

# ARTICLE: TRADITIONAL ADVOCACY FOR NONTRADITIONAL YOUTH: RETHINKING BEST INTEREST FOR THE QUEER CHILD

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## Highlight

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### ABSTRACT

This Article argues that attorneys representing queer children--those children who either self identify or are perceived by others as being a sexual minority or who do not conform to normative gender roles--must provide traditional zealous advocacy to their queer child clients. The heterosexism that pervades our culture infects our families, schools, courts, and child welfare systems, often with disastrous results for queer kids. Unfortunately, these biases also afflict attorneys who represent this population, tainting their ability to represent their clients in a conscientious, ethical, and effective manner. Given the extreme danger queer children face when they are entangled in the legal system, it is important to ensure that the attorneys representing them do not exacerbate the risks they face. The necessity for traditional advocacy is not dependent on the age of the child, the type of proceeding, or the sensibilities of the individual lawyer. Any advocacy model allowing an attorney to substitute his or her own judgment as to what is in a queer child's best interest is potentially devastating for queer child clients and must not continue. This Article concludes with a model rule, which would prohibit all but traditional representation for queer children.

## Text

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### [\*1054] INTRODUCTION

Queer youth <sup>1</sup> and the attorneys who represent them face unique and daunting challenges when attempting to safely navigate the legal and child welfare systems. The heteronormativity <sup>2</sup> and homophobia <sup>3</sup> that pervade our

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<sup>1</sup> I have previously defined "queer kids" as children "who are, who may be, who are questioning whether or not they are, who may be seen as being, or who are targeted for being lesbian, gay, bisexual, transgender, or gender nonconforming." Sarah E. Valentine, *Queer Kids: A Comprehensive Annotated Legal Bibliography on Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, [19 YALE J.L. & FEMINISM 449, 453 \(2008\)](#).

<sup>2</sup> See Michael Warner, *Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* xxi (Michael Warner ed. 1993) (heterosexual culture has the exclusive ability to interpret itself as society, as the elemental form of human association, and indivisible basis of community); see also Julie Novkov, *The Miscegenation/Same-Sex Marriage Analogy: What Can We Learn from Legal History?*, [33 LAW & SOC. INQUIRY 345, 360 \(2008\)](#) (defining heteronormativity as "those localized practices and centralized institutions that legitimize and privilege heterosexuality and heterosexual relationships as fundamental

[\*1055] culture also infect our families, schools, courts, and child welfare organizations. These biases are at the root of much of the harm suffered by queer children. Unfortunately, heterosexist and homophobic biases also afflict attorneys who are appointed to represent queer children, tainting their ability to represent their clients in a conscientious, ethical, and effective manner. Given the extreme danger queer children face when they are entangled in the legal system, it is important to ensure the attorneys representing them do not exacerbate the risks these children confront.

Most states can exert jurisdiction over children *qua* children until the age of majority and in some instances, much later.<sup>4</sup> During the past sixty years, most children facing the punitive powers of the state received the right to be represented by counsel.<sup>5</sup> However, the contours of that representation vary widely depending on the state, the proceeding, the attorney, and the court.<sup>6</sup> The education, expertise, and commitment attorneys bring to the representation of children are also highly variable. Attorneys assigned to represent children may be solo practitioners accepting the occasional appointment or may work in a state supported office specializing in the representation of children. The level of state support and attorney expertise certainly makes a difference in the adequacy of representation each child receives.<sup>7</sup> However, for many children (even those in delinquency proceedings) the representation is cursory at best, with the most well-meaning attorneys viewing themselves as inconsequential.<sup>8</sup> This less than robust legal [\*1056] representation may be based on overwhelming caseloads,

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and "natural" within a society.") (citation omitted).

<sup>3</sup> Homophobia is commonly used to express the full range of anti-LGBT thought and behavior. Scott Hirschfeld, *Moving Beyond the Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, [29 FORDHAM URB. L.J. 611, 617-18 \(2001\)](#) ("[W]hen discussing the belief . . . that [same-sex attraction] is 'wrong' or 'less than,' it may be more accurate to use the term 'heterosexism,' which can be understood as an overt or tacit bias against non-heterosexuals based on a belief in the superiority or, sometimes, the omnipresence of heterosexuality. Heterosexism is a broader term than homophobia in that it need not imply the fear and loathing the latter term suggests. Heterosexism can describe seemingly benign [but harmful] behavior based on the assumption that heterosexuality is the norm.").

