILLIAMS, GAY AND LESBIAN YOUTH: EXPRESSIONS OF IDENTITY* (1990).

There are also lone but heartening voices speaking on gay and lesbian youth in legal literature. See Abby Abinati, *Legal Challenges Facing Lesbian and Gay Youth*, in *HELPING GAY AND LESBIAN YOUTH*, *supra*, at 149; Kelli Kristine Armstrong, *The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Public Schools*, 24 *GOLDEN GATE U.L. REV.* 67 (1994); Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 *YALE L. & POL'Y REV.* 446 (1986); see also Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 *STAN. L. REV.* 661, 681-88 (1995) (analyzing the effects of homophobia on adolescent gay boys' construction of their sexual identities).

5. See Gary Remafedi, *Male Homosexuality, The Adolescent's Perspective* (1985) (unpublished manuscript, Adolescent Health Program, University of Minnesota), cited in *SEDGWICK, Queer and Now*, *supra* note 2, at 2.

6. See Gibson, *supra* note 4. On runaway gay and lesbian youth, see also Dennis D. Durby, *Gay, Lesbian, and Bisexual Youth*, in *HELPING GAY AND LESBIAN YOUTH*, *supra* note 4, at 16, 21-24 (noting that "studies in metropolitan areas, such as Los Angeles, suggest that the percentage of runaway/homeless youth who are gay is between 25 and 40 percent of all such youth").

of the closet can be more than a gay child can manage—gay kids are “the only group of adolescents with no peer group to identify with or receive support from”<sup>7</sup>—invisibility is often the best bargain a gay teenager can hope for.<sup>8</sup> To be labeled queer at school is typically far worse than the alienation of the closet. High school is one of the most intensely and often violently anti-gay sites in our culture and a central institution in the socialization of youth into homophobia. In many schools it is simply too “dangerous mentally and physically to come out,”<sup>9</sup> especially since school administrators and teachers typically not only “refuse to protect gay youth from peer violence” but themselves “harass, misinform, and unfairly punish gay students.”<sup>10</sup>

It is not surprising that the fantasy of gay kids’ non-existence has a quietly self-fulfilling propensity. Although the closet may be as safe a place as a gay child can expect to find in a homophobic world, it can offer no guarantees; secrets can become public instantaneously, and closets can collapse in the blink of an eye. Coffins, in contrast, promise safety that lasts. Gay and lesbian teenagers are two to three times more likely to attempt suicide, and to accomplish it, than their heterosexual peers. Nearly one third of all adolescent suicides are estimated to be committed by gay youth.<sup>11</sup> “The youths who are at the greatest risk for suicide are the ones who are the least likely to reveal their sexual orientation to anyone,” notes Gary Remafedi, a University of Minnesota pediatrician. “Suicide may be a way of making sure that no one ever knows.”<sup>12</sup>

A recent study suggests that, compared to gay boys, girls “experience longer and greater pressures to conform and pass as ‘straight’” and that therefore “girls have a greater risk of taking their life” rather than seeking support.<sup>13</sup> Sarah, a young woman who came out at age nineteen, recalls the isolation she used to feel: “When I read my journal again now, it scares me because I’ll see something that really sounds like a suicide poem.”<sup>14</sup>

7. *Id.* 20-year-old Jason Curry, who attempted suicide three times as a teenager, explains:

I very clearly remember feeling depressed and isolated because I was the only one who was gay.

. . . I thought I would never have any friends and would have to give up my family. . . . A black person would have other black friends, but gay kids can’t even count on having other gay friends.

Chris Bull, *Suicidal Tendencies: Is Anguish over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, THE ADVOCATE, Apr. 5, 1994, at 35, 40. However, the situation is more complicated for gay and lesbian kids of color. As Linnea Due puts it, for them “[t]he family is the bulwark against the crushing malevolence of the majority culture; to be banished from or even at odds with your family is like coming to bat with three strikes against you—race, age, sexual orientation—and perhaps gender as well.” Linnea Due, *Young and Gay*, X Y MAGAZINE, Mar. 1996, at 24, 28.

8. On gay teenagers’ socialization into the closet, see A. Damien Martin, *Learning to Hide: The Socialization of the Gay Adolescent*, 10 ADOLESCENT PSYCHIATRY 52 (1982).

9. HERDT & BOXER, *supra* note 4, at 126.

10. Dennis & Harlow, *supra* note 4, at 448. On anti-gay violence in schools and schools’ role in the production of homophobia, see *infra* Part III.C.

11. See Gibson, *supra* note 4. For similar findings, see also HERDT & BOXER, *supra* note 4, at 120.

12. Bull, *supra* note 7, at 38.

13. HERDT & BOXER, *supra* note 4, at 200.

14. Sadie Van Gelder, “It’s Who I Am,” SEVENTEEN, Nov. 1996, at 142, 143 (quoting young lesbian).

Listen also to the story of a 15-year-old gay boy from Jackson, Mississippi, who wrote the following letter to an Indiana gay youth group after hearing of it on the ABC television newsmagazine "20/20":

If you refuse [to help] me, all I will have left is suicide. I am a gay teen. When my friends found out, they all disowned me. Some even come together to beat me up. I am not afraid or ashamed to say that I have never hurt or cried as much as I am doing right now. I am so alone. Even my father will have nothing to do with me. My mother does not know, and I plan to keep it like that for as long as I can. Right now she is the only person talking to me. You guys are my only hope. I beg of you to help.<sup>15</sup>

Much as the boy from Jackson may think he is alone in the world, he is not. After the TV profile, the Indiana youth group was deluged with over 100,000 phone calls and letters from gay kids everywhere in the country. The group was able to respond to fewer than 1,000.<sup>16</sup>

Gay kids deserve recognition, respect, and protection. Yet it is heart-breakingly obvious that the denial of the existence—even of the conceptual possibility—of authentically gay kids is neither merely metaphorical nor a matter of innocent semantic oversight. After the Department of Health and Human Services Youth Suicide Report came out in 1989, Department Secretary Louis Sullivan discredited the report on gay and lesbian youth suicide, asserting that it "undermined the institution of the family."<sup>17</sup> In a written statement Sullivan declared, "[T]he views expressed [in the report] do not in any way represent my personal beliefs or the policy of this Department."<sup>18</sup>

Law-makers are equally knowledgeable about, and equally determined to deny, the high risk of AIDS among gay adolescents and their desperate need for accurate information.<sup>19</sup> In 1993, the House Select Committee on Children,

15. Bull, *supra* note 7, at 42.

16. *See id.* For youth with access to computer networks, cyberspace may be emerging as a source of support—uniquely suited for the first tentative steps in coming out. "One of the beauties of the Internet is that nobody knows you're 15 and live in Montana and are gay," the founder of the Internet Youth Assistance Organization explains. Trip Gabriel, *Some On-Line Discoveries Give Gay Youths a Path to Themselves*, N.Y. TIMES, July 2, 1995, at A1. Ryan Matsuno, 17, recently asked on a computer bulletin board for gay teenagers, "Does anyone else feel like you're the only gay guy on the planet, or at least in Arlington, Tex.?" *Id.* A particularly stirring posting came from an anonymous 14-year-old boy: "I feel like my life is over. Am I gay? God, I hope not. . . . WHY DOES THIS HAVE TO HAPPEN TO ME?" *Id.* at A16. For many, cyberspace is also a safe location to explore romance; 16-year-old Amy, for example, met her first girlfriend on-line. Van Gelder, *supra* note 14, at 145.

17. Bull, *supra* note 7, at 37.

18. EVE KOSOFSKY SEDGWICK, *How to Bring Your Kids Up Gay: The War on Effeminate Boys, in TENDENCIES*, *supra* note 2, at 154 [hereinafter SEDGWICK, *How to Bring Your Kids Up Gay*].

19. A San Francisco study suggests that gay youth "do not view themselves as part of the adult gay community." AIDS OFFICE & SPECIAL PROGRAMS FOR YOUTH, SAN FRANCISCO DEP'T OF HEALTH, YOUTH AND HIV DISEASE IN SAN FRANCISCO 3 (1993). They are therefore unlikely to receive the messages tailored for the adult community; unless recognized as gay youth and targeted as such, the chances for their survival diminish further. The study's central HIV prevention recommendation is, accordingly, to "[t]arget

Youth, and Families compiled a 400-page document on adolescents and AIDS. It obtained all the information for the report from the Bush administration. "They were sitting on all this stuff," the Committee Chairwoman deplored.<sup>20</sup> Indeed, the same information would be eminently useful for *all* adolescents, but, as Sedgwick notes, "[a]s a policy aimed at punishing young gay people with death,"<sup>21</sup> the suppression of information about AIDS is working. The ten-year incubation period of AIDS makes the denial of this murderous policy even easier; by the time gay kids die, they have already become homosexual young adults who "should have known better," who have no one to blame but themselves.<sup>22</sup>

As long as gay youth remain nameless, it is easy to ignore the homo-cidal efficacy of the dream of no-more-queers. This Article examines and criticizes the law's complicity in the production of the cultural fantasy that gay and lesbian youth do not exist. The first step in the protection of gay kids must be to *see* them as gay kids; unless the law is able to name the child, it will be unable to safeguard him or her.

The Article proceeds as follows. Part I sets out the politically and culturally contested topography of any debate involving children and sexuality, and it considers the risks posed by the seemingly indestructible myth of "homosexual recruitment." Part II explicates the contradictory meanings of homosexuality as both radical Otherness located in only a few individuals and as a potentiality latent in everyone. It explores the implications of these views for lesbian and gay youth and suggests that such views make the notion of a coherently gay adolescent inconceivable and, in the broader epistemological contest over the sexual definition of youth, provide the conceptual framework for the fantasy that gay and lesbian youth do not exist. Part III turns to an analysis of the role of the law in the construction and regulation of homosexuality and illustrates how the legal system produces (apparently) heterosexual youth in its regulation of the family and school. It suggests that the laws governing child custody, adoption, and the employment of queer teachers seek essentially to protect

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youth prevention resources proportionally to transmission risk," with first priority to "young men having sex with men." *Id.* at 5.

On the spread of AIDS among youth at the end of the 80s, see Douglas A. Feldman, *Gay Youth and AIDS*, in *GAY AND LESBIAN YOUTH*, *supra* note 4, at 185; see also William B. Pederson, *HIV Risk in Gay and Lesbian Adolescents*, in *HELPING GAY AND LESBIAN YOUTH*, *supra* note 4, at 131; Doug Sadownick, *Untamed Youth: Is Gay Generation X in Jeopardy? Has the Safe Sex Message Failed?*, *GENRE*, Feb./Mar. 1994, at 40, 43.

20. Sadownick, *supra* note 19, at 43. The fate of the report on gay and lesbian youth suicide and the administration's response to AIDS are hardly surprising when viewed in light of the virulent 1988 Republican National Convention in New Orleans, where delegates attacked gay protesters and yelled at them, "AIDS is not a disease—it's the cure!" NEIL MILLER, *IN SEARCH OF GAY AMERICA: WOMEN AND MEN IN A TIME OF CHANGE* 303 (1989), *reprinted in* *LESBIANS, GAY MEN, AND THE LAW*, *supra* note 1, at 235, 238.

21. SEDGWICK, *Queer and Now*, *supra* note 2, at 2.

22. See *YOUTH AND HIV DISEASE IN SAN FRANCISCO*, *supra* note 19, at 2 ("Given a median incubation period of 10 years, almost all 26-30 year olds with AIDS were infected with HIV during their youth.").

“confused” children with latent homosexual proclivities from becoming gay or lesbian adults. The Article concludes, in Part IV, with a call for the law to recognize and protect the youth who identify themselves as gay and lesbian by naming them as gay and lesbian, rather than as confused, presumptively heterosexual future adults.

#### I. TOPOGRAPHY OF DEBATE ON JUVENILE SEXUALITY

*For over a century, no tactic for stirring up erotic hysteria has been as reliable as the appeal to protect children.*

Gayle Rubin<sup>23</sup>

We live in a “sexualized century.”<sup>24</sup> Much as we may deplore the repressive nature of Western culture and its purported devaluation of sexuality, sex has nonetheless come to constitute one of the most active loci of social meaning and a central hermeneutical key to personal identity.<sup>25</sup> According to Michel Foucault, our cultural obsession with the repression of sexuality does not so much prohibit as produce the very discourse it ostensibly disavows: “What is peculiar to modern societies, in fact, is not that they consigned sex to a shadow existence, but that they dedicated themselves to speaking of it *ad infinitum*, while exploiting it as *the secret*.”<sup>26</sup>

This simultaneity of denial and fetishization is especially true with respect to how we view children. The notion of juvenile sexuality is fundamental to our notion of adolescence, yet we are constantly striving to desexualize adolescents. In his study of the emergence of modern sexuality, Foucault describes “a double assertion that practically all children indulge or are prone to indulge in sexual activity; and that, being unwarranted, at the same time ‘natural’ and ‘contrary to nature,’ this sexual activity posed physical and moral, individual and collective dangers.”<sup>27</sup>

The persistent pathological fascination with children’s masturbation suggests that the taboo and fetish of juvenile sexuality remain with us. It also exemplifies the dangers of participating in the discourse on children and sex. The war on onanism has taken new forms, yet it still retains much of its moral momentum. Parents may be less likely to tie their children down at night to

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23. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 271 (Carol Vance ed., 1984).

24. EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 91 (1990).

25. For an extended indictment of our much cherished “repressive hypothesis,” see 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION 15 (Robert Hurley trans., 1980).

26. *Id.* at 35.

27. *Id.* at 104; see also DAVID T. EVANS, SEXUAL CITIZENSHIP: THE MATERIAL CONSTRUCTION OF SEXUALITIES 212 (1993) (noting contradictory demands on family, which is “simultaneously required to protect its children’s natural asexuality within a culture which defines sexuality as integral to the natural”). On the history of children’s eroticization, see JAMES R. KINCAID, CHILD-LOVING: THE EROTIC CHILD AND VICTORIAN CULTURE (1992).

stop them from touching themselves,<sup>28</sup> and doctors may be more hesitant to suggest that playful boys be circumcised without an anesthetic or pleasure-seeking girls be cured with carbolic acid on the clitoris,<sup>29</sup> but a public suggestion that masturbation may after all be a good thing for children still sends a Surgeon General to early retirement.<sup>30</sup>

As sexuality is a hotly contested primary site of meaning in and of itself, attempts to redefine or reinterpret juvenile sexuality often elicit reactions bordering on hysteria. The reaction is hardly paranoid; the stakes of the struggle are high. The future of *all* our institutions depends ultimately on society's ability to keep reproducing its current norms in children. The control of children is thus key to the control of the future; how we socialize our children today has a decisive influence on what the world will look like tomorrow.<sup>31</sup>

While it is difficult to discuss children and sexuality in a dispassionate manner, to talk about youth and homosexuality without hysterical sanctimony is virtually impossible. Whether articulated or not, the mythical specter of "homosexual recruitment" accompanies every conversation about gay and lesbian youth. The myth may well be inspired by general anxiety about youth and sexualized children—thus reflecting displaced *heterosexual* desire and guilt—but in the end it is the homosexual child-molester who has become a stock character in our social mythology. No child is beyond the gravitational field of this myth. Here is the story of one gay boy's introduction to it:

In the summer after fourth grade, on the way to Provincetown, my mother took me aside for a talk. She warned that one day, a man in Provincetown might ask me up to his house. If I went up, terrible things would happen to me. The man might cut me up into little pieces. When I asked her why someone would do this to me, she paused and said, "Because they are what you call homosexuals."<sup>32</sup>

The myth grows out of the first axiom of heterosexual logic: homosexuals *must* resort to recruitment. The axiom is based on the patently counterfactual assumption that homosexuals cannot have children and that, therefore, the only

28. See Rubin, *supra* note 23, at 268.

29. Cf. JOHN HARVEY KELLOGG, *PLAIN FACTS FOR OLD AND YOUNG: EMBRACING THE NATURAL HISTORY AND HYGIENE OF ORGANIC LIFE* 295-96 (1887) (suggesting such "cures").

30. Surgeon General Joycelyn Elders was forced to resign because of the popular outcry in response to her suggestion that masturbation could be included in sex education discussions in school. See Gina Kolata, *The Rule Dr. Elders Forgot: America Keeps Onan in the Closer*, N.Y. TIMES, Dec. 18, 1994, at E5.

31. That control over children is crucial to the future of a culture finds political recognition in the fact that the forcible transfer of children from one national, ethnic, racial, or religious group to another is defined as an act of genocide under international law. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 8, 1948, art. II (e), 78 U.N.T.S. 277.

32. AARON FRICKE, *REFLECTIONS OF A ROCK LOBSTER: A STORY ABOUT GROWING UP GAY* 17-18 (1981). Fricke—already aware of being a "homosexual"—explains further, "[My mother] had no idea what impact that admonishment would have on me. She drove my ego to a really bad skid." *Id.* at 18.

way to transmit the homosexual “culture” is by converting heterosexual(s’) children: “[Homosexuals] don’t have any children of their own. If they don’t recruit children or very young people, they’d [sic] all die away. They have no means of replenishing.”<sup>33</sup>

Given this contested background, to discuss the legal treatment of children and homosexuality may be to court disaster. Yet the price that gay and lesbian youth pay for the silence about their lives is often so high—namely, their lives—that they have little left to lose and everything to gain from breaking the taboo.

## II. THE FEAR OF A QUEER PLANET: CONTRADICTIONARY MEANINGS OF HOMOSEXUALITY AND INVISIBLE GAY AND LESBIAN YOUTH

Our understanding of “homosexuality” consists of radically unstable and contradictory cultural meanings. The confused category reflects an analytical framework that stigmatizes gay and lesbian adults in order to keep them in the closet and thereby render them invisible. For queer kids, however, the implications are even more fatal: the framework simply precludes even the conceptual possibility of coherently gay youth.

### A. *Gay and Lesbian Adults: Stigmatized and Invisible*

*I loved a few people and they loved me. It had nothing to do with these labels. Of course, the world had all kinds of words for us.*

James Baldwin<sup>34</sup>

*If a homosexual who wants to renounce homosexuality finds a psychiatrist who knows how to cure homosexuality, he has every chance of becoming a happy, well-adjusted heterosexual.*

Dr. Reuben<sup>35</sup>

One of the main accomplishments of the emerging field of queer theory has been to demonstrate the incoherence and radical instability of the category “homosexual.” Eve Kosofsky Sedgwick’s *Epistemology of the Closet* is one of the most eloquent and suggestive articulations of that critique. In Sedgwick’s words, the hetero/homosexual distinction

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33. LAURA BENKOV, REINVENTING THE FAMILY: THE EMERGING STORY OF LESBIAN AND GAY PARENTS 84 (1994) (quoting California senator John Briggs, who campaigned in late 70s for a plan to ban gays and lesbians from teaching in public schools throughout California). See also JERRY FALWELL, LISTEN, AMERICA! 160 (1980) (“Homosexuals cannot reproduce themselves, so they must recruit.”).

34. Richard Goldstein, *‘Go the Way Your Blood Bears’: An Interview with James Baldwin*, VILLAGE VOICE, June 26, 1984, at 13, quoted in JONATHAN NED KATZ, THE INVENTION OF HETEROSEXUALITY 104-05 (1995).

35. DAVID REUBEN, EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT SEX, BUT WERE AFRAID TO ASK 132 (1970).



is organized around a radical and irreducible incoherence. It holds the minoritizing view that there is a distinct population of persons who “really are” gay; at the same time, it holds the universalizing views that sexual desire is an unpredictably powerful solvent of stable identities; that apparently heterosexual persons and object choices are strongly marked by same-sex influences and desires; and that at least male heterosexual identity and modern masculinist culture may require for their maintenance the scapegoating crystallization of a same-sex male desire that is widespread and in the first place internal.<sup>36</sup>

In other words, the need to label homosexuals as radically different originates in the fear that we are *not* different—the fear that anyone *could* be or become homosexual. The result is a predictable mix of paradox and hypocrisy. Society polices the hetero/homosexual boundary for transgressions, while at the same time it pretends that the boundary is impregnable and transgressions hence impossible.<sup>37</sup> In this way, homosexuals first become a central site of social construction as a necessary counterpoint for the creation of a heterosexual identity, and then a marginalized site of social destruction for establishing the superiority and (apparent) stability of that identity.

Under this framework, to the extent that we view sexual desire as “an unpredictably powerful solvent of stable identities,”<sup>38</sup> the corrosive influence of the more virulent strains of latent homosexuality must be contained. The notion of latent homosexuality suggests vulnerability—a person at risk, an individual on the brink of an abyss. The central method of heterosexual soteriology is to frighten us into immobility, to freeze us into heterosexuality to prevent our fall. As long as we stay fixed, we are safe. Out of a fear of a queer planet<sup>39</sup> grows a fantasy of an all-straight world, which relies on the stigmatization of the “homosexual” so that no self-respecting citizen—man, woman, or child—would want to be, or admit to being, gay or lesbian. To misname, or to misrepresent, is thus to deter.

Indeed, the power to name is the power to enforce one’s conceptions of reality.<sup>40</sup> However, to christen the “homosexual” the Other is not merely a matter of epistemological legerdemain. Acquiescence in this myth requires material sanctions. The stigmatized identity is imposed on the stereotypically

36. SEDGWICK, *supra* note 24, at 85 (citation omitted).

37. Iris Young characterizes homophobia as the paradigm case of a border anxiety: “Homophobia is one of the deepest fears of difference precisely because the border between gay and straight is constructed as the most permeable; anyone at all can become gay, especially me, so the only way to defend my identity is to turn away with irrational disgust.” IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 146 (1990).

38. SEDGWICK, *supra* note 24, at 85.

39. I owe the phrase to the collection of queer essays by the same title, *FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* (Michael Warner ed., 1993) [hereinafter *FEAR OF A QUEER PLANET*].