<sup>4</sup> . [CAL.WELF. & INST. CODE § 607](#) (West **2008**).

(a) The court may retain jurisdiction over any person who is found to be a ward or dependent child of the juvenile court until the ward or dependent child attains the age of 21 years, except as provided in subdivisions (b), (c), and (d). (b) The court may retain jurisdiction over any person who is found to be a person described in Section 602 by reason of the commission of any of the offenses listed in subdivision (b), graph (2) of subdivision (d), or subdivision (e) of Section 707 until that person attains the age of 25 years if the person was committed to the Department of the Youth Authority.

*Id.*

<sup>5</sup> See discussion *infra* Section I.B.

<sup>6</sup> In this Article the terms "family court" or "court" denote any proceeding that may affect in whose custody a queer child may be placed (i.e., custody, abuse and neglect, foster care extensions, adoptions, juvenile delinquency proceedings, and PINS or CHINS proceedings in which the child is alleged to be out of control or "in need of supervision"). The phrases "juvenile justice system" or "juvenile proceeding" are used specifically for those proceedings in which the state is asserting control over the juvenile based on the juvenile's own behavior such as a delinquency or PINS proceeding.

<sup>7</sup> See Susanne M. Bookser, *Making Gault Meaningful: Access to Counsel and Quality of Representation in Delinquency Proceedings for Indigent Youth*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 297, 305-06 (2004).

<sup>8</sup> As a juvenile defense counsel in Texas describes it, "[i]n most of the cases, probation tells you what the kid is going to plead to--they have already made the deal with the state, they've already talked to the defendant. Probation does all the work. We just advise and consent." TEXAS APPLESEED FAIR DEFENSE PROJECT ON INDIGENT DEFENSE PRACTICES IN TEXAS--JUVENILE CHAPTER, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 24 (2000), available at [www.njdc.info/pdf/TexasAssess.pdf](http://www.njdc.info/pdf/TexasAssess.pdf).

<sup>9</sup> a mistaken understanding of the attorney role, <sup>10</sup> or a fear that traditional advocacy will cost the attorney future appointments. <sup>11</sup>

Whatever the reason, the legal representation of children is severely deficient nationwide. Worsening this problem is the concept of "best interest" lawyering, in which attorneys appointed for children are given broad leeway to represent not their child clients, but their own beliefs as to what is in the best interest of those children. These notions <sup>12</sup> as to what might be in [\*1057] a particular child's "best interest" are shaped by an attorney's own biases and belief systems. While some have argued that best interest lawyering for children can be paternalistic, <sup>13</sup> ethically problematic, <sup>14</sup> and potentially harmful, <sup>15</sup> best interest lawyering for queer children is not only paternalistic and ethically problematic, but it is also almost always harmful and in many circumstances disastrous.

Queer children are outsiders and outcasts in a heterosexual society less than favorably inclined toward those who deviate from sexual and gender norms. Moreover, a queer child who is a member of a religious or ethnic minority

<sup>9</sup> "Mary Hermann, a Fulton County child advocate attorney, testified that the only thing she does in every case is read the initial deprivation petition, that she does not meet with all of her clients, that meeting with a child client is purely 'aspirational,' and that she does not know how many children she currently represents or how many children her office currently represents." Kenny A. *ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353, 1363 (N.D. Ga. 2005) (holding that caseloads of two-hundred and four-hundred children per attorney may be indicative of ineffective assistance of counsel).