40. For a relentless exposition of the identity between ontology and epistemology, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989).

homosexual, whereas “normal-appearing” homosexuals are bribed and intimidated into the closet to maintain the fantasy of the queer as radically different.<sup>41</sup> The true sin, in this vision, is not so much to be gay as to admit it openly. James Baldwin suggests that homophobia “is a way of controlling people. Nobody *really* cares who goes to bed with whom, finally. I mean, the State doesn’t really care, the Church doesn’t really care. They care that you should be frightened of what you do.”<sup>42</sup> As long as you are frightened, you will remain closeted and invisible, and as long as you remain invisible, you are socially dead.<sup>43</sup> The central cultural message of homophobia is, in Monique Wittig’s pointed formulation, “you-will-be-straight-or-you-will-not-be.”<sup>44</sup>

The extent to which the fantasy of a (nearly) perfectly straight world *is* merely a chimera is empirically impossible to demonstrate, for “silence is not eloquent.”<sup>45</sup> Yet silence carries meaning, although that meaning can be hotly contested. In Foucault’s formulation, silence

is less the absolute limit of discourse, the other side from which it is separated by a strict boundary, than an element that functions alongside the things said, with them and in relation to them within over-all strategies. . . . There is not one but many silences, and they are an integral part of the strategies that underlie and permeate discourses.<sup>46</sup>

The silence of the closet echoes throughout the culture, and the invisibility of homosexuals is taken to signify both that we do not exist and that we are ashamed to exist.

The more successful it is at keeping homosexuality in the closet, the greater the power of institutionalized heterosexuality to present itself as an inescapable ontological fact. To quote Foucault on the deployment of sexuality, “power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.”<sup>47</sup> Holding homosexuals as hostages, the closet normalizes heterosexuality by enabling a shattering contrast with an imaginary—fantastic—homosexuality. Dr. Reuben, author of the unfortunate classic *Everything You Always Wanted to Know About Sex*, authorizes a fantasy of “the homosexual”:

41. I have appropriated the suggestive terminology of “bribery” and “intimidation” from Janet Halley. Janet E. Halley, *The Construction of Heterosexuality*, in FEAR OF A QUEER PLANET, *supra* note 39, at 82, *passim*.

42. Goldstein, *supra* note 34, *quoted in* KATZ, *supra* note 34, at 104.

43. I borrow the phrase from Orlando Patterson. See ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

44. MONIQUE WITTIG, *The Straight Mind*, in THE STRAIGHT MIND AND OTHER ESSAYS 21, 28 (1992).

45. MACKINNON, *supra* note 40, at 206. Or, as Adrienne Rich has written of silence, “Do not confuse it with any kind of absence.” ADRIENNE RICH, *Cartographies of Silence*, in THE DREAM OF A COMMON LANGUAGE 17 (1978).

46. FOUCAULT, *supra* note 25, at 27.

47. *Id.* at 86.

The homosexual must constantly search for the one man, the one penis, the one experience, that will satisfy him. Tragically there is no possibility for satisfaction because the formula is wrong. One penis plus one penis equals nothing. There is no substitute for heterosex—penis and vagina. Disappointed, stubborn, discouraged, defiant, the homosexual keeps trying. . . . He is in a difficult position—condemned eternally to search after what does not exist—after what never existed.<sup>48</sup>

While Dr. Reuben's landmark opus devotes a whole chapter to a voyeuristic exploration—or fabrication—of male homosexuality, female sexuality is almost completely absent; lesbian sex is apparently not something you ever wanted to know about. Reuben's brief treatment of lesbians is hidden in the middle of a chapter on prostitution, for—he knowingly asserts—“the majority of prostitutes are female homosexuals in their private lives anyway.”<sup>49</sup>

In short, the right to stigmatize those with same-sex erotic impulses as “homosexuals” and thereby drive us into the closet has been the epistemological privilege to imagine that the world is straight. The closet has made it appear that sexuality *is* heterosexuality and that there are simply no other alternatives. Instead of being just one value among others, heterosexuality has become Objectivity; instead of being an institution, it has taken on the attributes of an emanation of Nature; instead of being a mere banalized “lifestyle,” it has installed itself as Life.

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48. REUBEN, *supra* note 35, at 132. Even by the standards of its genre, *Everything You Always Wanted to Know About Sex* is a remarkable collection of anti-gay prejudice. While Dr. Reuben admits that “there are dozens of variations” of homosexuality, he asserts that “they all have this in common: the primary interest is the penis, not the person.” *Id.* at 133. “Random and reckless selection of partners is the trademark. . . . This is the core of homosexuality.” *Id.* at 142. Yet as horrifying as anonymous homosexual encounters may be, longterm homosexual liaisons between men are even worse: “The bitterest argument between husband and wife is a passionate love sonnet by comparison with a dialogue between a butch and a queen.” *Id.* at 144.

49. *Id.* at 269.

B. *Gay and Lesbian Youth: Incoherent and Invisible*

*I entered sexuality assuming that I would fail at it and that it had failed me, that I, by virtue of my lust for men, was where sexuality broke down, where the system stopped working, where a mistake materialized.*

Wayne Koestenbaum<sup>50</sup>

There is little doubt, then, that as far as gay adults are concerned, the most immediate consequence of the institution of the closet is that it simultaneously stigmatizes us and renders us invisible. Yet the heterosexual *Weltanschauung* concedes at least the *possibility* of adult homosexuality, even while refusing to see actual adult homosexuals. Queer youth, on the other hand, are considered not only invisible but *impossible*. In the vulgar psychoanalytic theory that informs the popular construction of sexuality, homosexuality is seen as an infantile fixation and an instance of arrested development. In this understanding, an authentically gay adolescent is simply a contradiction in terms.

In Sedgwick's words, psychoanalytic theory remains "virtually the only heuristic available to Western interpreters for unfolding sexual meanings."<sup>51</sup> In the interpretation of sexuality, Freud has indeed become coterminous with the popular understanding of sex. The Freudian view of mature heterosexuality as the *telos* of normal sexual development is one of our most central, unchallenged cultural meanings.<sup>52</sup> While all adolescents pass through a phase of same-sex attraction, a normal sexual career will end in the haven of heterosexuality; hence the wishful mantra of parents of gay and lesbian children, "It's just a phase." That is to say, as long as youth are able to resist their immature homosexual longings and navigate their way unscathed through adolescence, they will emerge as undamaged heterosexual adults.<sup>53</sup>

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50. WAYNE KOESTENBAUM, *THE QUEEN'S THROAT: OPERA, HOMOSEXUALITY, AND THE MYSTERY OF DESIRE* 18 (1993).

51. EVE KOSOFKY SEDGWICK, *Is the Rectum Straight? Identification and Identity in 'The Wings of the Dove,'* in *TENDENCIES*, *supra* note 2, at 73, 74.

52. By a "Freudian" view, I mean a position typically attributed to Freud. What Freud himself in fact thought remains contested, but it is of limited significance to the exploration of the *popular* construction and adoption of his theory, which is my primary concern. It should perhaps be noted that Freud did not deem homosexuality necessarily incompatible with an otherwise "normal" existence. "Homosexuality is assuredly no advantage," he writes in his famous—as well as famously patronizing—letter to the mother of a homosexual son, "but it is nothing to be ashamed of, no vice, no degradation, it cannot be classified as an illness; we consider it to be a variation of the sexual function produced by a certain arrest of sexual development." Letter from Sigmund Freud, *quoted in* BENKOV, *supra* note 33, at 53. Benkov, for instance, notes that as Freud "walked the delicate line between viewing homosexuality as a normal aspect of human sexuality and seeing it as outright pathology, he often contradicted himself." BENKOV, *supra* note 33, at 53. For a homophile reading of Freud, see CHRISTINE DOWNING, *MYTHS AND MYSTERIES OF SAME-SEX LOVE* 30-50 (1989). Jonathan Katz interprets Freud's ambiguous theoretical legacy as providing "the most complex support of heterosexual rule and important tools for challenging heterosexual dominion." KATZ, *supra* note 34, at 57.

53. On Freud's moral evaluation of "immaturity," see Timothy F. Murphy, *Freud Reconsidered: Bisexuality, Homosexuality, and Moral Judgement*, *J. HOMOSEXUALITY*, Winter 1983-Spring 1984, at 65. See also HERDT & BOXER, *supra* note 4, at 174-75 (criticizing the "great myth of our culture that same-sex

In this conceptual framework, there is simply no place for a homosexual child or adolescent. There are only children and adolescents with latent homosexual inclinations, and adult homosexuals. Since the framework assumes that every human being is born with the promise and potential of fulfilled heterosexuality, everyone remains presumptively heterosexual until he or she has conclusively failed to conform to this heterosexist teleology. As “‘preliminary’ sexual beings, on this side of sex, yet within it, astride a dangerous dividing line,”<sup>54</sup> children are given—or forced to accept—the benefit of the doubt. Only if one persists in one’s immature desires into adulthood is one labeled “homosexual.” By heterosexual fiat, then, adolescents are denied the ability to define themselves as gay, and a non-conforming child is, by definition, not gay but “confused.”<sup>55</sup> Scholars of gay youth confirm that in national scientific meetings, in seminars in various academic fields, in high schools, and among lay groups their research is invariably met with a set of recurring questions: “Aren’t these youth . . . just confused? Aren’t they like other teenagers who are going through a ‘stage’ of sexual development, who are not homosexual, but who don’t know who or what they are?”<sup>56</sup> In a similar vein, one girl’s parents questioned her homosexuality by pleading, “You haven’t had sex with a man, you haven’t had sex with a woman—how do you know you’re a lesbian?”<sup>57</sup>

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desires are less than adult. . . . [and] a product of adolescent distress and irresponsibility, of surging hormones and . . . antisocial or rebellious behavior”).

For a breath-taking example of the propensity to infantilize gay men, see Midge Decter’s account of her sightings of upper-middle class gay men on the New York resort of Fire Island. Midge Decter, *The Boys on the Beach*, COMMENTARY, Sept. 1980, at 35. Decter’s essay, a naive yet unpleasantly familiar compendium of innumerable stereotypes, exemplifies the notion that heterosexuality is sexuality in its fullness while homosexuality is merely a liminal developmental stage—albeit one in which some retarded individuals’ development becomes arrested. In patronizing prose, Decter refers to the men she observes as “characterized by nothing so much as a tender, sweet, vain, pouting, girlish attention to the youth of and beauty of their bodies,” obsessed with “adolescent play” and seeking a “safety valve for that obsession” in alcohol, finding “primary pleasure in dress and decor and all things that covered their world with a sparkling if ambiguous surface.” *Id.* at 48.

54. FOUCAULT, *supra* note 25, at 104.

55. Questioning the authenticity of young people’s identification as gay is an act of considerable adult arrogance. Who, in our homophobic culture, would take on the label “homosexual” without serious reflection and commitment to it? When the writer Robb Forman Dew initially interrogated her son about whether he had “chosen” to become gay as an act of rebellion against his parents’ “bourgeois” values, he responded,

God. Something I’ve *chosen*! I don’t think this is anything that *anyone* would choose in this society. I didn’t plan this. You don’t understand. Even at St. Paul’s I used to take long walks by myself and think, ‘I can’t let this happen! I *won’t* let this happen! I’m not going to feel this way!’ I didn’t wake up one day and think it would really be *interesting* to be gay.

ROBB FORMAN DEW, *THE FAMILY HEART: A MEMOIR OF WHEN OUR SON CAME OUT* 32-33 (1994). As Bernard Boxill notes in his analysis of subordinated persons who cease to feign servility, “if a person is powerless it will not be easy for him to make others believe that he is taking off a mask. People do not take the powerless seriously.” Bernard R. Boxill, *Self-Respect and Protest*, 6 PHIL. & PUB. AFF. 58, 69 (1976).

56. HERDT & BOXER, *supra* note 4, at xv.

57. Van Gelder, *supra* note 14, at 144 (quoting parent). In contrast, it is difficult to imagine parents posing a similar epistemological challenge to a child’s professed heterosexuality in the absence of sexual contact.

Similarly, faced with a plaintiff who portrayed himself as a role model for gay kids, a judge of the Southern District of New York was “puzzled as to how [the plaintiff] determine[d] that these children, who are at most going through puberty, are potential homosexuals in need of such a role model.”<sup>58</sup> Although homosexuality is considered to be traceable to childhood,<sup>59</sup> in the end it is an adult condition. Only grown-ups get to be queer.<sup>60</sup>

To be sure, individuals’ experience of their sexuality varies, and many gay men and lesbians have in fact not self-identified as gay or lesbian until adulthood, often after years of lonely but fierce resistance to the stigmatized identity “homosexual.” Yet the very unavailability of the label “gay adolescent” is surely one reason for the tardiness of self-identification. Frightened by our homoerotic impulses, many if not most of us have told ourselves, in accordance with the cultural script purportedly representing our experiences, that “it” (and “it” must not be named or labeled) must indeed be just a phase, a phantasmagoria that can be willed away. Linda Heal recalls relying on Ann Landers to exorcise her feelings of lesbianism as they first arose: “For the next four years, I never acted on my feelings for women, hoping that eventually they would evolve into heterosexual feelings. Every now

58. *Bagarozy v. Maginnis*, 618 F.Supp. 1306, 1309 (S.D.N.Y. 1985).

59. As Foucault puts it, “The nineteenth-century homosexual became a personage, a past, a case history, and a *childhood* . . .” FOUCAULT, *supra* note 25, at 43 (emphasis added).

60. For the sake of absolute clarity, I emphasize that my call for the right of youth to claim the label “gay” should *not* be read as endorsing an essentialist notion of a natural, ahistorical ontological category. I only ask—although it is a radical demand—that this historically specific, late 20th-century political and social identification not be *denied* to young people who may desperately need it in order to survive in the homophobic culture that surrounds them. I fully support the efforts of radical social constructionists to destabilize and denaturalize the very notion of stable, self-evident sexual identity categories, and nothing will delight me more than to see the day when *no one*—whether a so-called “homosexual” or a so-called “heterosexual”—is imprisoned in a fixed, pre-defined sexuality. Yet so long as sexual identity continues to be a straight-jacket and the label “gay” continues to be homosexually-identified adults’ primary method of resisting heterosexuality as a normalizing regime, it seems that, at the very least, youth have the right to the same minimal defenses in their struggle against the force of normative heterosexuality.

One can of course retort that embracing “gay-ness” even in such a provisional manner nevertheless serves to reinforce the polar, and ultimately hierarchical, opposition between hetero- and homosexualities. I cannot pretend that there is absolutely no theoretical tension between the ultimate project of deconstructing the very notion of sexual identity and the more immediate social, political, and legal project of saving gay kids’ lives by demanding that we recognize their right to identify as “gay.” As Judith Butler formulates the dilemma of a gay politics (and indeed any identity politics, whether of sexual orientation, race, gender, or class): “There is a political necessity to use some sign now, and we do, but how to use it in such a way that its futural significations are not *foreclosed*? How to use the sign and disavow its temporal contingency at once?” Judith Butler, *Imitation and Gender Subordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13, 19 (Diana Fuss ed., 1991). Yet, as Sedgwick points out, it is the incorrigibly heterosexist political and social context against which “essentialist understandings accrue a certain gravity,” for they reach “deeply, and, in a sense, protectively into a fraught space of life-or-death struggle that has been more or less abandoned by constructivist gay theory: that is, the experience of gay or proto-gay children.” SEDGWICK, *supra* note 24, at 42. Moreover, affirming the sexual identification of gay and lesbian youth need not imply that there is only one way to be, or become, gay, straight, or in-between. To quote Sedgwick once more, “many gay adults may never have been gay kids and some gay kids may not turn into gay adults.” *Id.* I am therefore not offering a prescription to anyone, child or adult, as to how, or whether, to identify as “gay.” Rather, my objection in this Article is aimed at the *foreclosure* of even the *possibility* of valid gay self-identification to youth who may otherwise be left completely unmoored in their battle against a pervasively homophobic culture. For, as Linnea Due has put it, “[v]iewing yourself through the eyes of a society that loathes you is a devastating experience.” Due, *supra* note 7, at 29.

and then, on the pages of our newspaper, Ann Landers promised that they would. So I waited."<sup>61</sup> It is thus hardly surprising that even many adult gays and lesbians who have not come to their homosexuality until later in life fail to see the queer youth around them. A divorced lesbian mother of three children testifies as follows:

I don't notice [gay teenagers] when I'm in Newtown [a Chicago gay neighborhood]. Not on the street. I've never noticed a young gay couple. Maybe when I see teenagers I assume they're straight because they're teenagers. Gay for me is something you don't do until you're an adult, because I didn't do it until I was an adult. So it's hard for me to conceptualize gay teens. . . . When they get to be adults they get to join [our community]—then you're a person.<sup>62</sup>

That even gay adults fail to see the gay youth around them is surely the ultimate testament to the power of normative heterosexuality to obliterate queer kids. As long as our social, political, cultural, and legal institutions are able to convince us that gay and lesbian youth do not exist, they will continue to feel that they *ought not* to exist. Moreover, gay kids' internalization of the imperative to disappear—whether into the closet or the coffin—appears alarmingly rational in light of the heterosexual mythology on which they are raised. Recent ethnography confirms that gay youth still grow up fearing “that they are ‘out of their minds,’ full of sin or disease, that they are doomed to dress as transvestites, molest children, hate the opposite sex, or contract AIDS, which may lead them, if they remain alone and isolated, into desperate acts of risk, including drugs or suicide.”<sup>63</sup> Nursing such apocalyptic visions is indeed crucial in the moral war over the outcome of sexual development of youth; by inducing queer adults to remain invisible, these myths maintain the

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61. Linda Heal, *It Happened on Main Street*, in *GROWING UP GAY/GROWING UP LESBIAN: A LITERARY ANTHOLOGY* 8, 10 (Bennett L. Singer ed., 1994) [hereinafter *GROWING UP GAY/GROWING UP LESBIAN*].

62. HERDT & BOXER, *supra* note 4, at 70.

63. *Id.* at xv-xvi.

deterrence of caricatured homosexuality<sup>64</sup> and the illusion of a naturally straight world.

The goal must thus be to question both the ideological contours and the ostensible naturalness of normative heterosexuality. In MacKinnon's words, "[w]hen seemingly ontological conditions are challenged from the collective standpoint of a dissident reality, they become visible as epistemological."<sup>65</sup> As long as we inhabit a culture predicated on the fantasy of an all-straight world that does not even acknowledge its own straightness, youth with same-sex desires are left in a conceptual vacuum. To discover their condition as epistemological rather than ontological, they must be able to imagine roads where there are now only roadblocks, and possibility where there is now only denial. Simply put, their task is to imagine the unimaginable.<sup>66</sup>

### III. THE LEGAL CONSTRUCTION OF THE FANTASY THAT GAY AND LESBIAN YOUTH DO NOT EXIST

The law is not an innocent bystander in the cultural battle over the meaning of sexual identity. Section A below examines the law's role in the production of heterosexuality as an ideology,<sup>67</sup> while Section B illustrates how the legal

64. That society recruits heterosexuals by guarding the secret that homosexuality is an authentic possibility is evident from the popular reaction to portrayals of homosexuals/gay people in the media. Homosexual mass murderers, deranged transvestites, suicidal dirty old men, violent lesbians, and closeted child-molesters have traditionally been stock characters—even if usually only in appropriately marginal roles—both in movies and on television. Robb Dew, for example, describes how, upon their son's coming out, she and her husband became suddenly aware of the treatment of homosexuality on television:

We watched any sports we could find on television. There was no refuge in anything else on TV, because we discovered right away that, in 1991, the most innocent of sitcoms almost invariably had a passive but definite anti-gay agenda. Trotting out a stereotypical gay man—although rarely ever a lesbian—was apparently always good for a laugh. . . . How had we not noticed and been offended by it before?

DEW, *supra* note 55, at 15. Such stereotypical portrayals of gay men and lesbians are typically met with mild disgust, morbid voyeurism, patronizing titillation, or a combination of them, but rarely do they arouse significant controversy. In contrast, an innocent kiss between a "normal" same-sex couple, the faintest suggestion that evidently well-adjusted people might be gay or lesbian, can drown TV stations in howls of protest. When ABC's "Thirtysomething" showed briefly two men having a conversation in bed, corporate sponsors withdrew over \$1 million in commercials originally intended for the episode. See Chris Bull, *Acting Gay*, THE ADVOCATE, Dec. 27, 1994, at 44, 46. Similarly, when Ikea came out with a television commercial featuring a same-sex couple buying furniture for their home, this transgression of cultural norms ended up being analyzed on the Op-Ed page of the New York Times. This is surely an indication how much more deviant it is to suggest that homosexuals are perfectly boring than it is to represent them as perverted, sick, and self-destructive. See Frank Rich, *Cards on the Table: Ad (and Furniture) Not Perfect, But at Least Ikea's Trying*, N.Y. TIMES, Apr. 16, 1994, at 31A. The religious right is right: the specter of a happy homosexual—an affirmatively gay identity—does threaten the very fabric of our pervasively homophobic culture, for it suggests a cultural possibility that was not supposed to exist and that must be spoken of only as unspeakable.

65. MACKINNON, *supra* note 40, at 240.

66. The quandary of gay youth is like that of the feminist vision in a thoroughly gendered world; to imagine a different future requires what Adrienne Rich calls a "quantum leap" of imagination. RICH, *supra* note 45, at 272-73.

67. To use the term "ideology" to describe a dominant cultural system is always tendentious, but I use "ideology" to refer to what Teresa de Lauretis regards as an Althusserian understanding of it, namely, "a foolproof system whose effect is to erase its own traces completely, so that anyone who is 'in ideology,' caught in its web, believes 'himself' to be outside and free of it." TERESA DE LAURETIS, TECHNOLOGIES



norms governing adult-child relations in the contexts of the family and school reflect the conceptual framework critiqued in Part II.

A. *Law as a Moment in the Cultural Construction and Regulation of Homosexuality*

*Outlaw and mad are the names for those refuse to go by the rules and conventions, as well as for those who refuse to or cannot speak the common language.*

Monique Wittig<sup>68</sup>

The fantasy and wish that gay people not exist imbues every major institution of our culture. Law plays a central, although not independent, role in the construction and regulation of homosexuality. Yet what gives legal regulation particular potency is the coercive power of the state that backs it up, ready at any time to discipline those who do not abide by it. In Robert Cover's epigrammatic formulation, "[a] judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."<sup>69</sup> Apart from its ability to coerce those who do not conform, in regimes that style themselves as liberal law plays an important role also in the subtler epistemological struggle to legitimate cultural and social conventions.

Although its recourse to legitimized violence gives law unique significance, it exists on a wider juridico-medico-religio-psychiatric-administrative-educational spectrum, from whose regulation no significant cultural space is free.<sup>70</sup> The normative ideal of heterosexuality declines to label itself as such, yet it is everywhere. As Sedgwick observes wryly:

The presiding asymmetry of value assignment between hetero and homo goes unchallenged everywhere: advice 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 institutions whose programmatic undertaking is to prevent the development of gay people is unimaginably large. There is no major institutionalized discourse that

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OF GENDER 9 (1987). On the notion of ideology as a cultural system, see also CLIFFORD GEERTZ, *Ideology as Cultural System*, in THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 193 (1973).

68. MONIQUE WITTIG, *On the Social Contract*, in THE STRAIGHT MIND AND OTHER ESSAYS, *supra* note 44, at 33, 40.

69. ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 203 (Martha Minow et al. eds., 1992) [hereinafter NARRATIVE, VIOLENCE, AND THE LAW]. I invoke Cover here without commitment to his choice of gendered pronouns.

70. In Foucault's formulation, "the law operates more and more as a norm, and . . . the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory." FOUCAULT, *supra* note 25, at 144.

offers a firm resistance to that undertaking: in the United States, at any rate, most sites of the state, the military, education, law, penal institutions, the church, medicine, and mass culture enforce it all but unquestioningly, and with little hesitation at even the recourse to invasive violence.<sup>71</sup>

While in the twentieth century homosexuality has been largely medicalized and “de-moralized,” so that it is more often an issue of sickness than of sin,<sup>72</sup> the sanitized dream of a world filled with “normal,” well-adjusted cheerful heterosexuals is frequently no more hospitable to same-sex erotic attraction than was the early American settlers’ Puritan apotheosis of heterosexual, procreative marital intercourse. Rather, “there is a special obscenity about bigotry in the guise of ‘help,’ antihomosexual pronouncements in the name of ‘mental health,’ or similar prejudices from religious authorities.”<sup>73</sup> Even ostensibly progressive revisionist psychoanalysis (as opposed to the vulgar Freudianism that informs many of the most central cultural meanings regarding homosexuality) as well as other schools of psychology and psychiatry persist in their obsession with gender non-conformity in children, so that the new diagnosis of “Gender Identity Disorder” has installed itself as code for homosexuality.<sup>74</sup>

71. SEDGWICK, *How to Bring Your Kids Up Gay*, *supra* note 18, at 161.

72. See generally MICHAEL F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 397-433 (1988). To be sure, in 1973 the American Psychiatric Association decided to depathologize homosexuality by deleting it from its next Diagnostic and Statistical Manual, DSM-III, which was published in 1980. However, as Sedgwick poignantly notes, the very same DSM-III which was the first not to contain a diagnosis for “homosexuality” was also the first one to introduce a new disorder entitled “Gender Identity Disorder of Childhood.” SEDGWICK, *How to Bring Your Kids Up Gay*, *supra* note 18, at 156-57. Whatever the conceptual shifts in the relative emphases on homosexuality as sickness and as sin, both tropes continue to structure the discourse on sexual identity. For instance, the rhetoric of sin provides the basis for the religious right’s denunciations of homosexuality as an immoral “choice.” Ellen Craswell, Republican candidate for Washington governor, recently excoriated homosexuals for “a life-style choice” that will doom them to an early death. Timothy Egan, *Battle in Washington Brings Soul-Searching*, N.Y. TIMES, October 22, 1996, at A8.

73. Jonathan Ned Katz, *GAY AMERICAN HISTORY 197-205* (1976), reprinted in RUBENSTEIN, *supra* note 1, at 57, 61.

74. See *supra* note 72. For a history of the evolution of the diagnosis of Gender Identity Disorder (GID), see PHYLLIS BURKE, *GENDER SHOCK: EXPLODING THE MYTHS OF MALE AND FEMALE* 60-66 (1996). For astonishing accounts of gender-training for children hospitalized under the diagnosis of GID, see *id.* 66-108. Burke brings to light projects—financed, as late as 1978, by taxpayers through the United States Public Health Service and the National Institute of Mental Health—which studied “normal” and “abnormal” behavior in boys and girls in terms of how they flexed their wrists and elbows and how they carried their backpacks. *Id.* at 28-29. For example, Burke provides details of UCLA’s “feminine boy project” which “treated,” among other patients, an eight-year-old boy whose case history included such gender-inappropriate behavior as a tendency to say, “Oh, my goodness,” and “Goodness gracious.” Equally remarkable is the case of Stanley, who at age three was submitted to a five-year program of psychoanalytic treatment for GID at the Psychoanalytic Institute at the New York University Medical Center. In 1991, Dr. Calvin H. Haber reported that without such “treatment” Stanley would “likely have developed into an adult homosexual.” Echoing the cultural consensus, Dr. Haber confidently asserted that “psychoanalysis during prelatency can be effective in Gender Identity Disorders, and offers an alternative in some cases to a brittle sense of masculinity and/or homosexual orientation in the future adult.” *Id.* at 98-99. See also Daniel Goleman, *The ‘Wrong’ Sex: A New Definition of Childhood Pain*, N.Y. TIMES, Mar. 22, 1994 (advising parents on definition of disorder). As late as 1968, “thoughtful” parents who were

Ultimately the pedagogical and medicalized dream of no-more-gay-people is also a moral imperative. In her theory of sexual stratification, Gayle Rubin illustrates how our contemporary Euro-American culture evaluates sex acts in accordance with a hierarchy in which marital, monogamous, reproductive, heterosexual intercourse occupies "the top of the erotic pyramid."<sup>75</sup> The farther sex strays from this definition of "Good" sex, the more it takes on the label of abnormal, unnatural, sick and sinful "Bad" sex. Rubin further observes that "[o]nly sex acts on the good side of the line are accorded moral complexity," so that heterosexual sex can be "sublime or disgusting, free or forced, healing or destructive, romantic or mercenary,"<sup>76</sup> exhibiting the full range of moral experience. Homosexuality, in contrast, inhabits a far more limited spectrum, one of degrees of immorality; to be homosexual is to be dirty.

This indeed is the wider cultural strategy in dismissing "homosexuals." In a ruthless act of epistemological violence, our culture first reduces gay men and lesbians to sex—anonymous, meaningless, loveless, demeaning sex—and then proceeds to complain that homosexuality is only about sex. It first fantasizes a hideous stereotype, and then decries the ugliness of the picture it has painted.<sup>77</sup> Witness the words of one of the many judges who, without hesitation, in one sentence reduces homosexuals to genital activity: "While this court is not so naive as to suppose that only homosexuals engage in acts of sodomy, it is aware of no other group whose *very status* has been defined by such conduct."<sup>78</sup>

As part of the process of refusing to assume responsibility for what it is and does, the legal construction of homosexuality grounds itself in medical,

concerned about their offspring's potential homosexuality were told unequivocally: "The only way you can prevent it is to encourage heterosexuality. You have to fight fire with fire." PETER WYDEN & BARBARA WYDEN, *GROWING UP STRAIGHT: WHAT EVERY THOUGHTFUL PARENT SHOULD KNOW ABOUT HOMOSEXUALITY* 246 (1968), *quoted in* KATZ, *supra* note 34, at 112. A 1991 guidance manual, while generally agnostic about the aetiology of homosexuality and even disavowing the popular dominant-mother hypothesis, is no less concerned about the preservation of heterosexuality; the authors observe that "allowing a boy to behave in a feminine manner and dress in girl's clothing without being discouraged may have some impact." VIRGINIA LIVELY & EDWARD LIVELY, *SEXUAL DEVELOPMENT OF YOUNG CHILDREN* 89 (1991). The manual then urges upon us that "parents and teachers must consider the advantages of guiding their children toward heterosexuality at the present time." *Id.* at 90. The work also cites *The "Sissy Boy Syndrome" and the Development of Homosexuality*, a relatively recent *tour de force* of homophobia served to gays and lesbians on the pretext of help, for the finding that "young boys who persistently acted like girls were very likely to become homosexual or bisexual in their adult lives." LIVELY & LIVELY, *supra*, at 89; see RICHARD GREEN, *THE "SISSEY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY* (1987). In 1995, Dr. Green blithely summarized his research on "sissy boys" by quipping, "Barbies at five, sleeps with men at twenty-five." BURKE, *supra*, at 59. For Eve Kosofsky Sedgwick's incisive critique of Green's work, see SEDGWICK, *How to Bring Your Kids Up Gay*, *supra* note 18. It is noteworthy that the research on gender non-conformity is interested primarily in boys' sexual development; the possibility of lesbian girls rarely rises to the level of consciousness.

75. Rubin, *supra* note 23, at 279.

76. *Id.* at 282.

77. "What I hate is how we're not expected to be human," bemoans Frank, a seventeen-year-old gay boy. "They think we have only one thing on our minds." Due, *supra* note 7, at 27.

78. *Dean v. District of Columbia*, No. 90-13892, 1992 WL 685364, at \*9 n.15 (D.C. Super. Ct. June 2, 1992) (emphasis added), *aff'd*, 653 A.2d 307 (D.C. 1995).

religious, and popular homosexualities,<sup>79</sup> and courts disavow any prejudice; a judge who saw “wisdom and eloquence” in precedent that referred to a mother’s lesbianism as morally “miasmatic,” proclaimed at the same time, “This court knows of no authority . . . that does not view the homosexual with bewildered compassion.”<sup>80</sup> In their perennial quest for authority and precedent, judges marshal outside expertise into the courtroom—drawing as easily from religion as from psychology. The Minnesota Supreme Court, for example, defended the institution of marriage against homosexual subversion by tracing its origin to the Book of Genesis,<sup>81</sup> while the Superior Court of the District of Columbia resorted to the incantation of Genesis, Deuteronomy, Matthew, and Ephesians, all in one opinion, in order to protect itself against similar demands.<sup>82</sup> By seeing itself as merely a passive reflection of other major social institutions, law is thus able to take its own normalizing heterosexuality for granted. Case law is replete with “practicing homosexuals” while a “practicing heterosexual” is yet to appear; that is, only homosexuals “practice,” whereas heterosexuals simply *are*.

### B. *Legal Production of Heterosexual Youth in the Family*

Section 1 below illustrates how the law seeks to heterosexualize the family in general, while Section 2 examines the legal heterosexualization of young people in particular, most evidently in the regulation of child custody and adoption.

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79. Cf. *supra* text accompanying note 47. Foucault argues that power would not be accepted “if it were entirely cynical” and that it therefore must always deny its operation: “For it, secrecy is not in the nature of an abuse; it is indispensable to its operation.” FOUCAULT, *supra* note 25, at 86.

80. *L. v. D.*, 630 S.W.2d 240, 243 (Mo. Ct. App. 1982). As to the reasoning whereby the trial court had not only denied a lesbian mother’s motion for the transfer of custody of two of her four children from her former husband, but also reduced and limited her visitation rights, the judges of the Court of Appeals found it “a sagacious analysis of the law.” *Id.* at 241. The Supreme Court of Oklahoma considers itself no less homophobic. The judges affirmed the decision of a trial court that had removed a child from the custody of his mother to his father on the ground of her living in an “open homosexual relationship.” Noting that “[a] shift on the part of the law from opposition to neutrality arguably makes homosexuality appear a more acceptable sexual life-style, particularly to younger persons” and that “[y]oung people form their sexual identity partly on the basis of models they see in society,” the judges quickly dismissed all charges of prejudice: “We fail to uncover even a scintilla of prejudice, and commend the trial court for its interest in making the correct decision for the child’s best interests.” *M.J.P. v. J.G.P.*, 640 P.2d 966, 968, 970 (Okla. 1982).

81. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971).

82. See *Dean v. District of Columbia*, No. 90-13892, slip op. at 18-20 (D.C. Super. Ct. Dec. 30, 1991). When the plaintiffs contended that the court’s reliance on Biblical interpretation amounted to an unconstitutional “establishment of religion” in violation of the First Amendment, the court dismissed their claim as “totally frivolous.” *Dean v. District of Columbia*, No. 90-13982, 1992 WL 685364, at \*1 (D.C. Super. Ct. June 2, 1992), *aff’d*, 653 A.2d 307 (D.C. 1995).

### 1. *Defining the Family as Heterosexual*

*It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.*

*Moore v. City of East Cleveland*<sup>83</sup>

*Home has 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<sup>84</sup>

Carol Warren, among others, has noted that “the gay world has two distinctions,” namely, that “[i]t is almost universally stigmatized, and no one is socialized within it or toward it as a child.”<sup>85</sup> This is surely an understatement. Not only does family fail spectacularly to nurture, cherish, foster, sustain, cultivate, invite, and encourage homosexuality, but it is also one of the most powerful sites of heterosexual recruitment—or heterosocialization, to use a more polite term. In Foucault’s words:

The family, in its contemporary form, must not be understood as a social, economic, and political structure of alliance that excludes or at least restrains sexuality, that diminishes it as much as possible, preserving only its useful functions. On the contrary, its role is to anchor sexuality and provide it with a permanent support.<sup>86</sup>

And so it does. Susan Moller Okin has demonstrated the central role of the family in the institutional deployment of gender and its implications for social justice,<sup>87</sup> and Judith Butler in turn has argued persuasively that gender, heterosexuality, and desire form an analytically indissoluble complex of meaning.<sup>88</sup>

The family has become the home of heterosexuality as well as of heterosexual persons only—by both the popular and legal definitions of the term. Lest there be any doubt as to the marriageability of gays and lesbians, recent legislation, under the Orwellian title of the Defense of Marriage Act, codifies the Congress’s view that matrimony and the Federal benefits that

83. 431 U.S. 494, 503-09 (1977) (plurality opinion).

84. KOESTENBAUM, *supra* note 50, at 47.

85. CAROL A.B. WARREN, *IDENTITY AND COMMUNITY AND THE GAY WORLD* 4 (1974), *quoted in* HERDT & BOXER, *supra* note 4, at 101.

86. FOUCAULT, *supra* note 25, at 108.

87. *See generally* SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

88. *See generally* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 1-34 (1990).

accompany it are for heterosexual couples only.<sup>89</sup> Nor is there room for gay families in the collective heterosexual imagination. As an ideological concept, “the family” (as in the political invocation of “family values”) has come to constitute a normative ideal that “mask[s] intrafamily differences and conflicts of interest”<sup>90</sup> and “imposes mythical homogeneity on the diverse means by which people organize their intimate relationships.”<sup>91</sup>

Indeed, it *is* a fact—albeit an invisible one—that there are an estimated 1.5 to 5 million lesbian mothers and 1 to 3 million gay fathers in the United States, and that between 6 and 14 million children are raised in gay and lesbian households.<sup>92</sup> Yet courts seem oblivious to these statistics. District courts have confidently asserted that homosexuality is “*obviously* no portion of marriage, home or family life,”<sup>93</sup> and the Supreme Court has concurred.<sup>94</sup> Only to the extent that gay families are defined by violence or other negative attributes of the family do they occasionally partake in the sacred institution; while courts have refused to require that the unions of gay men and women who love one another be recognized as marriage,<sup>95</sup> some courts have agreed to extend the protection of domestic violence statutes to lesbians who batter one another.<sup>96</sup> Yet, this aberration aside, it has been declared by judicial fiat that gay people do not have families, marriages, or children. The legal system seemingly believes that gay and lesbian children come from the stork, or else descend on society as full-blown fags and dykes who were never children.

It is hence hardly surprising that the law is ill-equipped to protect gay or proto-gay children in the context of the family. While family law professes to be guided by “the best interests of the child,” in practice this often turns out to mean society’s interest in the production of heterosexual children, as the following section demonstrates.<sup>97</sup> The law’s respect for the privacy of the

89. The Defense of Marriage Act establishes a federal definition of marriage as a legal union between one man and one woman, and provides—with little regard for the Full Faith and Credit Clause of the U.S. Constitution—that no state shall be required to give effect to a same-sex marriage under the laws of another state. Defense of Marriage Act, Pub. L. No. 104-199 (1996).

90. Linda Gordon, *Family Violence, Feminism, and Social Control*, in *UNEQUAL SISTERS: A MULTICULTURAL READER IN U.S. WOMEN’S HISTORY* 141, 151 (Ellen Carol DuBois & Vicki L. Ruiz eds., 1990).

91. JUDITH STACEY, *BRAVE NEW FAMILIES* 269 (1990).

92. See Frederick W. Bozett, *Children of Gay Fathers*, in *GAY AND LESBIAN PARENTS* 39, 39 (Frederick W. Bozett ed., 1987); David K. Flaks, *Gay and Lesbian Families: Judicial Assumptions, Scientific Realities*, 3 *WM. & MARY BILL RTS. J.* 345, 345 (1994) (citing psychological authorities); see also *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 *Fam. L. Rep. (BNA)* 1512, 1513 (1987).

93. *Doe v. Commonwealth’s Attorney*, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (emphasis added), *aff’d*, 425 U.S. 901 (1976).

94. See *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (finding “[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other”).

95. The decision in *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), represents a potential exception to the rule, although the Supreme Court of Hawaii has not yet had its final say on the case.

96. See *State v. Hadinger*, 573 N.E.2d 1191 (Ohio Ct. App. 1991).

97. On the state’s generally using the best-interests doctrine to assert “its own proprietary interest in children as future citizens,” see Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decision-Making*, 101 *HARV. L. REV.* 727, 738 (1988).

heterosexual family belies its claims to neutrality, for the family is always a creature of law: "Rather than marking a boundary limiting state intervention in the family, laws governing the family define the kinds of families the state approves."<sup>98</sup> As far as the legal construction of the family is concerned, the state approves of straight families.

## 2. *Keeping the Family Heterosexual*

The regulation of custody and adoption, analyzed below in Subsections a and b, respectively, is among the most obvious ways in which the legal order structures families. Courts' attempts to protect children from contact with homosexual adults illustrate their unquestioned assumption that there are no authentically gay or lesbian youth and that it is hence the judiciary's imperative to protect "confused" children with latent homosexual desires from becoming gay or lesbian adults.

### a. *Legal Regulation of Child Custody*

She says: *I didn't know you had children.*

So I say: *That's what these [poems] are about. Not many people know I have children. They were taken away from me.*

She says: *You're kidding.*

I say: *No, I'm not kidding. I lost my children because I'm a lesbian.*

She says: *But how could that happen to someone with a Ph.D.?*

Minnie Bruce Pratt<sup>99</sup>

The fantasy of an all-straight world, despite its self-fulfilling propensity, is still only a fantasy, and courts do at times have to deal with the reality of gay and lesbian parents. In the language of the Court of Appeals of Tennessee, "the state has a substantial interest in viewing homosexuality as an errant sexual behavior which threatens the social fabric, and in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles."<sup>100</sup> Case law on custody decisions is particularly informative, for it is governed by an open-ended "best interests of the child" standard, which gives judges extraordinary discretion.<sup>101</sup> The absence of a vision of

98. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 276 (1990); see also Frances Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

99. MINNIE BRUCE PRATT, *My Life You Are Talking About*, in CRIME AGAINST NATURE 67, 67 (1990).

100. Collins v. Collins, 1988 Tenn. App. LEXIS 123, at \*16 (Ct. App. Mar. 30, 1988).

101. As commentators observe, a custody decision "often depends much less upon the particular facts before the court than upon the extent to which the judge is influenced by negative stereotypes." *Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties*, 19 HARV. C.R.-C.L. L. REV. 497, 516 (1984) [hereinafter *Burdens on Gay Litigants*]. For critical reviews of the law on custody, see Comment, *Assessing Children's Best Interests When a Parent Is Gay or Lesbian*:

authentically gay or proto-gay youth leaves courts unable to consider the best interests of gay or lesbian children.

In parenting disputes arising from heterosexual marriages, courts are generally reluctant to give custody to a gay or lesbian parent,<sup>102</sup> although several states have held that sexual orientation *per se* does not justify a denial of custody without an affirmative showing of adverse effect on the child.<sup>103</sup> Courts are similarly conservative in awarding visitation rights to non-custodial gay parents, which may result in part from the disturbing nature of the context itself: The homosexual defection of an apparently heterosexual parent suggests powerfully the mutability of sexual identity and alerts courts to the vulnerability of children's presumed heterosexuality.

Judges repeatedly express concern that a child's contact with a gay or lesbian parent and his or her homosexual cohorts will derail the child's developmental career from its heterosexual trajectory.<sup>104</sup> Relying on "excellent scientific research," one court denied custody to a lesbian mother on the ground that her daughter, if allowed to stay with her, would have "difficulties in achieving a fulfilling heterosexual identity of her own in the future."<sup>105</sup> Another appellate court upheld restrictions on a lesbian mother's visitation rights, worried that "any contact between [the mother's lover] or any other lesbian lover of the [mother] and children would, in fact, impair their emotional development."<sup>106</sup> Some years later, the same court found that expressions of affection between another lesbian mother and her lover presented "an unhealthy environment for minor children."<sup>107</sup> One appellate judge considered a ten-year-old girl's fondness for her mother's new lover so

*Toward a Rational Custody Standard*, 32 UCLA L. REV. 852 (1985), and Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989).