<sup>10</sup> Voicing this confusion, "one juvenile defender [stated] '[s]ometimes we sell 'em down the river. I get confused as to whether to be an advocate or act in the best interest of the child.'" ABA JUVENILE JUSTICE CENTER&NEW ENGLAND JUVENILE DEFENDER CENTER, MAINE: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY REPRESENTATION IN DELINQUENCY PROCEEDINGS, 28 (2003), available at [www.njdc.info/pdf/mereport.pdf](http://www.njdc.info/pdf/mereport.pdf). Another juvenile defender seemed to brag about his or her ability to circumvent the child client's right to a fair trial by admitting "[t]he first thing that I ask is 'did you do it'? . . . Most kids admit to what they have done. It's just the kids trying to beat the system, trying to drag it out--you know that they are lying . . . [sic] If I feel that a client is innocent, I will take a jury. If I feel like he is just trying to prolong things, make it difficult for the court, I'll take a judge." Statement by an "[a]ppointment attorney who reported that 97% of his cases plead on the first court date." TEXAS APPLESEED FAIR DEFENSE PROJECT, *supra* note 8, at 21.

<sup>11</sup> "There is tremendous pressure to plead the case out; you want to keep getting appointments, you bow to that pressure. Most of the time I am explaining the deal to the kid in court, after meeting him for the first time and talking with him for a few minutes, tops." TEXAS APPLESEED FAIR DEFENSE PROJECT, *supra* note 8, at 22; accord Merrill Sobie, *A Law Guardian by the Same Name: A Response to Professor Guggenheim's Matrimonial Commission Critique*, 27 PACE L. REV. 831, 861 (2007) (arguing that when counsel for children are dependent on judges for future appointments, it undermines their independence and ability to represent their clients).

<sup>12</sup> I intentionally use the term "notions" with its implication of something insubstantial. Even with the specialized training deemed necessary (but rarely obtained), attorneys representing children do not have the expertise to determine what is in the best interest for any individual child. See Ann M. Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children*, 28 HAMLIN J. PUB. L. & POL'Y 177, 195-96 (2006) (noting that even with training, attorneys cannot discern what is best for a given child, because they lack the time to completely understand all psycho-social factors affecting such a decision); see also Martin Guggenheim, *Reconsidering the Need for Counsel for Children in Custody, Visitation and Child Protection Proceedings*, 29 LOY. U. CHI. L.J. 299, 318-19 n.79 (1998) (discussing the randomness injected into court proceedings when lawyers representing children are allowed to inject their own personal notions of right and wrong).

<sup>13</sup> See, e.g., Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005).

<sup>14</sup> See, e.g., Emily Buss, "You're My What?" *The Problem of Children's Misperception of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699, 1712 (1996) (arguing that the "ability to identify and advocate a [child] client's best interests may be enhanced by cultivating child's misperception" of what the guardian ad litem role entails).

<sup>15</sup> See, e.g., Haralambie, *supra* note 12, at 196 (arguing that attorneys for children should "first do no harm" by providing client-directed child representation).

group may confront additional cultural or religious stigmatization, often with severe consequences.<sup>16</sup> While there is a slowly growing tolerance for queerness in adults, it has not yet permeated into societal attitudes about children.<sup>17</sup> Parental and peer reaction to a child's queerness can be the catalyst for ostracism,<sup>18</sup> bullying,<sup>19</sup> violent assaults,<sup>20</sup> dangerous ["1058] "cures,"<sup>21</sup> and even murder.<sup>22</sup> While not all queer children become victims, by their very nature the legal and child welfare systems are populated by overwhelmed, stressed, angry, and often dangerous children and adults. Studies show that a queer child finding herself in the legal or child welfare system is very likely to become a target or scapegoat.<sup>23</sup> The harm to queer youth goes far beyond the mental or physical

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<sup>16</sup> See RANDI FEINSTIEN ET AL., JUSTICE FOR ALL? A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 13-14 (2001), available at [www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf](http://www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf) (noting cultural and religious environments that heighten family rejection of queer youth) [hereinafter JUSTICE FOR ALL?]; Susan Hazeldean & Pradeep Singla, *Out in the Cold: The Challenges of Representing Immigrant Lesbian, Gay, Bisexual, and Transgender Youth* (2002), available at <http://www.urbanjustice.org/pdf/publications/lesbianandgay/OutintheCold.pdf> (claiming that it is not unusual for families who are in the process of immigrating to disown and refuse to assist a child who has announced a minority sexual orientation or has suddenly been perceived to be queer, effectively ending that child's chance of immigrating lawfully); Risha K. Foulkes, *Abstinence-Only Education and Minority Teenagers: The Importance of Race in a Question of Constitutionality*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 3, 38 (2008) (noting that queer students of color are more likely to experience lower self esteem and more stigma within their families and communities than queer white students).

<sup>17</sup> See Jose Gabilondo, *Irrational Exuberance About Babies: The Taste for Heterosexuality and its Conspicuous Reproduction*, 28 B.C. THIRD WORLD L.J. 1, 11-16 (2008) (describing both pre- and post-natal preferencing for heterosexuality of children).

<sup>18</sup> NICHOLAS RAY, NAT'L GAY & LESBIAN TASK FORCE POLICY INST. & NAT'L COALITION FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 12 (2006) [hereinafter AN EPIDEMIC OF HOMELESSNESS], available at [http://www.thetaskforce.org/reports\\_and\\_research/Homeless\\_Youth](http://www.thetaskforce.org/reports_and_research/Homeless_Youth) (quoting a mother who threatened her queer son, "[y]ou're going to be straight or you're not going to live here anymore.").

<sup>19</sup> See HUMAN RIGHTSWATCH, HATRED IN THE HALLWAYS 4-5 (2001), available at <http://www.hrw.org/reports/2001/uslgbt/toc.htm>.

<sup>20</sup> For example, Joel A., the lead plaintiff in a class action suit brought on behalf of queer youth in New York City foster care, was a thirteen-year-old boy who entered the foster care system at age nine, when he already self-identified as gay. Nina Bernstein, *Suit Alleges Frequent Abuse of Gay Children in Foster Care*, N.Y. TIMES, Jan. 16, 1999 (describing complaint in *Joel A. v. Giuliani*, filed by the Urban Justice Center, available at [http://www.urbanjustice.org/pdf/press/nytimes\\_16jan99.pdf](http://www.urbanjustice.org/pdf/press/nytimes_16jan99.pdf) (last visited Mar. 3, 2009)) ("The lawsuit charges that staff members at a series of group homes and a large residential treatment center rarely intervened when other children made Joel a target of abuse because he was effeminate. Among other incidents, he was thrown down a flight of stairs, had his nose broken twice, was hit in the face with a broom and had his shoulder blade broken.").

<sup>21</sup> See JASON CIANCOTTO & SEAN CAHILL, NAT'L GAY AND LESBIAN TASK FORCE, YOUTH IN THE CROSSHAIRS: THE THIRD WAVE OF EX-GAY ACTIVISM 64-66 (2006), available at <http://thetaskforce.org/downloads/reports/reports/YouthInTheCrosshairs.pdf> [hereinafter YOUTH IN THE CROSSHAIRS]; see also Thomas Mournian, *Hiding Out*, S.F. BAY GUARDIAN, Apr. 8, 1998, at 23; Lyn Duff, *I Was a Teenage Test Case*, 16 CAL. LAW. 47, 47-48 (1996). These articles describe locked facilities where retive or conversion therapy includes unrelenting counseling that homosexuality is abnormal, immoral, or unhealthy and often includes hypnosis, aggressive prescription of psychotropic medications, strip-searching, the use of isolation cells, and other behavior modification techniques. Mournian's article describes the use of penile plethymographs (application of electrodes to genitals with shocks being applied if a boy becomes aroused by gay sexual images). Mournian, *supra*, at 25.

<sup>22</sup> Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK, July 28, 2008, at 41.

<sup>23</sup> See, e.g., ROB WORNOFF ET AL., WELFARE LEAGUE OF AM. AND LAMBDA LEGAL DEFENSE & EDUC. FUND, OUT OF THE MARGINS: A REPORT ON THE REGIONAL LISTENING FORUMS HIGHLIGHTING THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH IN CARE (2006), available at

impact of slur or fist, though these are horrible enough. The greater harm to queer youth from homophobic and heterosexist bias is degradation of their ability to envision a healthy, meaningful future. Queer youth are denied the "right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."<sup>24</sup> Beyond the harms done to an individual child, society as a whole is damaged when a segment of its children are denied the ability to envision a safe, stable, and productive future.