102. See generally *Burdens on Gay Litigants*, *supra* note 101, at 515-46.

103. See *id.* at 520. See also BENKOV, *supra* note 33, at 40-46.

104. Empirical studies demonstrate that there is no statistically significant correlation between the sexual orientation of parents and children—a less than surprising conclusion considering that most gays and lesbians were raised by heterosexual parents. See, e.g., Mary B. Harris & Pauline H. Turner, *Gay and Lesbian Parents*, J. HOMOSEXUALITY, Winter 1985-86, at 101. For a brief review of research on the psychosexual development of children raised by gay and lesbian parents, see Flaks, *supra* note 92, at 364-71.

105. *S. v. S.*, 608 S.W.2d 64, 66 (Ky. Ct. App. 1980). Compare *In re Marriage of Diehl & Diehl*, 582 N.E.2d 281 (Ill. App. Ct. 1991), where the trial court found that it was in a daughter's best interest "not to be exposed" to her mother's lesbian relationship, although the Appellate Court of Illinois held that the threat posed by the mother did not rise to the level of such "serious endangerment" as to require restriction of visitation rights. Apparently assuming that the daughter's sexuality would be influenced by her mother's sexual orientation, the trial court suggested that, in order to be able to cope with her mother's lesbianism, the daughter needed to be "older and able to reasonably and logically make choices of her own and understand the differences in sexual preferences." *Id.* at 289.

106. *L. v. D.*, 630 S.W.2d 240, 245 (Mo. Ct. App. 1982). Cf. *In re R.E.W.*, 472 S.E.2d 295, 296 (Ga. Ct. App. 1996) ("The father's acknowledgment that he currently is engaged in a homosexual relationship which the citizens of this state, through their elective legislative representatives, have criminalized 'certainly augurs for potential harm to the child that the trial court was perfectly competent to assess.'") (citation omitted) (Carley, J., dissenting from denial of certiorari); *In re Marriage of Martins & Martins*, 645 N.E.2d 567, 573 (Ill. App. Ct. 1995) ("We find . . . that the trial court failed to evaluate fully the impact of the petitioner's lesbianism on her children.").

107. *S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. Ct. App. 1987).



alarming that the judge found it necessary to transfer her to the custody of her heterosexual father to guarantee her safety: "Who would place a child in a milieu where she may be inclined toward [homosexuality]?" the judge asked, taking the answer to be self-evident and adding that the court was not obligated to wait "till the damage is done."<sup>108</sup> Discussing a lesbian couple's open displays of affection and the fact that they share a bedroom in the family home, another judge complained that "[s]uch conduct can never be kept private enough to be a neutral factor in the development of a child's values and character."<sup>109</sup> The judge thus simply assumed that heterosexual marital precincts are somehow perfectly neutral and do not affect the development of a child's values. Homosexuality, in contrast, can never be secret enough—consider the lesbianism of the mother who "has chosen not to make her sexual preference private but invites acknowledgement and *imposes* her preference upon her children and her community."<sup>110</sup> Attesting to the durability and power of the latency hypothesis, courts often invoke it explicitly and appeal to a need to ensure that dormant desires not be awakened: "the [gay] father's milieu could engender homosexual fantasies causing confusion and anxiety which would in turn affect the children's sexual development,"<sup>111</sup> in the words of one expert witness cited by a court. Thus the operative assumption for these courts is that all the children whose development they are trying to protect are heterosexual, or at least proto-straight, as it would be difficult to characterize a parent's gayness as an "imposition" on a gay child.<sup>112</sup>

The child-molester myth is as familiar a phenomenon in case law as it is in popular culture. Courts constantly worry about gay parents' molesting their children into homosexuality, thereby assuming, first, that the children are naturally heterosexual and, second, that gays and lesbians are somehow naturally prone to child-molestation. Judges have relied on expert testimony suggesting that, under the custody of a gay father, "children upon reaching

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108. *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 186 (Mo. Ct. App. 1980). *Cf.* *Collins v. Collins*, 1988 Tenn. App. LEXIS 123, at \*29 (Ct. App. Mar. 30, 1988) ("While a child the age of parties' daughter [nine years old] is too young to emulate her mother's conduct, to [allow the daughter to remain in the lesbian mother's custody] would be adopting a 'wait and see' attitude and would endanger the child's moral development. It is too great a risk to postpone taking action to safeguard the moral well being of children until one sees tangible manifestations of harm to their characters.").

109. *S.E.G.*, 735 S.W.2d at 166. Compare *Scott v. Scott*, 665 So. 2d 760 (La. Ct. App. 1995), where a lesbian mother expressly argued that the "formation of her boys' gender identity will not be affected" by maternal custody because the mother's and her female lover's displays of affection before her two sons did not "exceed the bounds of friendship," yet the concerns of the Court of Appeals of Louisiana remained unallayed: "We cannot agree," it replied. *Id.* at 766.

110. *Id.* at 167 (emphasis added).

111. *In re J.S. & C.*, 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 54 (N.J. App. Div. 1976).

112. That such a claim would be difficult, if not absurd, to make does not, unfortunately, mean that courts have not intimated a willingness to make it. *See, e.g., In re Davis*, 1 Fam. L. Rep. (BNA) 2845, 2847 (Wash. Super. Ct. 1975) (court refused to place a 16-year-old boy with "homosexual tendencies" with a gay male foster couple—even if the sole alternative was to institutionalize him—because the boy "should be encouraged to behave normally *regardless of his sexual orientation*") (emphasis added).

puberty would be subject to either overt or covert homosexual seduction which would detrimentally influence their sexual development."<sup>113</sup> Given their power to ignore—the “epistemological privilege of unknowing,” to use Sedgwick’s apt term<sup>114</sup>—courts can simply disregard scores of studies which indicate that most child-molesters are *heterosexual* men molesting young girls:<sup>115</sup> “Every trial judge, or for that matter, every appellate judge, knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts’ testimony indicated.”<sup>116</sup> Impeccable credentials of articulate expert witnesses cease to count when it turns out that they are gay; a Michigan Court of Appeals discredited the testimony of a gay psychiatrist on grounds that he was an “advocate” because of his sexual orientation.<sup>117</sup> By the illogic of heterosexist asymmetry, the court never thought of labeling the heterosexual witnesses as champions of heterosexual parenthood.<sup>118</sup>

To bolt the closet door, judges frequently award both custody and visitation rights to gay and lesbian parents on a contingency basis: they get to enjoy their children’s company only so long as they remain closeted.<sup>119</sup> Courts evidently fear that otherwise even well-integrated heterosexuals will begin to disintegrate, beginning with homosexuals’ presumptively heterosexual children. Hence, the more prone to public “flaunting” and the more unapologetically queer one is, the greater the likelihood that one will be denied contact with one’s children.

Therefore, although homosexuals are generally reduced to sex and then excoriated for it, the moment their concerns go beyond the confines of the bedroom, they become menacing militant homosexuals. Not only are they homosexual, but they are shameless enough to wear their stigma with pride and thereby further expose their children. One court relied on an expert witness who testified that “defendant’s involvement in the gay movement had become an obsessive preoccupation.”<sup>120</sup> The expert witness pointed out “that his political activities appear to be a significant involvement in his life which go way above and beyond the *actual homosexual involvement*.”<sup>121</sup> In other words, sex is “actual homosexual involvement,” as sex is the essence of

113. *In re J.S. & C.*, 324 A.2d at 96.

114. EVE KOSOFKY SEDGWICK, *Privilege of Unknowing: Diderot’s ‘The Nun,’* in TENDENCIES, *supra* note 2, at 23, 24.

115. Social science literature indicates that most child-molesters are heterosexual men and that gays and lesbians are no more predisposed to pedophilia than heterosexual men or women. See Flaks, *supra* note 92, at 359-62 and sources cited therein.

116. *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 869 (Mo. Ct. App. 1982). In a less than stunning display of statistical sophistication, the court refuted the defendant’s statistics by conducting its own “study” on the relative frequency of molestation of minor boys by adult males. “A few minutes research discloses [seven] appellate decisions involving such molestation,” the court explained triumphantly. *Id.*

117. *Lamberson v. Lamberson*, No. 1202321 (Mich. Ct. App.), *cited in* BENKOV, *supra* note 33, at 80.

118. BENKOV, *supra* note 33, at 80.

119. *See id.* at 38.

120. *In re J.S. & C.*, 324 A.2d 90, 96 (N.J. Super. Ct. Ch. Div. 1974), *aff’d*, 362 A.2d 54 (N.J. App. Div. 1976).

121. *Id.* at 96 (emphasis added).

homosexuals, whereas "furthering the *cause* of homosexuality,"<sup>122</sup> as the court put it, is simply gratuitous pride in transgressive genital activity—an "obsessive preoccupation." Gay activists thus cannot aspire even to the status of real political activists. One court indicated its distaste for militant homosexuals by containing the term "'gay activists'" derisively in quotation marks,<sup>123</sup> while another referred to "so-called 'Gay Rights.'"<sup>124</sup> Yet quotation marks are by far the most lenient means by judges use to contain both latent and blatant homosexuality. The above defendant whose cardinal sin was that he was active both sexually *and* politically was ordered not to sleep with anyone other than a "lawful spouse," not to be in the presence of his lover, and not to involve his children in any community activities related to homosexuality while the children were visiting.<sup>125</sup> The heterosexual machinery of bribery is hard to resist when the price is your own children.

Yet even when they are successful in their extortion of gay and lesbian litigants, judges sometimes accuse gay parents of corruptibility. The South Dakota Supreme Court objected to a trial court decision that awarded unsupervised overnight visitation to a lesbian mother who had openly admitted her sexual orientation and who had been affectionate with her lover in front of the children. However, the mother had also stated on the record that it was "inappropriate to hold hands, kiss, and show affection" to a female lover in front of her children.<sup>126</sup> Yet even the defeated mother's willingness to comply with the court's insistence that she keep her sexuality in the closet in the future did not satisfy all members of the court. In a vituperative partial dissent and partial concurrence, one of the justices denied all credibility to a mother who had "followed a life of perversion and openly flaunted it before [her] children": "At the hour of judicial atonement, she now pretends to have changed. This present facade is of transitory mood and a cunning plan . . . to wrest away good judgment from the judicial officers hereunto attending this case."<sup>127</sup> For this justice, it is not enough for a homosexual to repent and retreat into the closet. In order to earn her children, she must not only hide her homosexuality, and thereby appear heterosexual, but *become* heterosexual; until then, her disavowals of "perversion" will ring hollow.

Moreover, although courts call for closets in order to hide homosexuality from heterosexual children, they nevertheless typically disavow their exquisite

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122. *Id.* at 95.

123. *J.L.P.(H.) v. D.J.P.*, 643 S.W.2d 865, 872 (Mo. Ct. App. 1982).

124. *Constant A. v. Paul C.A.*, 496 A.2d 1, 3 (Pa. Super. Ct. 1985). The Supreme Court of Wyoming seems to question even the worth of a gay couple's commitment by similarly placing "commitment" in quotation marks in its references to a "commitment ceremony" for two women. *Hertzler v. Hertzler*, 908 P.2d 946, 949, 951 (Wyo. 1995).

125. *In re J.S. & C.*, 324 A.2d at 97. Compare *Roe v. Roe*, 342 S.E.2d 691 (Va. 1985), a custodial decision involving a gay father, where the Supreme Court of Virginia noted bluntly that the judiciary had the option of "ordering him out of his lover's bedroom." *Id.* at 694.

126. *Chicoine v. Chicoine*, 479 N.W.2d 891, 894 (S.D. 1992) (Henderson, J., specially concurring in part, dissenting in part).

127. *Id.* at 896.

craftsmanship in the construction of those closets. In its denial of custody to Sandra Jacobson, a lesbian mother, the North Dakota Supreme Court bowed to a duty to protect her children from "the slings and arrows of a disapproving society"<sup>128</sup> and relied on the fact that Sandra's relationship with her lover, "under existing state of the law, never can be a legal relationship."<sup>129</sup> Yet part of the very reason why a child in a non-heterosexual household is likely to face societal disapproval is the law's denial of legitimacy to gay families. The court is thus pandering to prejudice it both creates and perpetuates. In a feat of judicial tautology, it first makes Sandra Jacobson into an outlaw and then takes her children away from her *because* she is an outlaw. Even while objecting to Sandra's cohabiting with her lover, the court nevertheless professes not to be blackmailing her, disingenuously denying any attempt "to force her to dissolve her living relationship in order to retain custody of her children"<sup>130</sup>: "[W]e need no legal citation to note that concerned parents in many, many instances have made sacrifices of varying degrees for their children."<sup>131</sup>

However, although courts invariably purport to be pursuing the (presumptively heterosexual) child's best interests, they sometimes come tantalizingly close to admitting that, ultimately, their decisions may be governed by society's interest in having straight, homophobic children, rather than by the child's own best interests. In revoking a lesbian mother's custody, the Supreme Court of Oklahoma seemed to accept expert testimony that maternal custody would neither adversely affect the child's development nor increase the probability that the child would turn out gay.<sup>132</sup> The court had to admit that essentially the only ground for its revocation of custody was ensuring that the child would be socialized in homophobia. If allowed to remain in maternal custody, the child "would have no idea that [homosexual] behavior was not normally accepted by society."<sup>133</sup>

128. *Jacobson v. Jacobson*, 314 N.W.2d 78, 81 (N.D. 1981). *See also S.E.G.*, 735 S.W.2d at 166 ("We wish to protect the children from peer pressure, teasing, and possible ostracizing they may encounter as a result of the 'alternative life style' their mother has chosen.").

129. *Jacobson*, 314 N.W.2d at 81.

130. *Id.*

131. *Id.*; *see also J.L.P.(H.) v. D.J.P.* 643 S.W.2d 865, 872 (Mo. Ct. App. 1982) (claiming that trial court's restrictions on gay father's visitation rights were not an attempt "to dictate to the father with respect to any facet of his life style"). Compare *Collins v. Collins*, 1988 Tenn. App. LEXIS 123, at \*29 (Ct. App. Mar. 30, 1988), where the court chose alcoholism as a metaphor for homosexuality and urged that "[j]ust as an alcoholic overcomes the habit and becomes a nondrinker, so this mother should attempt to dissolve her 'alternate life style' of homosexual living":

Such is not too great a sacrifice to expert [sic] of a parent in order to gain or regain custody of his or her child. This Court can take judicial notice of the fact that throughout the ages, dedicated, loving parents have countless times made much greater sacrifices for their children.

*Id.* at 29-30.

132. *M.J.P. v. J.G.P.*, 640 P.2d 966, 968-69 (Okla. 1982). On the perpetuation of social ignorance as a rationale for anti-gay custodial decisions, *see Burdens on Gay Litigants*, *supra* note 101, at 534-35.

133. *M.J.P.*, 640 P.2d at 969.

b. *Legal Regulation of Adoption*

*I hate that so many twisted straight people become parents, while I have to fight like hell to be allowed to be a father.*

Anonymous Queers<sup>134</sup>

The law's role in the production of heterosexual youth is even clearer in the context of adoption, as is the judicial assumption that all kids are straight—and that they are “confused” rather than gay if they should have homosexual desires.

While the best interests of the child are supposed to govern adoption decisions as well, courts have much less difficulty in justifying denials of adoption to homosexual would-be adoptive parents than they do in revoking custody from gay or lesbian biological parents since, legally, adoption is not a right but a statutory privilege. The invocation of the shibboleth of “privilege” alleviates the due process problems; if homosexuals are not due even their own biological children, *a fortiori* they are not due other people's children.

At present, there are two states, Florida and New Hampshire, that have statutes prohibiting adoptions by homosexuals categorically. The theory behind the bans is elegantly simple: homosexuals adopt children, children adopt homosexuality. The Florida statutory ban was enacted in the wake of Anita Bryant's venomous “Save Our Children” anti-gay crusade, touched off by the enactment of a gay rights law in Dade County, Florida in 1977—the first law of its kind in the South. Deeming—correctly—an appeal to the child-molester myth her most powerful weapon, Bryant decried the law as a plot to “legitimize homosexuals and their recruitment of our children.”<sup>135</sup> Echoing what Sedgwick calls the “radical and irreducible incoherence” of the hetero/homosexual distinction,<sup>136</sup> the campaign thus at once appropriated all “our” children as naturally heterosexual and at the same time obliquely admitted that they *could* nevertheless be “recruited” and thus apparently harbored homosexual potential. The crusade succeeded in fomenting enough fear to incite voters to overturn the Dade County law. The day after the Dade County vote, the Governor of Florida signed into law a statutory ban on adoptions by homosexuals—or “human garbage,” in the argot of Bryant's crusade.<sup>137</sup>

A decade later, in 1987, New Hampshire enacted a similar law that prohibited homosexuals both from adopting children and becoming foster-

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134. Anonymous Queers, *supra* note 1, at 46.

135. BENKOV, *supra* note 33, at 83 (quoting Anita Bryant). See also ANITA BRYANT, THE ANITA BRYANT STORY: THE SURVIVAL OF OUR NATION'S FAMILIES AND THE THREAT OF MILITANT HOMOSEXUALITY 203 (1977) (“recruitment of our children is absolutely necessary for the survival and growth of homosexuality”).

136. See *supra* text accompanying note 36.

137. See BENKOV, *supra* note 33, at 83.

parents. After the bill's initial defeat in 1986, its champion, State Representative Mildred Ingram, took her battle to the media. The subsequent floor debate within the House degenerated into rhetoric describing gay men as "feces-consuming barbarians out to recruit the state's children."<sup>138</sup> Ingram denied any suggestion that she was motivated by bigotry:

I'm not against homosexuals. *They are adult people.* They made their own choice and the only one they have to answer to is their maker. They can go on their merry way to hell if they want to. I just want them to keep their filthy paws off the children.<sup>139</sup>

Although Ingram's rhetoric is less sophisticated, her reasoning is ultimately the same as that of most judges who deny adoptions to gay and lesbian parents. Like the courts described below, Ingram claims that she is not anti-gay but is merely trying to protect the best interests of children, and, like the courts, she relies on the assumption that homosexuals are "adult people," thereby creating a dichotomy between "children" and "homosexuals." In order to maintain that the interests of children and homosexuals are necessarily opposed, she turns the two groups into mutually exclusive categories.

In the absence of outright statutory bans, adoptions by homosexuals in other states are governed by the best-interests test. As with custody decisions, what accords with the child's best interest depends largely on the particular decision-maker. Juvenile Court Chief Justice Francis Poltrast announced to the press that he is simply unwilling to place foster children with gay men because of the putatively high risk of molestation.<sup>140</sup> Rather than limiting itself to opining on laws on the books, an Arizona appellate court has pleaded helplessness before the laws of nature, finding itself unable to approve a bisexual as an adoptive father, for to do so would be "inimical to the natural family."<sup>141</sup>

That adoption courts subscribe to the confused-child notion of juvenile homosexuality is evident from their affection for the role-model theory of the aetiology of sexual orientation, which they typically offer as justification for

138. *Id.* at 99.

139. John Milne, *Starting Today, N.H. Bars Gay Foster Parents*, BOSTON GLOBE, July 24, 1987, at 13 (emphasis added).

140. Kenneth Cooper, *Gay Foster Parenting: Debate Grows*, BOSTON GLOBE, May 12, 1985, at 1. For statistical evidence that most child-molesters are heterosexual men, see Harris & Turner, *supra* note 104. For an account of the heated debate on gay foster parenting in Boston in 1985, see BENKOV, *supra* note 33, at 86-98.

141. Appeal in Pima County Juvenile Action B-10489, 727 P.2d 830, 835 (Ariz. Ct. App. 1986). In a similar vein, an Ohio judge suggested the unnaturalness of gay and lesbian families by resorting to quotation marks: He dismissed the two gay men's desire to adopt as an attempt to create an "adoptive 'family.'" *In re Charles B.*, 1988 WL 119937, at \*1 (Ohio Ct. App. Oct. 28, 1988). In cavalier language, the court also concluded that, despite the absence of an express statutory ban on adoptions by lesbians and gay men, "as an unexceptional matter of absolute per se law," homosexuals are ineligible to adopt in Ohio. *Id.* at \*2.

denying adoptions to gays and lesbians. The courts seem to fear that adolescents with unstable desires and surging hormones are all too likely to be good students of homosexuality. The proffered goals of the New Hampshire anti-gay adoption statute, for instance, were the promotion of “the provisions of a healthy environment[,] . . . role model[s,] . . . [and] positive nurturing” to adoptive children as well as the elimination of the “social and psychological complexities” that living with gay people would create.<sup>142</sup> The Justices of the New Hampshire Supreme Court, invited to opine on the constitutionality of the statute before its enactment, agreed that “the legislature can rationally act on the theory that a role model can influence [a] child’s developing sexual identity.”<sup>143</sup>

The justices went even further to stamp into the law their own contradictory understanding of homosexuality both as radical Otherness and as potentially lurking in every body, or, in Sedgwick’s language, “the minoritizing view that there is a distinct population who ‘really are’ gay” and “the universalizing view that sexual desire is an unpredictably powerful solvent of stable identities.”<sup>144</sup> For the purposes of the proposed statute, the New Hampshire legislature defined “a homosexual” as one who engages in same-sex genital activity.<sup>145</sup> The justices found this definition too narrow to withstand constitutional scrutiny. After all, many a distracted, “bi-curious” heterosexual has had same-sex erotic experiences of varying intensity. The justices hence assumed that the legislature must have meant voluntary and recent homosexual activity. The bi-curious were thus allowed to rest on their heterosexual laurels; horse-play in the midst of drunken male-bonding yesterday or even more sober experimentation in the past do not a homosexual make, for to say otherwise would be to suggest that perhaps almost anyone—especially if Kinsey’s figures were right—*could* be “homosexual.”<sup>146</sup> But instead of drawing the logical conclusion that perhaps pure, unadulterated, one-hundred-and-ten percent heterosexuals are indeed rather rare, the justices seemed to envision a homosexual somehow more profoundly different from his or her heterosexual peers. Their opinion suggests that there is more to being gay than just a gay sex act—how else is one to explain that a history of homosexual behavior by itself need not detract from one’s identity as heterosexual? Yet, if

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142. *In re Opinion of the Justices*, 530 A.2d 21, 23 (N.H. 1987).

143. *Id.* at 25.

144. SEDGWICK, *supra* note 24, at 85.

145. *Opinion of the Justices*, 530 A.2d at 22.

146. According to Kinsey’s study, “at least 37 per cent of the male population has some homosexual experience between the beginning of adolescence and old age.” The figure is especially high when one considers the strictness of Kinsey’s definition, which only included “persons who have had physical contacts with other males, and who were brought to orgasm as a result of such contacts.” ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 623 (1948). Kinsey’s findings suggest that the incidence of female homosexual behavior is considerably lower: “Between 2 and 6 percent of the unmarried females in the sample, but less than 1 percent of married females, had been more or less exclusively homosexual in their responses and/or overt experience . . . in each of the years between twenty and thirty-five years of age.” ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 473-74 (1953).

homosexuality grows out of an identity, not just from the homosexual sex one has, the role model theory makes less sense; instead of being homosexual by virtue of his sexual biography, a homosexual just *is* homosexual. In the end, only “homosexuals” are defined by the homosexual sex they have; if one is heterosexual, one can have whatever sex one wants (at least as long as one feigns intoxication or disinterest).<sup>147</sup>

Yet as radically different as homosexuals would seem to be, the legislature that passed the statute also envisions a world filled with potentially “confused” heterosexual adolescents. The law denies adoption to those foster families “in which one or more of the *adults* is a homosexual.”<sup>148</sup> If children truly adopt homosexuality as easily as homosexual families adopt children, it seems illogical that adoptive children would not be as likely—and in fact more so—to learn homosexuality from their siblings as from their adoptive parents. Yet the presence of homosexual teenagers in an adoptive family is omitted as a disqualifying factor. The omission is difficult to explain unless one concludes that the drafters of the statute simply did not conceive of a gay or lesbian adolescent.

Responding to a challenge to the constitutionality of the Florida anti-gay adoption statute, the state’s second judicial circuit articulated a somewhat more sophisticated justification for the homosexual adoption ban, seemingly disavowing any reliance on the simplistic notion that if homosexuals adopt children, children will adopt homosexuality:

Statistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences. As a result, those children will need education and guidance after puberty concerning relationships with the opposite sex. In our society, we expect that parents will provide this education to teenagers at home. These subjects are often very embarrassing for teenagers and some aspects of the education are accomplished by the parents telling stories about their own adolescence and explaining their own experiences with the opposite sex. It is in the best interests of a child if his or her parents can personally relate to the child’s problems and assist the child

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147. I am invoking the distinction between understandings of homosexuality as a category of *persons* and as a typology of *acts*. Foucault’s account of the conceptual shift from an act-centered understanding to a person-centered one in the nineteenth century has become the *locus classicus* for the statement of this distinction:

As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. . . . The sodomite had been a temporary aberration; the homosexual was now a species.

FOUCAULT, *supra* note 25, at 43.

148. *Opinion of the Justices*, 530 A.2d at 23 (emphasis added).



in the difficult transition to heterosexual adulthood. . . . Without reliance upon any unsubstantiated notion that a homosexual parent could “teach” a child to become a homosexual, [the Department of Health and Rehabilitative Services] maintains that the legislature may still decide that the best interests of children require that they be adopted by persons who can and will serve as heterosexual role models.<sup>149</sup>

This ostensibly less homophobic rationale posits that the anti-gay adoption statute is not motivated by a theory that children learn homosexuality from adults—an “unsubstantiated notion,” the court generously notes. Rather, the law is supposedly based on a genuine concern for young people’s own well-being as they navigate through adolescence to an adult sexuality, which, statistically, happens to be heterosexuality for most. This much is indeed reasonable: helping heterosexual youth cope with their sexuality is an eminently worthy goal.

Yet the court’s grandiloquent concern for the “difficult transition to heterosexual adulthood” is in stark contrast to the utter, complete absence of even the *mention* of youth who, instead of embarking on the perilous Odyssey to heterosexuality, find themselves attracted to members of their own sex. If the transition even to the blessed state of heterosexuality is so difficult, it seems a strange oversight for the court not even to consider the complications that youth experience when they embrace, kicking and screaming, the loathsome identity “homosexual.” The court notes how “very embarrassing” it is for teenagers to discuss their heterosexual feelings and experiences with their parents. Undoubtedly so—but it is hardly any *less* embarrassing to discuss homosexual feelings with one’s parents. In fact, many gay youth are not just embarrassed but terrified by the prospect of having a parental discussion of their sexual identity. Much too frequently, the terror turns out to be fully justified: studies suggest that as many as one young gay man out of four has been forced to leave home when parents found out they had a gay son,<sup>150</sup> and the Institute for the Protection of Lesbian and Gay Youth reports that, among its adolescent clients who have suffered violence because of their sexual orientation, thirty percent of the violence came from family members (mostly parents and step-parents, but also brothers and sisters).<sup>151</sup>

But the court is too busy attending to its duty to protect future heterosexual adults. When it endorses the claim that the legislature may indeed decide that

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149. Florida Dep’t of Health and Rehabilitative Servs. v. Cox, 627 So. 2d 1210, 1220 (Fla. Dist. Ct. App. 1993), *approved in part, quashed in part*, 656 So. 2d 902 (Fla. 1995) (remanding case to trial court for completion of factual record on equal protection issue).

150. See *supra* note 6 and accompanying text.

151. See GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 58 (1991) (citation omitted); see also Joseph Harry, *Parental Physical Abuse and Sexual Orientation in Males*, 18 ARCHIVES SEXUAL BEHAV. 251 (1989).

“the best interests of children require that they be adopted by persons who can and will serve as heterosexual role models,” the claim holds true only for heterosexual, or proto-heterosexual, children. Since the court is unwilling to admit that it subscribes to the “unsubstantiated” theory that sexual orientation is learned, it cannot even hide behind the claim that having a heterosexual role model would increase a child’s likelihood of reaching mature, fulfilling, natural heterosexuality. This leaves the court with no justification whatsoever for providing a gay or proto-gay child with a heterosexual role model. When the judges claim that it is “in the best interests of a child if his or her parents can personally relate to the child’s problems,”<sup>152</sup> this logic surely must apply to gay youth as well.

One could respond by noting that the state has no way of identifying the gay or proto-gay children in need of gay role models, while at the same time, “[s]tatistically, the state does know that a very high percentage of children available for adoption will develop heterosexual preferences.” Therefore, the argument goes, the state is justified in distributing *all* adoptive children to heterosexuals. This might be an objection, but it is not one that the court offers. The category of gay kids simply does not exist in the judicial vision; there are only presumptively heterosexual children, some of whom become gay *adults*. Why, or how, do some of these apparently heterosexual children become gay, then? It seems that, all disclaimers aside, this court, too, is hostage to the central cultural notion that there are, or may be, latent homosexual urges residing even in heterosexual children’s innocent bodies, and, depending on the circumstances, what is latent may become overt and manifest in adulthood. And, although the court never (openly) says it, the last thing the world needs is more (openly) gay people.

### *C. Legal Production of Heterosexual Youth at School*

Besides family, school is a central site in the production of homophobia. Subsection 1 below examines some of the manifestations and consequences of homophobia in school, while Subsection 2 analyzes the law’s complicity in the institutional effort to eradicate even the possibility of lesbian and gay students.

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152. *Cox*, 627 So. 2d at 1220.

### 1. *Defining School as Heterosexual*

*I hate that I was tormented by other kids for being a faggot, but more that I was taught to feel ashamed for being the object of their cruelty, taught to feel it was my fault.*

Anonymous Queers<sup>153</sup>

*I've been a guidance counselor at this school for more than twenty years, and I don't ever recall a student coming to me and telling me that he or she was a homosexual. I don't think we have any gay kids here.*

Guidance Counselor at Newton South High School<sup>154</sup>

"High schools may be the most homophobic institutions in American society, and woe be to anyone who would challenge the heterosexist premises on which they operate."<sup>155</sup> The observation should not come as a surprise to anyone who has attended high school in North America. Hetrick and Martin, pioneering scholars of gay and lesbian youth, note that—in addition to dealing with the normal stressors of adolescence—the gay adolescent's primary developmental task is emotional, social, and cognitive adjustment to a stigmatized role.<sup>156</sup> Schools, however, contribute far more to the stigmatization than to the adjustment of queer kids.

In 1984, Dr. Virginia Uribe, a Los Angeles counselor and science teacher, discovered that one of her students had dropped out because of harassment for being gay. A closer examination revealed that the same student had already been hounded out from four other schools for the same reason.<sup>157</sup> Disheartened, Uribe initiated a support group for gay and lesbian high school students, only to be told by a notable member of the clergy that hers was merely a recruitment program for homosexuals and that homosexuality itself is only "an underdeveloped stage of heterosexuality."<sup>158</sup> The view is decidedly not limited to the religious right but reigns in public schools as well. The administrators in a New York high school who caught a 15-year-old girl writing a love note to a female teacher apparently also considered

153. Anonymous Queers, *supra* note 1, at 46.

154. Robert Parlin, *We Don't Have a Problem Here*, in *ONE TEACHER IN 10: GAY AND LESBIAN EDUCATORS TELL THEIR STORIES* 219, 219 (Kevin Jennings ed., 1994) [hereinafter *ONE TEACHER IN 10*].

155. Gerald Unks, *Thinking About the Gay Teen*, in *THE GAY TEEN*, *supra* note 4, at 3, 5.

156. E. Hetrick & A.D. Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, *J. HOMOSEXUALITY*, No. 4, 1987, at 25.

157. Virginia Uribe & Karen M. Harbeck, *Project 10 Addresses Needs of Gay and Lesbian Youth*, 57 *EDUC. DIGEST* 50 (1992). Consider Kevin Jennings' recollection of the Pavlovian method by which he learned not to participate in class: "Whenever I volunteered to answer a question or write on the board, a slightly audible murmur from my classmates would arise. 'Faggot,' I would hear." Kevin Jennings, *I Remember*, in *ONE TEACHER IN 10*, *supra* note 154, at 19, 20.

158. Michael Quintanilla, *Haven for Gay Teens*, *L.A. TIMES*, Dec. 7, 1989, at E20.

homosexuality an acute case of “arrested development,” for they transferred the girl to a school for the mentally retarded.<sup>159</sup>

More typically, however, administrators, teachers, and other professional helpers are hellbent on not seeing gay kids and not acknowledging their abuse, whether subtle or brutal. As a Massachusetts educator opined in May of 1991, “I’m actually not certain that having a program on homosexuality is that relevant to us here. Maybe communities in other parts of the country—say in California—are struggling with this, but we don’t have a problem here.”<sup>160</sup>

Students are often as blithely oblivious to the genuine possibility of gay fellow students. Reggie Sellars, at the time a closeted teacher, explains how he used to urge students not to use the words “faggot” or “dyke” as slurs: “I would ask how they thought someone who was gay or lesbian would feel if they overheard, and they would reply that no one at our school *was* like that.”<sup>161</sup> In other words, unless one is a walking embodiment of the queer stereotype, the presumption of heterosexuality is all but irrefutable.<sup>162</sup> Moreover, although individual schools vary in the intensity of their homophobic attitudes, even the more liberal institutions are able, or willing, to see only so much.<sup>163</sup> When Sellars, as a high school student, volunteered to play the role of a homosexual in a skit for a sexuality workshop, the effusive health teacher “thought it was so great that the football captain, the track captain, the heralded student leader, would put himself in such a position. She said that my doing this would help some student who really *was* dealing with his sexuality.”<sup>164</sup> To imagine that a healthy heterosexual student would so compromise himself to support those in need of help and validation—what a wonderfully progressive idea. To imagine that a healthy and heralded student leader might *not* be heterosexual at all—that remained unimaginable.

159. Dennis & Harlow, *supra* note 4, at 450.

160. Parlin, *supra* note 154, at 219 (quoting teacher).

161. Reggie Sellars, *Working My Way Back Home*, in ONE TEACHER IN 10, *supra* note 154, at 244, 248.

162. Sellars recalls a frustrated attempt to come out to a classmate in high school to express his outrage after he found out that the classmate was a gay-basher: “I screamed, ‘I’m gay! Why don’t you try to fight me? You know you can’t kick my ass!’ He just laughed and said that I was just saying this—‘You can’t be gay. You’re my friend. You’re captain of the football team.’” *Id.* at 246.

Yet, if one manifests sufficient gender non-conformity, one can become labeled queer without regard to one’s sexual proclivities. For the case of “Straight Sam,” a high-school student who identified insistently as heterosexual, but who was targeted as the “school fag” by his classmates, see HERDT & BOXER, *supra* note 4, at 197-98. As an example of similar involuntary as well as arbitrary attribution of homosexuality in prison context, consider the male inmates of the Shelby County Jail who were segregated into separate “homosexual” and “heterosexual” cells: those who “appeared weak, small, or effeminate” were assigned to the “gay” section, regardless of their personal sexual identifications. Gay Inmates of Shelby County Jail v. Barksdale, No. 84-5666, 1987 WL 37565, at \*1 (6th Cir. June 1, 1987).

163. Moreover, that an institution is generally liberal and progressive in its policies is not a reliable index of its homophobia. See William P. Norris, *Liberal Attitudes and Homophobic Acts: The Paradoxes of Homosexual Experience in the Liberal Institutions*, J. HOMOSEXUALITY, Nos. 3-4, 1991, at 81. Comstock’s informal survey of college freshmen in the liberal institution where he taught found that sixteen percent of his male students had engaged in anti-gay/lesbian violent acts, including some who were his friends. COMSTOCK, *supra* note 151, at 167 tbl.E.1.

164. Sellars, *supra* note 161, at 247.

The fantasy of innocently heterosexual student bodies is accompanied by a determination to keep them that way. The Supreme Court has proudly declared that school boards may not “cast a pall of orthodoxy” over classrooms,<sup>165</sup> but as far as the pedagogization of children’s sex is concerned,<sup>166</sup> it is perfectly clear that heterosexuality will not tolerate heterodoxy. The inculcation of heterosexuality begins by denying not only that gay and lesbian students exist in our schools, but by erasing queer adults as well. As Gerald Unks puts it, “Within the typical secondary school curriculum, homosexuals do not exist. They are ‘nonpersons’ in the finest Stalinist sense. They have fought no battles, held no offices, explored nowhere, written no literature, built nothing, invented nothing, and solved no equations.”<sup>167</sup> A student need not be a cultural theorist to read the writing on the wall: healthy human beings are not gay.<sup>168</sup>

The eclipsing of homosexual identities forces queer teachers in an insoluble dilemma: if they come out in order “to build a world in which gay and lesbian young people will want to live,”<sup>169</sup> they risk losing their livelihood, and if they remain in the closet, by default they will teach yet another generation of queer kids to hate themselves. Kevin Jennings, now a teacher himself, recalls a high school teacher whose sexual orientation used to trouble him:

I know now that Mr. Korn must have been gay. And I know that this was what I was asking when I queried after his children. What I was truly asking for, however, was not information about his sexual orientation. I was asking for information about me. I was asking him to tell me that I was going to be all right, that I was going to grow up and be gay and be okay. I was asking him to show me something I had never seen before in North Carolina: a gay man who was happy with himself.<sup>170</sup>

The justifications for both coming out and remaining in the closet are irreconcilable but often equally compelling. As Jim Bridgman, another teacher, explains, apart from maintaining his own self-respect in a homophobic society,

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165. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (holding that “fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children”).

166. I owe the term “pedagogization of children’s sex” to Foucault. FOUCAULT, *supra* note 25, at 104.

167. Unks, *supra* note 155, at 5.

168. Pattullo, for instance, asserts that even if only some children should be “waverers” with respect to their sexual orientation, we must “give [them] clear, repeated signals as to society’s preference” for heterosexuality—even if it means “condemn[ing] youngsters, who from the earliest memory know themselves to be gay.” E.L. Pattullo, *Straight Talk About Gays*, COMMENTARY, Dec. 1992, at 22, 24, quoted in Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 520-21 (1994) [hereinafter Halley, *Politics of Biology*].

169. Parlin, *supra* note 154, at 224.

170. Jennings, *supra* note 157, at 21.

there was another reason he wanted to come out at school: "I was a gay student at Northampton High School twenty years ago, and I remembered how scared I felt, how isolated and lonely, and how much I hated myself for what I was."<sup>171</sup> The motivations of Robert Parlin, a Massachusetts teacher, are similar: after his freshman year in college, he tried to commit suicide simply because he could not "envision a life in which I could be happy and whole."<sup>172</sup>

Yet the consequences of coming out are unpredictable—or, perhaps, all too predictable. Robert Parlin describes his anxiety:

I feared coming under attack from all sides, helpless to stop responses ranging from hurtful comments to malicious destruction of my property. I anticipated outraged calls from parents, who would demand the removal of their children from my classes. I imagined students running by my room yelling, "Faggot," through the open doorway. I expected to one day find my car in the faculty parking lot with its tires slashed. Even worse, I feared losing my effectiveness as a teacher, with my relations with students becoming awkward and difficult as they avoided looking at me or responding to my questions with sincerity. Was it worth it?<sup>173</sup>

Many teachers have concluded, understandably, that coming out is simply too risky—and although education is a profession dominated by women, it is the female teachers who feel the most vulnerable.<sup>174</sup> As Teri Gruenwald, a pointedly pseudonymous lesbian teacher, explains: "I live two lives: one in the classroom, and one at home. . . . It is a chasm so deep that I fear it will swallow me up. I worry that I may have to choose between being a teacher and living my life."<sup>175</sup>

171. Jim Bridgman, *Yes, I Am*, in ONE TEACHER IN 10, *supra* note 154, at 123, 124.

172. Parlin, *supra* note 154, at 221.

173. *Id.* at 220-21. Although student reactions vary, and, indeed, are often far more enlightened than those of other teachers and administrators, the scenario is *not* just the product of paranoid homosexual imagination. As David Bruton recounts his coming-out story,

My classroom windows were shot out and broken with stones and pop bottles several times, and on one occasion, a dead 'possum was thrown through the broken window. *Bruton's faggot. Fire Bruton!* was spray-painted on buildings, parking lots, sidewalks, and ten school buses that made their rounds with the graffiti intact. Several small buildings and a truck were set afire and burned.

David Bruton, *Insisting on Ignorance: The Paradox of Withholding Knowledge in Our Schools*, in ONE TEACHER IN 10, *supra* note 154, at 177, 180.

174. Kevin Jennings, executive director of the Gay, Lesbian and Straight Teachers Network, explains how, in the course of his editing a collection of gay and lesbian educators' stories, it became quickly apparent that women felt much more at risk than men in sharing their stories. The final collection is over sixty percent male, even though education is a female-dominated field. Furthermore, of the women who contributed, one-third felt the need to use pseudonyms for themselves or their hometowns, while only one man did so. Clearly, male privilege continues to exist.

Kevin Jennings, *Preface*, in ONE TEACHER IN 10, *supra* note 154, at 11-12.

175. Teri Gruenwald, *Ms. G. Is a Lesbian*, in ONE TEACHER IN 10, *supra* note 154, at 147, 155.

Yet the lives of queer kids remain the singular responsibility of queer teachers, alone and isolated themselves. David Bruton decided he could wait no longer when he came upon a letter from a student to a faculty committee, "literally begging us to discuss sexual orientation." The student explained that "he probably wouldn't have tried to commit suicide the year before if he had been able to talk to someone about being gay." The administration's response? "Other faculty advisors didn't think such a topic warranted discussion, and *certainly* not for impressionable high school students."<sup>176</sup> Paradoxically, Bruton received more support for a gay and lesbian student group from the student body that presumably needed to be protected from him than from his paranoid colleagues.

Gay and lesbian students are of course not the only losers in the fantasy of their non-existence; ultimately families and friends will share in their losses as well. Bruton tells how, after a second student of his took his own life in the space of one year, that student's younger brother approached him with a barely concealed sense of urgency:

[W]ith a direct purposefulness indicative of much thought about the issue, he asked me if his brother could have been gay. I had no answer that would have helped, but it broke my heart that this was the first thing that he wanted to know. We talked, trying to make some sense where none existed, until some of his friends arrived, but before they got close enough to hear us, he put his hand on my arm and looked directly at me, with his eyes filled with more pain than a seventeen-year-old ought to have to bear, and he begged me to keep on with the support group. "No matter what," he said, "don't stop."<sup>177</sup>

When teachers fail them, queer students often cannot turn to counselors for help. Most gay and lesbian students perceive their counselors to be ill-informed, unconcerned, and uncomfortable when talking with them.<sup>178</sup> The perceptions are woefully well-grounded in fact: two-thirds of the school counselors surveyed in a 1991 study expressed negative attitudes to gays and lesbians.<sup>179</sup> Consider the counselor who informed his students that "homosexuals cannot become professionals and must settle for less challenging

176. Bruton, *supra* note 173, at 179.

177. *Id.* at 189.

178. James T. Sears, *Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs?*, J. HOMOSEXUALITY, Nos. 3-4, 1991, at 29, cited in Amy L. Reynolds & Michael J. Koski, *Lesbian, Gay, and Bisexual Teens and the School Counselor: Building Alliances*, in THE GAY TEEN, *supra* note 4, at 85, 89. That homophobic schools should have homophobic counselors is hardly surprising. According to a recent study, the sexual orientation of the counselor and the institutional climate of the organization where she or he works are the two factors most predictive of a career counselor's behavior toward gay clients. Kathleen J. Bietschke & Connie Matthews, *Career Counselor Attitudes and Behaviors Toward Gay, Lesbian, and Bisexual Clients*, 48 J. VOCATIONAL BEHAV. 243 (1996).