The risks queer children face from the legal system are not dependent on the type of court proceeding in which they may find themselves. Queer [\*1059] children who are placed in the custody of non-supportive parents may find themselves confronting parental fear and anger.<sup>25</sup> Queer kids removed from abusive or neglectful parents and placed with unsupportive foster parents face hostility and rejection, compounding their plight.<sup>26</sup> Queer youth who end up in group homes or state detention facilities encounter violence from both their peers and staff.<sup>27</sup> Regardless of where queer children are placed or the type of proceeding in which they find themselves, they face a myriad of dangers. Queer children need and deserve attorneys who steadfastly represent the child's interests instead of attorneys who may manifest heterosexist assumptions about what is in their client's "best interest."

This Article argues that the risks to queer children from the legal and child welfare systems are far too high to allow attorneys to provide queer children with anything other than traditional client directed advocacy. Best interest lawyering for queer children only ensures that society's heterosexist erasure and punishment of sexual difference will be inflicted on these child clients. Part I presents an overview of the conflicting roles and digms present in the representation of children in the juvenile justice and child welfare courts in the United States. This section also discusses the impact case law, statutes, and ethical rules have on the representation of minors. Part II introduces queer youth and explores the discrimination they face in family settings and in society at large, which leads them to become over represented in the court and child welfare systems. While state custody can be potentially harmful for many children, this section details the additional danger queer kids face because of their perceived sexuality or gender nonconformity once in the child welfare system. Part III contrasts the harm resulting from best interest representation of queer youth with the positive [\*1060] effects of traditional advocacy. Part IV of this Article discusses several possible mechanisms to ensure queer youth receive the zealous representation they deserve. Finally, this Article provides a model rule or statute that could be adopted to achieve this goal.

## I. ROLE OF THE ATTORNEY REPRESENTING CHILDREN

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[www.ct.gov/dcf/lib/dcf/safe\\_harbor/pdf/out\\_of\\_the\\_margins.pdf](http://www.ct.gov/dcf/lib/dcf/safe_harbor/pdf/out_of_the_margins.pdf) [hereinafter OUT OF THE MARGINS]; COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEFENSE & EDUC. FUND, YOUTH IN THEMARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER ADOLESCENTS IN FOSTER CARE (reprinted 2005), available at [http://www.jimcaseyyouth.org/docs/youthinthemargins\\_2001.pdf](http://www.jimcaseyyouth.org/docs/youthinthemargins_2001.pdf) [hereinafter YOUTH IN THE MARGINS]; JUSTICE FOR ALL?, *supra* note 16, at 12.

<sup>24</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 851 (1992)).

<sup>25</sup> One teen recalled his father's anger at learning his homosexuality, "[y]ou fucking queer, you goddamn faggot . . . Sissy . . . Do you actually have sex with your lover??" 'I don't think it's any of your business.' Grabbing my throat, Dad shouted, 'It is my fucking business.'" Sonia Renee Martin, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 *HASTINGS L.J.* 167, 167 (1996) (citing ONE TEENAGER IN TEN, 43 (A. Heron ed., 1983)). Another queer teenager recounts being taken in handcuffs, by his parents, to a religious program designed to "cure" homosexuality and being told that if he left he would be arrested. YOUTH IN THE CROSSHAIRS, *supra* note 21, at 13.

<sup>26</sup> See OUT OF THE MARGINS, *supra* note 23, at 19-22 (describing the need for safe and affirming foster families for LGBT youth) One youth in foster care said "[a]fter coming out to one of my foster families, I was told I was going to hell and forced to go to church with them. *Id.* at 114. Another said, "[m]y foster family took away my clothes, called me a 'dyke,' and tried to remake me." *Id.* at 19.

<sup>27</sup> *Id.* at xi ("I got jumped by a bunch of guys in my group home, and when I told the Director he said, 'Well, if you weren't a faggot, they wouldn't beat you up.'"); JUSTICE FOR ALL?, *supra* note 16, at 34 ("One attorney discussed a case where a gay client was hit and spat on by a staff member at a limited-secure [Office of Children and Family Services] facility . . . The youth 'couldn't do anything about [the harassment] because they were staff.'") (second alteration in original).

*A judge said Thursday that two boys placed in a foster home shared by two women who are believed to be lesbians are well taken care of and should not be removed from the home. . . . The children's court-appointed guardian, Wayne Graham, had challenged the placement. He said his religious beliefs are that homosexuality is immoral and that the children should not be subjected to an immoral lifestyle.* <sup>28</sup>

Since the mid 1950s, children have slowly been granted the right to counsel in family court and juvenile proceedings. This right has been granted by statute or court rules in some states. <sup>29</sup> More importantly, court decisions have held children have a fundamental liberty interest under the Due Process Clause of the Fourteenth Amendment requiring representation of counsel when they are the subject of delinquency or child welfare proceedings. <sup>30</sup> Courts require not just representation, but effective assistance of counsel, <sup>31</sup> and have extended the scope of that right beyond the initial proceeding on the grounds that children in state custody have a right to "reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm." <sup>32</sup> Thus, a continued right to counsel is seen as the only way to allow children to enforce their right to safety and protection from harm.

It is clear that the legal community has recognized the importance of counsel for children. <sup>33</sup> Unfortunately, it is equally clear that the right to effective assistance of counsel is chimerical at best. Multiple studies indicate that the representation of children is exceedingly poor. <sup>34</sup> There are numerous [\*1061] issues that must be addressed in order for the representation of children to rise to the minimum standard of effective representation, including caseloads, training, and the rate of compensation. <sup>35</sup> A mount (and generally neglected) issue is the nature of the representation the attorney provides. This is because the role adopted by counsel directly affects the attorney-client relationship as well as the ultimate outcome of the proceeding, both of which can affect the amount of harm queer children face. <sup>36</sup>

#### A. The Role Continuum

Attempting to establish the meters of the roles adopted by attorneys representing children has been a veritable cottage industry for legal academics, <sup>37</sup> bar associations, <sup>38</sup> and other legal organizations. <sup>39</sup> States provide for

<sup>28</sup> *Boys Can Stay in Foster Home*, DAYTON DAILY NEWS, Oct. 18, 1996, at 4B.

<sup>29</sup> See, e.g., **N.Y. Family Court Act § 249** (McKinney **2008**) (requiring the appointment of counsel for a child who is the subject of a proceeding or faced with protective custody); GA. CODE ANN. § 15-11-98 (**2008**) (requiring counsel for children in termination of parental rights hearings).

<sup>30</sup> See, e.g., *In re Gault*, 387 U.S. 1 (1967); Kenny A. *ex rel Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005); *In re Jamie T.T.*, 599 N.Y.S.2d 892 (N.Y. App. Div. 1993).

<sup>31</sup> *In re Jamie T.T.*, 599 N.Y.S.2d at 895 (recognizing failure of child's attorney to take an active role requires reversal).

<sup>32</sup> *Kenny A.*, 356 F. Supp. 2d at 1360.

<sup>33</sup> Brookser, *supra* note 7, at 297-99 (outlining attempts by legislators, bar associations, and children's rights organizations to create, promulgate, and enforce standards for the effective representation of juveniles).

<sup>34</sup> Hollis R. Peterson, *In Search of the Best Interest of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1084 (2006) (discussing studies on the effectiveness of guardians ad litem).

<sup>35</sup> *Id.* at 1097-98.

<sup>36</sup> See *infra* Part IV.