179. See Sears, *supra* note 178, at 29.

occupations."<sup>180</sup> Another counselor "helped" a gay boy by reporting his sexual orientation to his parents, who then forced him to leave home.<sup>181</sup>

At school, the fantasy that queer students do not exist begins with the subtler, though devastating, strategies of denial and implicit disapproval. It ends with the physical brutalization of those who are unable or unwilling to remain invisible. Name-calling is often only the first warning. According to Gary Comstock's landmark study, the most commonly identified perpetrators of anti-gay/lesbian violence are young male strangers and fellow male students.<sup>182</sup> A recent report by the Department of Justice similarly concludes that "gays and lesbians are the most frequent victims of hate crimes, and school is the primary setting for this type of violence."<sup>183</sup> Comstock's study found also that males report more anti-gay violence in school settings than do females.<sup>184</sup> Anecdotal evidence accords with these findings:

When I was about, I don't know, fifteen I guess, people at school decided I was gay. I didn't even know what they were talking about at first. They just started calling me "faggot" this and "fag" that, and all of a sudden I didn't have any friends any more. So when people started calling me faggot and queer and stuff, I thought, Yeah, I'm gay. That's what I am. I saw what happened to other kids who got called queer at school. I dropped out.<sup>185</sup>

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180. Dennis & Harlow, *supra* note 4, at 450.

181. *See id.* at 449-50 n.12.

182. COMSTOCK, *supra* note 151, at 115. Almost half of the perpetrators are only 21 years old or younger. *Id.* at 59. For a table of the various groups of perpetrators, see *id.* at 51. However, as Kendall Thomas observes,

We may never know the full story of the violence to which gay men and gay women are subjected. In spite of their frequency, it is estimated that a full 80% of bias violence against gay men and women is never reported to the police. This underreporting is not surprising, since victims of anti-gay violence have reason to be fearful that the response of state and local officials may be unsympathetic or openly hostile, or that the disclosure of their sexual orientation may lead to further discrimination.

Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1464 (1992) (citations omitted). Young victims of anti-gay violence certainly have little reason to expect a sympathetic response from school officials and not to expect further discrimination from their peers.

183. Andi O'Connor, *Who Gets Called Queer in School? Lesbian, Gay, and Bisexual Teenagers, Homophobia, and High School*, in THE GAY TEEN, *supra* note 4, at 95, 98 (citing Gregory M. Herek, *Hate Crimes Against Lesbians and Gay Men: Issues for Research and Policy*, 44 AM. PSYCHOLOGIST 948 (1989)). "[S]chool is a place where 'fag' and 'queer' are everyday insults, where many older teens are vocal in their willingness to use violence against anyone suspected of being gay. Hostility is even found among some teachers and school executives themselves." Del Stover, *The At-Risk Students Schools Continue to Ignore*, 57 EDUC. DIGEST 36 (1992). "According to a study of gay students in New York, one in five reported being beaten because of his homosexuality. Attacks on gay youth in New York quadrupled in the last five years and statistics show that eighty percent of the perpetrators of all hate crimes against gays are teen-agers." Armstrong, *supra* note 4, at 75 (citations omitted); see also Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 76 (Gregory M. Herek & Kevin T. Berrill eds., 1992); Eric Weissman, *Kids Who Attack Gays*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN, *supra*, at 170; Mary B.W. Tabor, *For Gay High-School Seniors: Nightmare Is Almost Over*, N.Y. TIMES, June 14, 1992, at 41.

184. *See* COMSTOCK, *supra* note 151, at 49, 52. Women, in contrast, report more anti-gay violence in home settings and straight-identified public areas outside school. *Id.*

185. O'Connor, *supra* note 183, at 96-97.



Dropping out was probably the smartest thing to do—considering what happened to Paul M. from Ohio: “There, eight boys dragged him into a bathroom stall at school, bashed his head against a toilet while calling him faggot, threatened to kill him and burned his arm four times with a lighter.”<sup>186</sup> After another incident in which “a truckfull of rednecks mowed him down on his bike, leaving him in a body cast for months,” Paul finally moved to New York City where he started attending the Harvey Milk High School—a high school for gay and lesbian youth like Paul who have been driven out of their own schools.<sup>187</sup>

Although anti-gay violence by adolescents is often dismissed as pranks by unruly youth, its consequences are frequently brutal, and sometimes fatal.<sup>188</sup> A seventeen-year-old from Bangor, Maine, recounts the killing of Charlie Howard:

We were just going to talk to him or scare him. I walked up to him and said, “Hi, how you doing, fag?” You could tell he was really scared. We did pick him up and brought him over to the rail [of the bridge over the stream]. . . . We threw him in. I didn’t want to kill him—all I did was try to scare him.<sup>189</sup>

According to the two other attackers, afterward “all shook hands with each other; they were all laughing, just laughing like when you tell a joke.”<sup>190</sup> Much adolescent gay- and lesbian-bashing is recreational,<sup>191</sup> instead of

186. Jesse Green, *This School Is Out*, N.Y. TIMES, Oct. 13, 1991, §6 (Magazine), at 12, 32.

187. On the Harvey Milk High School, run by the non-profit Hetrick-Martin Institute providing counseling and services to gay kids, see *id.* “The idea for a program devoted exclusively to the needs of gay and lesbian youths was born in an act of sexual violence. In 1979, a 15-year-old boy who had been gang-raped at a New York City shelter was evicted because, according to officials, the rape was his fault, for being gay.” *Id.*; see also Jesse Green, *Out and Organized*, N.Y. TIMES, June 13, 1993, §9, at 1 (report on activities of the Hetrick-Martin Institute).

188. Consider the following report by Community United Against Violence in San Francisco: One man’s body was discovered with his face literally beaten off. Another had his jaw smashed into eight pieces by a gang of youths taunting, “you’ll never suck another cock, faggot!” Another had most of his lower intestine removed after suffering severe stab wounds in the abdomen. Another was stabbed 27 times in the face and upper chest with a screwdriver, which leaves a very jagged scar. Another had both lungs punctured by stab wounds, and yet another had his aorta severed.

Ron Wickliff, *Queerbashers Meet Resistance in the Streets of San Francisco*, WIN, Aug. 31, 1981, quoted in Thomas, *supra* note 182, at 1463.

189. *Judge Binds Bangor 3 Over for Murder Trial*, WEEKLY NEWS (Miami, Fla.), Aug. 29, 1984, at 3, quoted in COMSTOCK, *supra* note 151, at 76 (alteration in original).

190. *Id.*, quoted in COMSTOCK, *supra* note 151, at 77.

191. See COMSTOCK, *supra* note 151, at 94. “We would never make a decision to go beat up fags. But if we were walking down the street and some guy passed that looked ‘queer,’ we’d let him have it.” Eric Rofes, *Queer Bashing: The Politics of Violence Against Gay Men*, GAY COMMUNITY NEWS (Boston), Aug. 12, 1978, at 8, quoted in COMSTOCK, *supra* note 151, at 70. “What would happen is, the whole gang would be hanging around and some feminine guy would walk by and someone would say, ‘let’s get the fag!’ We’d all surround the guy, scare him half to death, and rough him up a little.” *Id.* at 9, quoted in COMSTOCK, *supra* note 151, at 70.

springing from strong, personal hatred of gays and lesbians.<sup>192</sup> Rather, it is often conducted as a macho sport to alleviate boredom and to help participants constitute their own heterosexual masculinity.<sup>193</sup>

The Maine case is painfully instructive. The youths were not local thugs, but "normal" kids; the murderous 17-year-old-boys' attorney based their defenses on "unsolicited character references from people who said the boys simply would not harm another human being."<sup>194</sup> They were described as "social" at the Maine Youth Center to which they were sentenced (for less than a year), and a counselor noted that "throwing a known homosexual off the bridge is something that would be a feather in their cap among kids at Bangor High."<sup>195</sup> As far as the counselor could tell, "there was no single reason for their dislike of gays—they only treated gays as they thought most people did."<sup>196</sup>

Indeed. What is ultimately most disturbing is that the violent homophobes are *not* atypical, anti-social, self-destructive, easily identifiable students. They are the average students of heterosexuality that our families and schools produce. As Comstock summarizes,

Perpetrators are not only predominantly male and white, but just as likely, or even more likely, to be middle class; good in their classes; involved in school and community activities, organizations and athletics; popular, friendly, and sociable; enrolled in college-preparatory programs in high school or enrolled in college; and/or in the military . . . .<sup>197</sup>

A Toronto police officer who arrested five teenage boys who had beaten and kicked their victim to death described the perpetrators as perfectly ordinary:

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192. In fact, sometimes the attackers choose their victims because of their *attractiveness*, as one candid gay-basher noted while also admitting that he and his friends "were probably attacking something within themselves." COMSTOCK, *supra* note 151, at 172. The interviewer expressed his surprise that they did not "simply attack[] any gay man without regard for particular features and looks they found attractive; [the attacker] suggested that the victims 'were more carefully selected than that, that not any gay was a likely target.'" *Id.* In a similar vein, James Baldwin suggests that macho men

have created faggots in order to act out a sexual fantasy on the body of another man and not take responsibility for it . . . I think it is very important for the male homosexual to recognize that he is a sexual target for other men, and that is why he is despised, and why he is called a faggot. He is called a faggot because other males need him.

Goldstein, *supra* note 34, quoted in KATZ, *supra* note 34, at 104 (ellipsis in original).

193. Experiments suggest that even the simple act of labeling another male as queer enhances one's perception by others as masculine. In one study, an experimental confederate was labeled as homosexual by another confederate; in the control group, he remained unlabeled. The experimental subjects who interacted with the confederates perceived the confederates who performed the labeling as significantly more masculine and sociable when they designated someone as homosexual than when they did not. Rodney G. Karr, *Homosexual Labeling and the Male Role*, J. SOC. ISSUES, Summer 1978, at 73, 82.

194. Peter Canellos, *A City and Its Sins: The Killing of a Gay Man in Bangor*, BOSTON PHOENIX, Nov. 13, 1984, at 1, quoted in COMSTOCK, *supra* note 151, at 92.

195. *Id.*, quoted in COMSTOCK, *supra* note 151, at 92.

196. *Id.*, quoted in COMSTOCK, *supra* note 151, at 239.

197. COMSTOCK, *supra* note 151, at 106.

"If you went to [a shopping mall] and picked up any group of young males about the same age as these boys—that is what they were like. Average."<sup>198</sup> A mother whose son was a friend of the boys but not present when the attack took place was perhaps the most perceptive of all: "I just thank God my son happened not to be there that night. . . . He is a good boy, but it could be him going to jail, too. It could be anyone's son."<sup>199</sup> (And so could the victim.)

That bored adolescent males choose to attack those they perceive as queer is hardly an accident. As Comstock notes, "[t]argets are those whom adults shun and denigrate."<sup>200</sup> While teachers typically do not beat up gay and lesbian students, they almost invariably let homophobic acts by others go unchallenged and often engage in them themselves.<sup>201</sup> No student can fail to discern that teachers have a sexual preference: they prefer heterosexuals. When unspeakable cruelty becomes entertainment so that teachers joke openly about the "miracle of AIDS"—"it turns fruits into vegetables"<sup>202</sup>—one is led to conclude that students who seek to obliterate lesbians and gays are acting out an adult fantasy. Schools, as well as families, send unmistakable signals. Students who attack gays perceive, correctly, that permission to attack them has been given in the the form of

(1) familial, church, and community norms which exclude, disapprove of, and are hostile to lesbians and gay men; (2) the failure or refusal of high school educators to protect lesbian and gay students and/or to teach about the full range of human sexualities; (3) the tendency of the police to respond slowly or not at all to incidents of anti-gay/lesbian violence and/or to release perpetrators and apprehend victims; and (4) the practice of judges and juries to acquit or sentence lightly those who are apprehended for physically harming or killing lesbians and gay men.<sup>203</sup>

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198. Philip Plews, *The Evil That Boys Do*, TORONTO, May 1986, at 60, 63, *quoted in* COMSTOCK, *supra* note 151, at 93 (alteration in original).

199. Linda Clark, *Killing in the Park: What Possessed 5 'Average, Sensitive Youths' to Beat a Man to Death*, GLOBE AND MAIL (Toronto), Dec. 4, 1985, at A1, *quoted in* COMSTOCK, *supra* note 151, at 93.

200. COMSTOCK, *supra* note 151, at 116.

201. In athletics in particular, coaches routinely use homophobic slurs to punish and to shame. *See* Pat Griffin, *Homophobia in Sport: Addressing the Needs of Lesbian and Gay High School Athletes*, in *THE GAY TEEN*, *supra* note 4, at 53, 54. Consider, for instance, the high school gym teacher who "ridiculed for months a sixteen-year-old boy, known to be gay, and finally compelled him to attend girls' gym class." Dennis & Harlow, *supra* note 4, at 449. And the more teachers join in the fun, the merrier: "In the District of Columbia, for example, several teachers repeatedly taunted an openly gay fifteen-year-old, calling him 'faggot' and 'fruit,' knowing that he was also being harassed and beaten by fellow students. When he complained to other teachers and the principal, they blamed the gay student and recommended that he leave school." *Id.*

202. Gary Campbell, *Coming Out of the Cloakroom*, in *ONE TEACHER IN 10*, *supra* note 154, at 131, 134.

203. COMSTOCK, *supra* note 151, at 105 (citations omitted).

What is more absurd, while criminal behavior of adolescents is usually a way of rebelling against society, the harassment of gays and lesbians is an attempt to *conform*—to gain acceptance and to fit in. As a form of sexual cleansing, it is a way of observing the heterosexual ethic we learn at home and at school, as well as in myriad other social spaces. Yet, for the self-avowed liberal who condemns homophobia, at least on intellectual grounds,<sup>204</sup> it is easier to believe that the perpetrators of anti-gay violence are psychopaths than that they are in fact brothers, sons, fathers, and other male relatives and friends. As Comstock suggests,

we are not comfortable with the notion that we or those like us are either capable of committing or actually do commit those acts that we find tasteless or wrong. We prefer to consider the origin, arena, and actors for such activity to be other than or outside of that with which we are familiar and *for which we are responsible*.<sup>205</sup>

Yet we are responsible for homophobia—in schools and elsewhere. And so are the courts when they sanction homophobia by upholding the firing of gay and lesbian teachers on the theory that the law must protect “confused” students and help them blossom into fully enfranchised heterosexuals, as the following section demonstrates.<sup>206</sup>

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204. Young contrasts conscious, discursive disavowals of prejudice with actual behavior in social interactions involving members of socially devalued groups:

In social interactions the socially superior group often avoids being close to the lower-status group, avoids eye contact, does not keep the body open. . . . Those exhibiting such behavior, however, are rarely conscious of their behavior or how they make the others feel. Many people are quite consciously committed to equality and respect for women, people of color, gays and lesbians, and disabled people, and nevertheless in their bodies and feelings have reactions of aversion or avoidance toward members of those groups.

YOUNG, *supra* note 37, at 133-34. For Young’s analysis of the moral and psychological dynamics of “conscious acceptance, unconscious aversion,” see *id.* at 130-36.

205. COMSTOCK, *supra* note 151, at 170 (emphasis added).

206. That the homophobic legal ideology which sanctions the firing of queer teachers serves to legitimize violence against gay and lesbian students parallels Kendall Thomas’s argument that sodomy statutes provide the official “theory” of homophobia while private acts of anti-gay violence constitute the “practice.” See generally Thomas, *supra* note 182.

## 2. *Keeping School Heterosexual*

*What happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual.*

*Gay Lib v. University of Missouri*<sup>207</sup>

*"You know," [the headmaster] says, if I had known seven years ago that you were a lesbian, I'm not sure I would have hired you." He likes me though, in spite of himself. I sense the fear of what he doesn't understand. I hear his internal struggle. I like her. What if the parents find out? She is a good teacher.*

Patty Smith<sup>208</sup>

When Sedgwick speaks of school systems "where teachers are fired, routinely, for so much as intimating the right to existence of queer people, desires, activities, children,"<sup>209</sup> she is paraphrasing much of the case law on queer teachers. The evidence speaks for itself: school boards need no other cause to fire queer teachers than the possibility that their mere presence will provide a supportive atmosphere for potentially gay youth.<sup>210</sup>

The post-Socratic fear that teachers will corrupt our young shows no signs of relenting. "Moral turpitude" remains one of the few legal grounds for revoking tenure,<sup>211</sup> and the inculcation of morality is still one of teachers' central missions—much as we may disavow such unfashionable notions and profess adherence to a liberal curriculum that encourages students to fashion their own values. Part of the educational morality of our schools is the simple heterosexual ethic according to which it is better (read: mandatory) to be straight than gay. Again relying on diluted Freudianism, courts seek to protect latently homosexual students from turning into full-blown queers by lending the color of law and justice to the firing of queer teachers. And, again, as gay and lesbian students become non-persons, their protection becomes a non-issue; for courts, they exist only as promises of adult heterosexuality.

Moreover, 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

207. 558 F.2d 848, 852 (8th Cir. 1977).

208. Patty Smith, *Private Conversations*, in ONE TEACHER IN 10, *supra* note 154, at 193, 195.

209. SEDGWICK, *Queer and Now*, *supra* note 2, at 2.

210. *See, e.g., In re C.*, slip op. at 19 (Wash. Dist. Ct. Jan 31, 1984) (hearing officer's findings) (upholding dismissal of openly lesbian teacher because her presence created "a climate of acceptability or condonation of sexual practices by students who might look to staff members for confirmation of their own sexual identities and/or orientation, and for approval of their sexual behavior"), *quoted in* Dennis & Harlow, *supra* note 4, at 473 n.127.

211. *See* Rubin, *supra* note 23, at 290.

natural allies become enemies in a struggle for survival. As one female student complains, "This one English teacher, all these girls have such a big crush on him. I *know* this guy is gay, he has to be. And he avoids me like the plague for two years. Like he KNOWS I KNOW and I'm going to turn him in or something."<sup>212</sup> And the fear is often mutual: "I was intrigued with my lesbian teacher, but also terrified. My conscious awareness of homosexuality was pretty limited back then: I must have thought being gay was contagious, like the mumps or the chicken pox, and too much contact with this woman would give me her disease."<sup>213</sup>

While gay students may resent their teachers' fears of being "turned in," the students can hardly accuse the teachers of paranoia. Insofar as school boards and courts subscribe to the seemingly timeless theory that the "homosexual is one, who by some freak, is the product of an arrested development" (in the Supreme Court's eloquent phrasing),<sup>214</sup> they are seized by a constant fear of queer teachers' derailing the development of volatile adolescent sexuality.

The decision of the Supreme Court of Washington in *Gaylord v. Tacoma School District No. 10*<sup>215</sup> represents a textbook example of the dangers of counseling students who need help and have no one to whom to turn. The Supreme Court of Washington was called upon to decide the fate of a teacher who had been outed after agreeing to counsel a student with "homosexual problems," as the court put it.<sup>216</sup> In interpreting the school district's policy providing for discharge of school employees for "immorality," the court ultimately made it clear that heterosexuality was an essential credential in establishing fitness to care for the young. In explicating their understanding of homosexuality—"a word [not] to be thoughtlessly or lightly used"—the justices soberly noted that the "medical and psychological and psychiatric literature on the subject of homosexuality distinguishes between the overt homosexual and the passive or latent homosexual."<sup>217</sup> Shifting from the rhetoric of psychopathology to that of "choice" and morality, the court then observed that Gaylord "desired no change and has sought no psychiatric help because he feels comfortable with his homosexuality." The court thus drew the inevitable conclusion that Gaylord had "chosen" to be an "overt homosexual": "He has made a voluntary choice for which he must be held morally responsible."<sup>218</sup> And having looked up "homosexuality" in the *New*

212. O'Connor, *supra* note 183, at 96 (quoting teenager).

213. Nancy D. Kates, *My Mother's Worst Fears*, in *GROWING UP GAY/GROWING UP LESBIAN*, *supra* note 61, at 126, 131.

214. *Boutilier v. Immig. & Naturaliz. Serv.*, 387 U.S. 118, 127 (1967) (Douglas, J., dissenting). It is noteworthy that this formulation belongs to the *progressive* minority of the Court; the majority held that homosexuality is a "psychopathic personality," *id.* at 122, while the more sophisticated minority deemed it *merely* an instance of "arrested development," *id.* at 127.

215. 559 P.2d 1340 (Wash. 1977).

216. *Id.* at 1346.

217. *Id.* at 1345, 1344.

218. *Id.* at 1345-46.

*Catholic Encyclopedia* as well as having consulted a few other sources, the court concluded that Gaylord was indeed immoral.

However, the justices went on to examine whether there was evidence for a further conclusion that Gaylord's "immorality" in fact impaired his fitness as a teacher. Alas, the evidence was seemingly all there: "at least one student expressly objected to Gaylord teaching at the high school because of his homosexuality," and three fellow-teachers were similarly opposed to Gaylord's remaining on the staff, while the vice-principal and principal both foresaw "problems."<sup>219</sup> The opinion leaves the precise nature of any "problems" unclear, except for a vague reference to "confusion, suspicion, fear, expressed parental concern and pressure upon the administration" that would both harm Gaylord's "efficiency as a teacher and injure the school"<sup>220</sup> if Gaylord were permitted to remain on the teaching staff.

Gaylord defended himself by noting that "his homosexuality became known at the school only after the school made it known and that he should not be responsible therefor so as to justify his discharge as a homosexual." The justices dismissed this argument swiftly: "It was [Gaylord] who granted an interview to the boy who talked to him about his homosexual problems."<sup>221</sup> After the interview had been brought to an administrator's attention, he had a *duty* to report, the court noted; the school simply "cannot be charged with making plaintiff's condition known so as to defeat the school board's duty to protect the school and the students against the impairment of the learning process in all aspects involved."<sup>222</sup> The lesson is clear: school boards have a duty to prevent queer teachers from helping queer kids, and teachers who do support their gay and lesbian students do so at their own peril.

Yet, at its very conclusion, the *Gaylord* opinion suggests that its unflagging concern for the impairment of "the learning process" refers not just to learning in general but, more particularly, to the learning of heterosexuality. The court stresses that "[i]t is important to remember that Gaylord's homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by

219. *Id.* at 1346

220. *Id.* at 1347.

221. *Id.* at 1346 (quoting lower court's findings of fact).