<sup>37</sup> See Bruce A. Green & Annette R. Appell, *Representing Children in Families--Foreword*, 6 NEV. L.J. 571 (2006); see also Bruce A. Green & Bernardine Dohrn, *Ethical Issues in the Legal Representation of Children Foreword*, 64 FORDHAM L. REV.

a wide range of role possibilities for attorneys representing children, although they do not always clarify what those roles encompass.<sup>40</sup> Courts have also been unhelpful in clarifying the role of children's attorneys, even when interpreting a relatively straightforward statute requiring counsel for children like that of New York.<sup>41</sup> Regardless of the nomenclature used, whether it be "law guardian," "guardian *ad litem*," "attorney," or "advocate," both statutes and case law often describe the role of the attorney for children as one in which the attorney's loyalty is, or should be, to the court and not to the child in question.<sup>42</sup> Consequently, attorneys representing [\*1062] children are often viewed as adjuncts of the court, and their position is accorded far greater weight than other attorneys in the proceeding.<sup>43</sup> The deference given to the child's attorney is based entirely on the perception of his or her role vis-a-vis the child client.<sup>44</sup> The issue of where an attorney's loyalty lies, whether it be with the child or with the court (and through the court to society at large), is at the heart of the debate on the ethical representation of children.

On one end of the continuum in this debate is the model of traditional client-based representation,<sup>45</sup> in which the attorney is a zealous advocate taking direction from the child client. On the other end is the model of attorney as Guardian ad litem (GAL) or "best interest" attorney, in which the attorney advocates for the best interest of the child,

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[1281 \(1996\)](#). The Nevada and Fordham conferences (both reported in a specially issue of the hosting law school's respective law journal) were the two largest and best-known conferences on the representation of children, although there have been others.

<sup>38</sup> Both state and national bar associations have adopted guidelines for the representation of children. See, e.g., ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), available at [www.abanet.org/child/repstandwhole.pdf](http://www.abanet.org/child/repstandwhole.pdf); NYSBA COMMITTEE ON CHILDREN AND THE LAW: STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN NEW YORK CHILD PROTECTIVE, FOSTER CARE, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS (2007), available at <http://www.courts.state.ny.us/ad3/lq/June2007CoverandStandards.pdf>.

<sup>39</sup> See Robert E. Shepherd & Sharon S. England, "I Know the Child is My Client, But Who Am I?", [64 FORDHAM L. REV. 1917, 1939-41 \(1996\)](#) (listing ten national committees or advisory panels between 1976 and 1995 which addressed the role of counsel representing children in court proceedings).

<sup>40</sup> See, e.g., Barry J. Berenberg, *Attorneys for Children in Abuse and Neglect Proceedings: Implications for Professional Ethics and Pending Cases*, [36 N.M. L. REV. 533, 537-38](#).

<sup>41</sup> See *infra* notes 88-102 and accompanying text.

<sup>42</sup> See, e.g., [Carrubba v. Moskowitz, 840 A.2d 557, 564 \(Conn. App. Ct. 2004\)](#) (explaining that an attorney for a child is more like a prosecutor than a public defender); [Clark v. Alexander, 953 P.2d 145, 152 \(Wyo. 1998\)](#) (citing Ann M. Haralambie & Deborah L. Glaser, *Practical and Theoretical Problems with the AAML Standards for Representing "Impaired" Children*, 13 J.A.M. ACAD. MATRIM. LAW 57, 73-74 (1995)).

<sup>43</sup> See, e.g., Martin Guggenheim, *A Law Guardian by Any Other Name: A Critique of the Report of the Matrimonial Commission*, [27 PACE L. REV. 785, 817-18 \(2007\)](#) [hereinafter Guggenheim, *A Law Guardian by Any Other Name*] (describing New York Appellate Division decisions, which specifically rely on the Law Guardian's recommendations).

<sup>44</sup> This privileging of the child's attorney by courts ends if and when the court believes the attorney is representing the child. Martin Guggenheim, *How Children's Lawyers Serve State Interests*, [6 NEV. L.J. 805, 830 \(2006\)](#). In my own years of practice representing children, the deference a judge would give to my position as the child's attorney was remarkably high, until I represented the child in a delinquency or PINS proceeding. Then I was treated as merely another defense attorney or perhaps even worse, viewed as someone who was an obstacle to the system "helping" the child.