222. *Id.* Although the battle over the fate of queer teachers is fought largely on the field of representation, some decisions suggest that even the willingness to adopt a public heterosexual identity is not enough to protect a teacher in his or her job. While most gay and lesbian teachers are fired for the *disclosure* of their homosexual identities, in *Acanfora v. Board of Educ.*, 491 F.2d 498 (4th Cir. 1974), the Fourth Circuit upheld the transfer of a teacher for his *failure to disclose* his sexual orientation in his teaching application. Thus, *both* the representation of one's identity as homosexual *and* its misrepresentation as heterosexual can result in one's dismissal; even the closet cannot protect a teacher if only those with ontologically authentic heterosexual identities are deemed qualified to teach the young. That is to say, teachers may be outside even "[the] pocket of legal protection for individuals who obey a prohibition on homosexuality not by eschewing homosexual acts or rejecting a subjective homosexual identity, but by appearing straight." Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 958 (1989).

the school board as indicating adult *approval* of his homosexuality."<sup>223</sup> Keeping in mind the court's discussion of "latent" homosexuals, evidently the danger that any "approval" poses is that it will wake up what is now only dormant: "confused" students will grow up into queer adults. Again, the school as well as the law see it as their task to nurture and protect students' heterosexuality.

In *Gay Lib v. University of Missouri*, judges of the Eighth Circuit reasoned similarly from the premise that youth are heterosexual at best and "confused" at worst, so that even latently homosexual youth can be intimidated into heterosexuality.<sup>224</sup> Asked to rule on the refusal of the University of Missouri to provide funding to Gay Lib, a gay student group, the court relied on "findings of fact" by the University:

There are potential or latent homosexuals, i.e. persons who come into adolescence or young adulthood unaware that they have homosexual tendencies, but who have fears of sexual relations with a member of the opposite sex.

. . . What happens to a latent or potential homosexual from the standpoint of his environment can cause him to become or not to become a homosexual.<sup>225</sup>

The court ultimately affirmed Gay Lib's right to funding on First Amendment grounds but without questioning the premise of latency.<sup>226</sup> The dissent indeed capitalized on the majority opinion's acceptance of the notion; it noted that state university officials have responsibilities that encompass the

223. *Gaylord*, 559 P.2d at 1347 (emphasis added).

224. *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977).

225. *Id.* at 852.

226. The case belongs to the category of decisions where the particular outcome is pro-gay but grounded in assumptions that ultimately confirm the homophobic logic of anti-gay decisions. Compare *United States v. Coffeerville Consolidated School District*, 513 F.2d 251 (5th Cir. 1975), in which a teacher had taken the liberty of mentioning "her personal encounters with queers with her eighth grade class"; the court found that there was not sufficient cause for her dismissal and thus absolved her of her "single instance of bad judgment." *Id.* at 251.

Although the First Amendment is virtually the only source of law that has provided protection for gays and lesbians with some degree of consistency, First Amendment rights may be limited in the context of school if their exercise proves too disruptive. Yet the more homophobic a particular school is, the greater the likelihood of disruption when lesbian and gay teachers come out. Ironically, it is thus permissible for openly queer teachers to seek to help queer students and to call for tolerance of homosexuality in environments that are relatively tolerant; the more homophobic the school, the more likely that the disruption caused by openly gay adults is sufficient to justify the suspension of those adults' right to publicly identify as gay.

Consider the aftermath of the brutal Maine incident, *supra* text accompanying notes 189-96. In response to the killing of Charlie Howard, a high school teacher organized a "Tolerance Day," which was to entail inviting an openly lesbian person to participate in one of the events. In response to the invitation, the school received threats of pickets, bomb threats, and threats of sabotage to the school furnace; the school subsequently canceled the program. The state's highest court held that the cancellation did not violate the planners' First Amendment rights, because the prospective disruptions would have resulted in the loss of a school day. *Solmitz v. Maine Sch. Admin. Dist. No. 59*, 495 A.2d 812 (Me. 1985).



right to protect latent or potential homosexuals from becoming overt homosexual students. In carrying out these responsibilities, they were aware that unlike recognition of political associations, whether of the right, center or left, an organization dedicated to the furtherance and advancement of homosexuality would, in any realistic sense, certainly so to impressionistic [sic] students, imply approval not only of the organization per se but of homosexuality and the normality of such conduct, and thus adversely affect potential homosexual students.<sup>227</sup>

The Supreme Court declined to review the case, but in their dissent from the denial of certiorari, Justices Rehnquist and Blackmun invoked the specter of confused youngsters. The Court stated that the "meeting together of individuals who consider themselves homosexual" poses dangers that are likely to be "particularly acute in the university setting where many students are still coping with the sexual problems which accompany late adolescence and early adulthood."<sup>228</sup> Sounding rather like the naive adolescent girl who feared that homosexuality was passed like mumps or the chicken pox,<sup>229</sup> the Justices described the University's dilemma as akin to the question "whether those suffering from measles [analogous to homosexuals] have a constitutional right, in violation of quarantine regulations [analogous to sodomy laws], to associate together and with others who do not presently have measles, in order to urge repeal of a state law providing that measles sufferers be quarantined."<sup>230</sup> This powerful (notably pre-AIDS) image of viral transmission of homosexuality again invalidates even the possibility of authentically queer children: all kids are healthy heterosexuals and will remain so if only properly protected from the plague of homosexuality.

The more intimate the adult's relationship with her students, the swifter the sanction is likely to be. Marjorie Rowland, a closeted guidance counselor at the Mad River public high school, lost her job after disclosing the secret of her bisexuality to an ill-chosen co-worker.<sup>231</sup> In the case of Vernon Jantz, a high school teacher and coach in Wichita, the mere mention by the principal's secretary that Jantz "reminded her of her former husband, whom she believed to be a homosexual," made him unqualified for a teaching position—regardless of the fact that Jantz was married and had two children.<sup>232</sup> Young boys' future heterosexuality was apparently simply too

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227. *Gay Lib*, 558 F.2d at 859 (Regan, dissenting). As far as "advancement and furtherance of homosexuality" is concerned, the student group had provided in its statement of purpose that "Gay Lib does not seek to proselytize, convert, or recruit." *Id.* at 851 n.4 (quoting *Gay Lib*'s petition for recognition by university).

228. *Ratchford v. Gay Lib*, 434 U.S. 1080, 1083 (1978).

229. See *Kates*, *supra* note 213, at 131.

230. *Ratchford*, 434 U.S. at 1084.

231. *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984).

232. *Jantz v. Muci*, 976 F.2d 623, 626 (10th Cir. 1992).

precious a thing to risk, and the flimsiest evidence of a coach's homosexuality sufficed.

Yet it is not enough that teachers, counselors, and coaches serve as role models for "confused" youth; even university librarians must be ready, willing, and able to disseminate the gospel of heterosexuality. This became evident to James McConnell when the University of Minnesota informed him that by applying for a marriage license with another male he had lost his eligibility to head the cataloging division of the campus library<sup>233</sup>—a position seemingly *not* requiring a particular sexual orientation. The court, however, agreed with the University that McConnell's homosexuality was "not consistent with the best interest of the University."<sup>234</sup> As the Eighth Circuit explained, this was not "a case in which an applicant is excluded from employment because of a desire clandestinely to pursue homosexual conduct," but rather one in which a prospective employee made "extravagant demands" about "the right to pursue an activist role in *implementing* his unconventional ideas concerning the social status to be accorded to homosexuals and, thereby, to foist tacit *approval* of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning."<sup>235</sup>

In the end, just as legally constructed families have no room for gay children, courts are unable to envision queer students. At best, they worry about "confused" youth whose redemption lies in shielding them from contact with lesbian and gay teachers, coaches, counselors, and even librarians.

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233. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

234. *Id.* at 194.

235. *Id.* at 196 (second emphasis added).

## IV. GAY KIDS: WHAT'S IN A NAME?

*Two, four, six, eight!*

*What makes you think your kids are straight?*

Gay and lesbian youth in Chicago<sup>236</sup>

*To be untouchable is (perhaps) not so awful as to be invisible.*

Michael Walzer<sup>237</sup>

Children are a central battleground in the struggle over the meaning of homosexuality, as the above analysis of the legal construction of the family and school illustrates. Haunted by fears of homosexual recruitment—as well as actively inflaming them—courts are unwilling to allow openly gay adults to raise and teach children. Typically, the response has been an empirical challenge. The kids will *not* grow up to be gay, advocates have told courts—often to no avail.<sup>238</sup> An increasing number of voices have begun to question the normative assumptions underlying the judiciary's concern over the outcome of children's sexual development—that is, the powerful heterosexist teleology according to which it is simply better to be straight than queer. A new generation of advocates tender “a more deeply challenging response to the question of whether the kids of homosexuals will grow up to be gay—namely, so what if they do?”<sup>239</sup> This reply attacks frontally the devaluation of gay and lesbian adults implicit in the question “Will the kid grow up to be gay?” It nevertheless leaves its perhaps most anti-gay premise unchallenged, namely, the assumption that *kids* cannot be gay in the first place.

To enter into a debate on the aetiology of homosexuality is always fraught with danger, as Sedgwick, among others, has observed: “[M]y fear is that there currently exists no framework in which to ask about the origins or development of individual gay identity that is not already structured by an implicit, trans-individual Western project or fantasy of eradicating that identity.”<sup>240</sup> Given this well-founded fear, the only viable response may indeed be to challenge the notion that homosexuality has a “cause.”<sup>241</sup> Because of its epistemological privilege as a knowing subject, heterosexuality

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236. The chant of a youth group in Chicago's eighteenth annual Gay and Lesbian Pride Day parade. HERDT & BOXER, *supra* note 4, at 26.

237. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 253 (1983).

238. Pro-gay voices have appealed to studies showing that children raised by gay parents are no more likely to become gay adults than their peers in heterosexual households, *see supra* note 104; the main difference is simply that children with gay parents tend to be more tolerant of homosexuality. *See* BENKOV, *supra* note 33, at 96. Of course, this may in fact be the very reason courts are reluctant to allow children to grow up in gay families. *Cf. supra* text accompanying notes 132-33.

239. BENKOV, *supra* note 33, at 63.

240. SEDGWICK, *supra* note 24, at 41.

241. On the political and legal implications of scientific research on the aetiology of homosexuality, *see* Halley, *Politics of Biology*, *supra* note 168.

is in a position to turn homosexuality into an object of knowledge.<sup>242</sup> Scientifically, what causes heterosexuality is as compelling a question as what causes human beings to have two hands or one head. Hence, the safest ground may well be to assert that homosexuality *is* already in the world and possesses the same ontological authority and authenticity as heterosexuality. New and more aggressive questions may be needed to move the debate from an attempt to justify gay kids' existence to a more productive discussion of what their rights and needs are as real, already existing, embodied people. For what if homosexuality is not a matter of children's derailed sexual development, of kids *growing up* to be gay, but of *being* gay? What if the dystopia envisioned by the preachers of a queer eschatology is not a future nightmare but our world as it exists? What if the apocalypse is here already, and the planet has been queer all along? What if, behind the closet doors, kids are holding up signs proclaiming *Queers 'R' Us?*<sup>243</sup>

That gay youth are not represented in law, politics and culture has serious, often fatal, consequences for gay kids, but their invisibility is not surprising. All queer kids belong to at least two politically powerless groups: children and homosexuals. Simply put, "[c]hildren are the paradigmatic group excluded from traditional liberal rights."<sup>244</sup> Gays and lesbians, on the other hand, have found themselves excluded from the political process because of the legal, social, and cultural system of bribery and intimidation that drives us into the closet and thereby buys our compliance with the fantasy that there are no queers.<sup>245</sup>

242. For a classic statement of the construction of the Other as a passive object to be known by a cognitively privileged subject, see Edward Said's study of the Orientalized Other. EDWARD W. SAID, *ORIENTALISM* 31-48 (1978).

243. Again, I do not wish to imply an essentialist ontology of a group of people—whether adults or young people—who “really” are gay. Compare *supra* note 60 on the tension between the theory and practice of identity politics. By suggesting that “homosexuality *is* already in the world and possesses the same ontological authority and authenticity as heterosexuality,” I mean simply just that. That is, there are no more “real” heterosexuals than there are “real” homosexuals, for in the end *both* categories are rhetorical and social rather than ontological—in this sense, they have the same ontological authenticity, or, ultimately, inauthenticity. Nevertheless, as a society we accord great respect to heterosexuals' attachment to their sexual identities as fundamentally valid and authentic. In other words, while heterosexuality is not any *more* real as an *ontological* category than homosexuality is, neither is homosexuality any *less* real as a *social* category, and, in this sense, having the same ontological authenticity (or, really, inauthenticity), homosexuality and heterosexuality should be taken equally seriously.

Besides, regardless of the ultimate complexities of the construction of our identities, there is absolutely no doubt that many youth (as well as adults) *interpret and experience themselves* as being “really,” essentially, ontologically gay—indeed, this is the very effect of the cultural pervasiveness of the hetero/homosexual dichotomy which structures our social reality. I thus simply maintain that we have no ground, moral or legal, to delegitimize the fundamental identities and self-understandings of young gay and lesbian people while cherishing and celebrating those of straight-identified youth. For not only do most gay kids not have a voice, but even on those occasions when they do succeed in vocalizing a cry for help, the world is deaf. Julia Sullivan, recalling her closeted childhood and youth in a small town in Massachusetts, tried to think of advice to give to the little girl that she used to be—but she concluded, sadly: “I don't think I could give her the courage to speak, and I don't think anyone would hear her if she did.” Julia Sullivan, *The World Outside*, in *GROWING UP GAY/GROWING UP LESBIAN*, *supra* note 61, at 54, 59.

244. MINOW, *supra* note 98, at 283.

245. On the legal deterrence of public identification as gay, see Halley, *supra* note 222, at 958 (observing that there exists “a pocket of legal protection for individuals who obey a prohibition on

The notion that all children are presumptively heterosexual future adults unless something in their development goes awry is a fantasy especially dear to parents. While coming to terms with the “spoiled identity”<sup>246</sup> that society imposes on them is terrifying for youth whose sexual attraction is directed to members of their own sex, parents often find it no less painful to accept their children’s non-heterosexual identity. Robb Dew describes how she and her husband reacted when their son first came out:

As far as Charles and I knew, there was no other family who had ever known they had a gay child. There was no social construct to catch us as we flew apart. We felt overwhelmingly isolated in spite of the fact that two of my closest women friends had been a couple for several years, and two of Charles’s favorite younger colleagues are openly gay and lesbian. I have no idea why none of this occurred to us as relevant.<sup>247</sup>

And Dew offers an answer to her own question: “Perhaps it was because we only knew these people as successful adults; it didn’t occur to us that they had once been children, had—each one—at some time been defined as being someone’s child.”<sup>248</sup>

Having a gay or lesbian child reflects not only on the child but the entire family. For one thing, it also alters the parents’ social status.<sup>249</sup> Walter Fricke, a father of a gay son, writes:

Hopefully, [your gay children] will understand, or come to understand, that as hard as it was for them to look at themselves while growing up gay and say “I am gay,” it is a thousand times more difficult for you to look at yourself and say “My child is gay.”<sup>250</sup>

Hyperbole aside, Fricke correctly notes that, “just like your children, you have been pegged into a socially predetermined slot.”<sup>251</sup> By coming out, a child outs his or her parents as the mother and father of a gay or lesbian child; that is, as parents who somehow “arrested” their child’s normal heterosexual development, and, in short, messed the kid up.

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homosexuality not by eschewing homosexual acts or rejecting a homosexual subjective identity, but by appearing straight”).

246. The term is Erving Goffman’s. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

247. DEW, *supra* note 55, at 46.

248. *Id.*

249. HERDT & BOXER, *supra* note 4, at 219 (“there is a perception of status demotion that occurs when parents tell others they have a gay or lesbian child”) (citing ANNE MULLER, *PARENTS MATTER* (1987)).

250. AARON FRICKE & WALTER FRICKE, *SUDDEN STRANGERS: THE STORY OF A GAY SON AND HIS FATHER* 66 (1991).

251. *Id.* at 94.

Giving up the heterosexual dreams most parents construct for their children is difficult indeed. Looking back on her son's coming out, Robb Dew admits her fears. "I was afraid of society, and I know now that I was counting on Stephen to make the situation easy for me at his expense—something he had done automatically for most of the years of his life."<sup>252</sup> One father, who admits that he has "never dealt with a moment's oppression," explains his reaction: "I was raised upper middle class. I'm a professional. When my daughter told me she was a lesbian, I realized her whole life people would hate her blindly, without reason. First it made me frightened to death for her, and then it made me furious."<sup>253</sup> But not all parents direct their anger and disappointment at the homophobic society; instead, they turn to the child. Too often, then, the demise of a child's heterosexual identity means death as a son or daughter as well: "My parents couldn't deal with it. My mother said, 'You are dead to me. How can you be queer?'"<sup>254</sup> Another mother, Florence Rush, tells of nursing her son with AIDS along with his lover: "His own parents abandoned him. They said, 'You made your own bed; now go lie in it.'"<sup>255</sup>

Just as individual parents often feel that they are losing their children when they come out as gay kids, the heterosexual society at large similarly seems to assume that with each kid coming out it is losing one of "its" children. It is as if gays and lesbians were purloining a precious resource to which they have no entitlement. The dynamic is not unique, of course, but occurs whenever society is challenged to redistribute. Every time whites or men, for instance, are called to surrender some of the power they have held since time immemorial, Blacks and women are demanding "special rights." By a similar logic, with every coming out, gays and lesbians are getting "special children"

252. DEW, *supra* note 55, at 88. More than being afraid, Mary Griffith was initially ashamed of her gay son: "Once, he arrived instead of [his sister] Joy to pick her up from a pizza lunch with some women friends. Mary saw him entering and practically bolted with him to the door. She was terrified that Bobby's gayness would somehow telegraph itself." LEROY AARONS, PRAYERS FOR BOBBY: A MOTHER'S COMING TO TERMS WITH THE SUICIDE OF HER GAY SON 98 (1995). Aarons' account is a poignant indictment of the role of organized religion in the nurturance of suicidal self-loathing in gay and lesbian kids. At 16, Bobby wrote in his diary,

I can't ever let anyone find out that I'm not straight. It would be so humiliating. My friends would hate me. They might even want to beat me up. And my family? I've overheard them. They've said they hate gays, and even God hates gays. Gays are bad, and God sends bad people to hell. It really scares me when they talk that way because now they are talking about me.

*Id.* at 57. Yet the story of Mary Griffith's heartbreaking guilt over her own homophobia and that of her church is ultimately inspirational; after her son's death, Mary Griffith became an advocate for the cause of gay and lesbian youth.

253. Due, *supra* note 7, at 28 (quoting father of lesbian).

254. HERDT & BOXER, *supra* note 4, at 170 (quoting a 19-year-old gay youth). The mother of this Caucasian boy from the Chicago suburbs kicked him out of the house when he was 18. *Id.*

255. Georgia Dullea, *AIDS Mothers' Undying Hope*, N.Y. TIMES, Apr. 20, 1994, at C1, C6 (quoting Florence Rush). Consider also the background of the prosecution of 15-year-old Michael Gachot for the shootings of his mother and father. Michael's parents had been in the process of getting divorced at the time of the shootings, neither parent had wanted to have his custody but neither wanted the other parent to have it either, and, according to Michael's testimony, his father had accused him of being gay, called him "queer" and "faggot," had threatened to kill his mother in front of him and then kill him if he found out that Michael was in fact gay. *State of Louisiana v. Gachot*, 609 So. 2d 269, 271 (Ct. App. La. 1992).

and new recruits. If reallocation of rights is controversial, reallocation of children is sacrilegious. The notion that perhaps some of us never "belonged" to heterosexuals in the first place gives rise to savage indignation; society's original entitlement to each child as heterosexual is deemed irrefutable.<sup>256</sup>

Powerful as the fantasy that there are no gay youth may be, and despite the massive cultural machinery of heterosocialization and the omnipresent imperative to be straight, it is a fact—and a miracle—that there are youth who, against all odds, self-identify as gay. Whether we call them gay kids or confused children matters a great deal. In the first place, they are not confused about the gender of their object choice; the confusion and anxiety attending their sexual orientation grows out of the *social meaning* attaching to their sexual identities.<sup>257</sup> As Linda Heal wrote in her teenage journal: "I just have

256. The epistemological struggle over the right to define the meaning(s) of youth's sexual identity is so contested no doubt in part precisely because of the inherently unstable nature of heterosexuality as a category. Compare sexual identity with race: Black parents' having a Black child may change the overall Black-white ratio of the society, but it does not directly take a child away from white people. That is to say, we accept the fact that some children are born white and others Black, even though we might prefer white children to Black children. According to this racist logic, once Black children are born, the damage is done. However, since we do presume that *all* children are potentially heterosexual, the fight over sexual identity is not over until we die. As Iris Young has put it:

The construction of the idea of race, its connection with physical attributes and lineage, still makes it possible for a white person to know that she is not Black or Asian. But as homosexuality has become increasingly deobjectified, no specific characteristics, no physical, genetic, mental, or moral "character," marks off homosexuals from heterosexuals.

YOUNG, *supra* note 37, at 146. While Young's description of race corresponds to our common-sense understanding of the category, intermarriage complicates the dynamic; what race are the children of biracial couples? On the ambiguities of inhabiting the impossible conceptual location of "a white black woman"—much like that of "a gay kid" who is held, by definition, not to exist—see Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1990); see also Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

257. In Herdt and Boxer's study of gay adolescents in Chicago, "[m]ost of the youth said that they had always known that they were gay." HERDT & BOXER, *supra* note 4, at 118. Based on their analysis of sexual identity measurements, the authors concluded that the youth in the study were not confused about their sexual desires . . . Their desires are firm; the confusion they experience usually rests in how to express their desires in meaningful and valued ways in society. The experiences of the youth tell us that they have neither been seduced into same-sex relations by an adult, nor have these youth ventured into same-sex relations because of a lack of heterosexual opportunities.

*Id.* at 200 (citation omitted). Herdt and Boxer summarize their findings on the effect of previous heterosexual experiences:

A theme running through the accounts of youth describing their first heteroerotic experience was that it was "sex without feelings," which they "kept trying" but did not particularly find rewarding or fulfilling. Regardless of whether it was preceded by a homoerotic experience or not, a feeling of "unnaturalness" and a lack of affective intensity in their first heteroerotic sex was mentioned repeatedly. . . . [T]he effect [of the first homoerotic experience] seemed magnified if the experience had been preceded by a heteroerotic one with which to compare it.

*Id.* at 193. Herdt and Boxer note that, at the same time, many youth self-identify as gay or lesbian without any overt homoerotic experiences. *Id.* at 186. Eighteen percent of the self-identified gay men surveyed in a study by Gary McDonald similarly labelled themselves "homosexual" in the absence of any overt same-sex sexual experience. Gary J. McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, J. HOMOSEXUALITY, Fall 1982, at 47, 47.

Anecdotal evidence accords with the findings. When 17-year-old high school junior Travis Wise came out to his mother, his only contact with other gay youth had been through the local computer bulletin board services. The day following his coming out, he noted in his journal: "She wants to go to counseling with me. Not to get me to convert, she knows that's impossible, but just to make sure that 'it's really the way

what adults would call 'very confusing feelings.' Damn right they're confusing. I'm not attracted to boys at all."<sup>258</sup> To say that gay youth are "confused" when they fail to fit into the confused category "homosexual" is thus to pathologize the objects of bigotry instead of the category that fails to represent their experience. To name the homosexual as always adult and the family as always straight is to define the gay child as mad: "If a household is presumptively defined as 'heterosexual persons only,' eighteen-year-old Johnny says, then how can the youth who desires the same sex exist, unless he or she is 'crazy or weird?'"<sup>259</sup>

The act of renaming youth with same-sex erotic desires as gay or proto-gay kids has direct implications for what it means to protect them. In today's heterosexist soteriology, to protect the putatively confused heterosexual child from latent homosexual desires means to heterosocialize him or her so as to minimize the risk of his or her slipping into homosexuality. This means keeping the possibility of homosexuality as stigmatized and secret as possible. The method has been, in a word, the closet and the manifold social, cultural, and legal mechanisms that maintain it. However, to protect a gay or proto-gay child means to provide an environment that supports rather than stigmatizes his or her identity. It means breaking the mendacious silence of the closet and, in Sedgwick's phrase, ending children's "systematic sequestration from the truth about the lives, culture, and sustaining relations of adults they know who may be queer."<sup>260</sup> It means an end to the social, cultural, and legal bribes and sanctions that support the closet and thereby maintain the fantasy of a perfectly straight society with impossibly straight families. It means courts that do not deny gay and lesbian parents custody and adoption, and courts that do consider the needs of gay kids in their adoption and custody decisions. And it means courts that do not sanction the firing of gay and lesbian teachers, and courts that do recognize the interests of gay kids at school. It means recognizing that it is child abuse to make gay kids grow up in a culture where "they fear that they will never find someone to love them in a different course of life that will probably preclude heterosexual marriage and children, bring disappointment to their parents and families, and lead eventually to a fearful period of rejection and loneliness in old age."<sup>261</sup> Above all, it means recognizing that it is worse than child abuse to exercise social, cultural, and legal sanctions to make these fears come true.

The objection that naming gay kids as gay will create conflict and discord in families and society arrogantly assumes that there are no conflicts of interest

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you feel' . . . she just doesn't get it that for FIVE years its [sic] been the UNQUESTIONABLE way I feel." Travis Wise, *Coming Out to My Mom*, in *GROWING UP GAY/GROWING UP LESBIAN*, *supra* note 61, at 119, 120-21.

258. Heal, *supra* note 61, at 10.

259. HERDT & BOXER, *supra* note 4, at 103.

260. SEDGWICK, *Queer and Now*, *supra* note 2, at 2.

261. HERDT & BOXER, *supra* note 4, at 146.



in heterosexual families and heterosexual society. What appears as harmony may exist only because of the silence of those whose interests go unrecognized. Closets are invisible to those who do not inhabit them—or, in MacKinnon's pointed words, "if you *are* the tree in the epistemological forest, your demise doesn't make a sound if no one is listening."<sup>262</sup>

It is of course unlikely that, any time soon, either the United States Congress or the Supreme Court will celebrate the legislative and judicial inauguration of the authentically gay kid. Yet legislatures and judges are not the only source of legal meanings. As Robert Cover has argued, "No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."<sup>263</sup> Legal meanings, Cover suggests, are born out of a tension between reality and vision;<sup>264</sup> law functions as "a bridge linking a concept of reality to an imagined alternative."<sup>265</sup>

To change the meaning of the law, we must offer an alternative vision, imagine a different future. To be sure, our vision, too, is constrained by a reality—the closet and its sanctions. Those sanctions should not be underestimated: "the threshold to freedom is the most heavily guarded and perilous place to stand."<sup>266</sup> Yet, as heavily guarded as it is, even the closet cannot imprison imagination; even the caged bird can sing.<sup>267</sup> The reality may be even harsher and more restricting for young gays and lesbians, but when included in our adult vision, that vision can alter the legal regulation of gay kids' reality as well. To quote Cover again, "If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nevertheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust."<sup>268</sup> Visions matter, as they confront the law. Even if they cannot alter the legal text, they can transform the context that gives it meaning. "The community that writes law review articles has created a law—a law under which officialdom may maintain its interpretation merely by suffering the protest of the articles."<sup>269</sup>

Indeed, where the law is as indeterminate as "the best interests of the child," the only thing we need to change is our vision of the child and her good.<sup>270</sup> We must be more visible as gay and lesbian adults and never cease

262. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 14 (1985).

263. ROBERT COVER, *Nomos and Narrative*, in NARRATIVE, VIOLENCE, AND THE LAW, *supra* note 69, at 95-96 [hereinafter COVER, *Nomos and Narrative*].

264. *See id.* at 101 ("A *nomos* is a present world constituted by a system of tension between reality and vision."); *id.* at 135 ("But reality is only one ground for norms. Vision is the other.").

265. *Id.* at 101.

266. BENKOV, *supra* note 33, at 29.

267. I owe the image to the poet Maya Angelou. MAYA ANGELOU, *I KNOW WHY THE CAGED BIRD SINGS* (1969).

268. COVER, *Nomos and Narrative*, *supra* note 263, at 99 (citation omitted).

269. *Id.* at 148.

270. While many, if not most, heterosexual parents may think that it is in potentially gay children's best interests to be "straightened out," the meaning of "best interests" remains nevertheless contested and

to remind the world of its neglect of gay and lesbian children. Visions worthy of the name are born out of inspiration, but turning them into reality is work. By default, the protection of gay children is the work of gay adults. No one else is going to do it, for no one ever has. The goal, then, must be to "save *our* children," to quote Anita Bryant with a twist. Or, as Leonard Matlovich urges gays and lesbians: "Everyone [sic] of you, you are a parent. And who are your children? Your children are tomorrow's lesbians and gays coming along. And being caring, loving parents—we are going to leave a history today."<sup>271</sup>

Change in the law is often painfully slow. Although most courts interpreting custody and adoption law are nowhere near the possibility of conceptualizing gay kids, there are opinions that give one hope.<sup>272</sup> When New York Surrogate's Court approved second-parent adoption for a lesbian couple, it refused to surrender to the hysteria of "protecting" children from gay adults: "Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed."<sup>273</sup> A New Jersey judge who gave child custody to a lesbian mother noted that "there is little to gain by creating an artificial world where the children may dream that life is different than it is."<sup>274</sup> The judge also rejected children's possible stigmatization as a basis for denying custody:

[The community's intolerance] does not necessarily portend that [the children's] moral welfare or safety will be jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able

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open to revision. "[T]here is no societal consensus about what is 'best' or even 'good' for all children." JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 133 (1979).

271. HERDT & BOXER, *supra* note 4, at 68 (quoting Leonard Matlovich speaking at dedication of Harvey Milk's grave in Congressional Cemetery in 1987).

272. A recent Supreme Court decision inspires hope outside the contexts of family and school as well. *See Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding that Colorado's adoption of a constitutional amendment precluding all legislative, executive and judicial action at any level of state or local government designed to protect the rights of gays and lesbians infringed the fundamental right of gays and lesbians to participate in the political process and thereby violated the Equal Protection Clause).

273. *In re Evan*, 583 N.Y.S.2d 997, 1000 (N.Y. Sur. Ct. 1992). The opinion continues:

Here this Court finds a child who has all of the above benefits and two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic, or social philosophy to obstruct such a favorable situation.

*Id.*

274. *M.P. v. S.P.*, 404 A.2d 1256, 1262 (N.J. Super. Ct. App. Div. 1979). *Cf. Blew v. Verta*, 617 A.2d 31, 35, 36 (Pa. Super. Ct. 1992) (observing that "[o]f primary importance to the child's well-being is the child's full and realistic knowledge of his parents" and that, in the absence of evidence that a father's homosexuality in some way harms his son, limiting the son's relationship with his father "fails to permit him to confront his life situation").

to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.<sup>275</sup>

As far as gay and lesbian kids' future at schools is concerned, one hopes that a recent federal trial in Wisconsin will become a landmark. When Jamie Nabozny first filed suit against the Ashland Public School District in U.S. District Court, the case was dismissed for failure to allege sufficient facts.<sup>276</sup> Jamie had offered evidence that, despite the school's policy of investigating and punishing student-on-student battery and sexual harassment, school administrators ignored his harassment and physical abuse from 1988 through 1993 when, after two suicide attempts, he finally dropped out at seventeen and moved to Minneapolis on his own.<sup>277</sup> The Seventh Circuit, however, restored Jamie's equal protection claim for discrimination based on sexual orientation and gender.<sup>278</sup> At the ensuing trial—the first federal trial of a school district and administrators for failure to protect a gay student—the jury found liable three administrators who agreed quickly to settle for \$900,000.<sup>279</sup> As one of Jamie's lawyers put it, "After some point, [the school district was] sending a strong message that it was O.K. to beat up a gay student."<sup>280</sup> But, fortunately, after some point the Seventh Circuit felt compelled to recognize the young gay plaintiff and his claims.

The most visible sign of progress in the legislative arena has taken place in Massachusetts: It has become the first, and only, state to outlaw discrimination against gay and lesbian students in public schools.<sup>281</sup> Under

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275. *M.P.*, 404 A.2d at 1263.

276. Don Terry, *Suit Says Schools Failed to Protect a Gay Student*, N.Y. TIMES, Mar. 29, 1996, at A14. The "insufficient" facts included ceaseless name calling, the performance of a mock rape of Jamie in class by two boys, an incident in which Jamie was urinated upon, and a beating by a group of boys who kicked him in the stomach for five to ten minutes—while others were cheering—so hard that the internal bleeding eventually required surgery. Jamie presented evidence that the principal had responded to the mock rape by saying that "boys will be boys" and that Jamie should "expect" such behavior if he was "going to be so openly gay," while an assistant principal had laughed at the kicking episode and told Jamie that he deserved such treatment because he was gay. *Nabozny v. Podlesny*, 92 F.3d 446, 451-52 (7th Cir. 1996).

277. Jamie's mother explains, "Letting him go was the hardest thing I've ever had to do as a parent. But we had to do something because we knew we were going to lose this kid, either by him running away or by suicide." Terry, *supra* note 276, at A14. In Minneapolis, Jamie was diagnosed with Post Traumatic Stress Disorder. *Nabozny*, 92 F.3d at 452.

278. The court agreed with the trial court that Jamie had failed to establish a violation of his right to due process under the Fourteenth Amendment. *Nabozny*, 92 F.3d at 454. Less than a year earlier, the U.S. District Court for the Northern District of Illinois had considered a similar scenario at Riverside-Brookfield Township High School in Illinois, but that court steadfastly rejected both the equal protection and due process claims. *Doe v. Riverside-Brookfield Township Sch. Dist.*, 1995 U.S. Dist. LEXIS 17028 (N.D. Ill. Nov. 14, 1995).

279. *Gay Man Abused as a Student Wins \$900,000*, N.Y. TIMES, Nov. 21, 1996, at A12.

280. Terry, *supra* note 276, at A14. Jamie was represented by the Lambda Legal Defense and Education Fund.

281. Sara Rimer, *Gay Rights Law for Schools Advances in Massachusetts*, N.Y. TIMES, Dec. 8, 1993, at A18. William Weld, Governor of Massachusetts, also created the first commission on gay and lesbian youth. Toni Locy, *Weld Creates Panel on Gay Youth Issues*, BOSTON GLOBE, Feb. 11, 1992, at 18. The commission makes non-binding recommendations to schools. While it has recommended policies to increase

the new law, gay youth can sue the school district when they suffer harassment and violence, and schools are required "to allow same-sex couples to attend high school proms, to back students who wish to form gay support groups, and to include discussion of gay issues in health curricula in sex education classes"<sup>282</sup>—small things, perhaps, yet extraordinary changes, should the law redeem its promise. That the law, which had been buried in committee for two years, actually passed was due to the lobbying efforts of gay and lesbian youth themselves. By showing up in legislators' offices, the kids were finally able to convince the lawmakers that they exist—and that their existence is threatened. According to the chief secretary to the Governor, "There were 1,000 young people up here endlessly. . . . And I think they were able to persuade members of the Legislature that the problem was real and that the solution was reasonable. Their stories about their own difficulties were very compelling, very persuasive."<sup>283</sup>

However, Massachusetts stands alone among all the states in attempting to offer legislative protection and dignity to queer kids.<sup>284</sup> Legislatures in other states have shown undisguised hostility even to allowing students to come in contact with gay teachers. Oklahoma, for instance, has banned homosexuals from teaching in public schools.<sup>285</sup> Measure 13 in Oregon, which ultimately failed, sought to forbid presenting in public schools the idea that homosexuals are the "legal or social equivalent" of other population groups, and to require public libraries to deny minors access to "books and materials which address homosexuality."<sup>286</sup> In 1992, Alabama passed a law prohibiting colleges and universities from providing gay and lesbian student groups with public funding or facilities.<sup>287</sup> Most recently, the Salt Lake City school board decided to ban all extracurricular student clubs in order to oust a Gay/Straight Alliance in a

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sensitivity to gay and lesbian students, it has shied away from suggesting any curricular changes. Armstrong, *supra* note 4, at 79.

282. Don Aucoin, *Weld Signs Gay Student Rights Law*, BOSTON GLOBE, Dec. 11, 1993, at 17.

283. Rimer, *supra* note 281, at A18.

284. Despite often vociferous opposition, there are, nevertheless, local projects underway in many of the nation's largest cities, such as Gay and Lesbian Adolescent Social Services and Project 10 in Los Angeles, the pioneering Hetrick-Martin Institute in New York City, and the Sexual Minority Youth Assistance League in Washington, D.C. See Armstrong, *supra* note 4, at 84-93 (review of programs for gay youth); Warren J. Blumenfeld, "Gay/Straight" Alliances: Transforming Pain to Pride, in THE GAY TEEN, *supra* note 4, at 211; Greg Greeley, *Service Organizations for Gay and Lesbian Youth*, in HELPING GAY AND LESBIAN YOUTH, *supra* note 4, at 111; Hugh Singerline, *OutRight! Reflections on an Out-Of-School Gay Youth Group*, in THE GAY TEEN, *supra* note 4, at 225; Virginia Uribe, *Project 10: A School-Based Outreach to Gay and Lesbian Youth*, in THE GAY TEEN, *supra* note 4, at 203.

285. The act was upheld as constitutional in *National Gay Task Force v. Board of Education*, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

286. David W. Dunlap, *Struggle Over Gay Rights Moves to Statewide Level*, N.Y. TIMES, Nov. 6, 1994, at A30. A similar referendum, Proposition 1 in Idaho, sought to prohibit public elementary and secondary schools from presenting homosexuality as "a healthy, approved or acceptable behavior." *Id.*

287. The law prohibited the use of public funds or facilities "to, directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws [of the Code of Alabama]." ALA. CODE § 16-1-28 (Michie Supp. 1994). The statute was held unconstitutional in *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548 (M.D. Ala. 1996) (appeal pending).

city high school,<sup>288</sup> and the Utah legislature affirmed the act by voting to permit the banning of student clubs that “involve human sexuality.”<sup>289</sup> Despite what appears to be an aberration in Massachusetts, the reigning political imperative is to keep children straight—and to imagine that all children *are* straight, at least until “tampered” with.

#### V. CONCLUSION

*I've heard of many people who claim they'd as soon their children were dead as gay. What it took me a long time to believe is that these people are saying no more than the truth. They even speak for those too delicate to use the cruel words.*

Eve Kosofsky Sedgwick<sup>290</sup>

*What are the words you do not yet have? What do you need to say? What are the tyrannies you swallow day by day and attempt to make your own, until you will sicken and die of them, still in silence?*

Audre Lorde<sup>291</sup>

A vision is an epistemology, a different perspective on the world. New visions kindle fear, for they imply new worlds. As Toni Morrison has put it, “The definers want the power to name. And the defined are now taking that power away from them.”<sup>292</sup> Child abuse and sexual harassment were once unnameable, invisible to inhabitants of visions with no conceptual space for them. That we fail to see the injustice of the familial, pedagogical, and legal heterosocialization of gay youth is because these processes are invisible to us—and yet they are invisible to us only because we refuse to exercise our moral imagination.

Having a name and a place in a vision are necessary conditions for an existence worth living, or even an existence that can be endured. Naming gay kids as gay kids will help them in their self-acceptance, and it will relieve parents of the guilt they feel as involuntary actors in a cruel psychoanalytical myth of absent fathers and dominant mothers.<sup>293</sup> It will expose the lie that

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288. James Brooke, *To Be Young, Gay and Going to High School in Utah*, N.Y. TIMES, Feb. 28, 1996, at B8. With woeful predictability, a state senator asserted, “Young people reach their teenage years, and their sexuality starts developing. . . . And I believe that they can be led down that road to homosexuality.” *Id.*

289. *MoJo's August Hellraiser!*, MOTHER JONES, July/Aug. 1996, at 18.

290. SEDGWICK, *Queer and Now*, *supra* note 2, at 2.

291. AUDRE LORDE, *The Transformation of Silence into Language and Action*, in *SISTER OUTSIDER* 40, 43 (1984).

292. Claudia Dreifus, *Chloe Wofford Talks About Toni Morrison*, N.Y. TIMES, Sept. 11, 1994, § 6 (Magazine), at 73, 74 (quoting Toni Morrison).

293. A Yale undergraduate told me, anonymously, that when he came out to his mother, her immediate reaction was, “Don't tell your father! He'll say it's my fault.” Robb Dew also initially worried about her and her husband's role in their son's homosexuality, but now concludes, “surely it was more than strange that neither of us was struck by the astounding solipsism, even the arrogance, of the idea that Stephen's

there are no other gay kids—that you are the only gay kid in your school, city, country, or the world. It will give gay kids space to construct their lives, the ability to write their own biographies—unlike the young Paul Monette:

Everybody else had a childhood, for one thing—where they were coaxed and coached and taught all the shorthand. Or that's how it always seemed to me, eavesdropping my way through twenty-five years, filling in the stories of straight men's lives. . . .

And every year [the straight boys] leaped further ahead, leaving me in the dust with all my doors closed, and each with a new and better deadbolt. Until I was twenty-five, I was the only man I knew who had no story at all.<sup>294</sup>

To make the world safe for gay kids to come out as gay kids is a revolutionary vision in a society where the closet has been the burial ground of homosexuality. A hopeful Tony Kushner ends his play *Angels in America* with the proclamation,

This disease will be the end of many of us, but not nearly all, and the dead will be commemorated and will struggle on with the living, and we are not going to go away. We won't die secret deaths anymore. The world only spins forward. We will be citizens. The time has come.<sup>295</sup>

The immediate referent for the "disease" in the play is AIDS, but the ultimate disease that daily ravages gay kids is homophobia. Few items rank below the protection of gay and lesbian children on anyone's agenda for justice and social reform; in Derek Jarman's words, many adults "will sooner see them die than be happy."<sup>296</sup>

To remake the world, queer youth must no longer die secret deaths—whether of AIDS or hopelessness in a world that manifestly does not want them to exist. As long as gay kids remain nameless and invisible, it is too easy to deny that our relentless inculcation of normative heterosexuality mutilates children, even in the name of law, familial love and public education—and those children include *your* children, as there is no "you" and

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sexuality—whatever it might be—revolved around us." DEW, *supra* note 55, at 32. On the several—often contradictory—ways in which the medical establishment has blamed the parents, see generally BURKE, *supra* note 74, at 50-60. As Burke summarizes, "The parents were accused of being lenient, phallic, distant; too masculine, too feminine; negligent, competitive, empty. They were portrayed as suffering from bad marriages, penis envy, rage, jealousy and impotence." *Id.* at 59-60.

294. PAUL MONETTE, *BECOMING A MAN: HALF A LIFE STORY 1* (1992). Cf. ANDREW HOLLERAN, *DANCER FROM THE DANCE 68* (1978) ("He felt as if he were a character in Henry James; he began to suspect he was to be that man to whom nothing whatsoever was to happen.").

295. TONY KUSHNER, *ANGELS IN AMERICA: A GAY FANTASIA ON NATIONAL THEMES 298* (1995).

296. DEREK JARMAN, *AT YOUR OWN RISK: A SAINT'S TESTAMENT 5* (1993).

“us.” For there is but one homophobic world that we all create and recreate day after day.

In the end, we will never know how many lives and loves that could have been were not. Nothing we do now will revive the broken spirits of the queer kids who lost their battles against bigotry and self-loathing. We can only remember them and learn from their stories; the dead will be commemorated and will struggle on with the living. Yet for the queer kids who are still here—and they *are* here—it is not too late to get to see a better world.

The world will start spinning forward, because it *must*. Gay kids will be citizens. The time has come.