<sup>45</sup> Within the traditional advocacy role there are variations reflecting the level of deference the attorney gives to the client's decisions. The most well known of these roles are the authoritarian, the client directed, and the collective models. Henning, *supra* note 13, at 309-23. However, this Article argues that regardless of the variations within traditional advocacy and best interest lawyering, any variation of traditional advocacy is better for the queer child than any variation of best interest lawyering.

substituting her judgment for that of her client.<sup>46</sup> Beyond substituting judgment, attorneys adopting the GAL approach generally must ignore the professional rules regarding attorney-client privilege<sup>47</sup> and client autonomy<sup>48</sup> and may, if necessary, directly undermine their client before the court.<sup>49</sup>

**[\*1063]** Between the two poles of traditional advocacy and best interest (GAL) lawyering are various hybrid models, in which the attorney may attempt to bridge the roles, representing the child's wishes unless, or until, they are deemed "unreasonable."<sup>50</sup> However, because hybrid representation models allow for substituted judgment, they are merely variations on the GAL model.<sup>51</sup> There is also a parent-directed best interest model,<sup>52</sup> which shifts the locus of power from the attorney to the parent, but nevertheless removes autonomy from the child.

The rationales for how and when attorneys are to choose traditional advocacy over the GAL model are numerous and multifaceted: the age of the child,<sup>53</sup> the child's verbal or cognitive abilities,<sup>54</sup> the type of proceeding involved,<sup>55</sup> or how "considered" or injurious a child's expressed desires may seem to the attorney.<sup>56</sup> While the

<sup>46</sup> Substitution of judgment representation is not technically the same as best interest representation. Substitution of judgment requires an attorney who "substitutes" her judgment for that of her child client to attempt to advocate the position the child would adopt, were the child capable of making a decision. See Henning, *supra* note 13, at 303-05. The best interest attorney's role is to advocate what the attorney thinks would be in the child's best interest, regardless of the child's position. See *id.* at 269, 281-82, 284. However, both types of representation cede authority to the attorney, removing it from the child client and "substituted judgment" representation is subject to the same arbitrariness and abuse as best interest lawyering. *Id.* at 305.

<sup>47</sup> See Peter Margulies, *Lawyering for Children: Confidentiality Meets Context*, [81 ST. JOHN'S L. REV. 601, 607 \(2007\)](#) (discussing the scope of child-client confidentiality when representing a child's best interest).

<sup>48</sup> Compare Shepherd & England, *supra* note 39, at 1941-42 (arguing that GAL diminishes the child's autonomy by reducing the child's voice at the proceeding in favor of the lawyer's understanding of the child's best interest), with Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, [64 FORDHAM L. REV. 1655, 1675 \(1996\)](#) (zealous advocacy on behalf of children is consistent with client autonomy).

<sup>49</sup> *In re Amika P.*, [684 N.Y.S.2d 761 \(N.Y. Fam. Ct. 1999\)](#) (refusing child's request to remove law guardian who refuses to advocate for the child's position); see Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 825-28 (describing cases in which courts have refused to allow him to substitute as the attorney for the child where children have objected to the position taken by their assigned counsel).

<sup>50</sup> Buss, *supra* note 14, at 1702.

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

<sup>52</sup> See Henning, *supra* note 13, at 294-303 (describing the parent-directed model and suggesting that it assumes a conflict free relationship between parent and child that does not always exist). I suggest a conflict free relationship rarely exists between a queer child involved in a legal proceeding and his or her parents or guardians.

<sup>53</sup> See, e.g., Donald N. Duquette, *Two Distinct Roles/Bright Line Test*, [6 NEV. L.J. 1240, 1240 \(2006\)](#).

<sup>54</sup> See, e.g., *Recommendations of the UNLV Conference on Representing Children in Families: Child Advocacy and Justice Ten Years After Fordham*, [6 NEV. L.J. 592, 609 \(2006\)](#) [hereinafter *UNLV Recommendations*].

<sup>55</sup> See, e.g., ABA STANDARDS, *supra* note 38; ABA, *Standards of Practice for Lawyers Representing Children in Custody Cases*, [37 FAM. L.Q. 131, 133 \(2003\)](#).

<sup>56</sup> See *UNLV Recommendations*, *supra* note 54, at 609; see also N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2 (2007).

When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes.



rationales provided by proponents of best interest lawyering are nuanced, the differences in the two types of representation [\*1064] are extreme.<sup>57</sup> These differences reflect a profound divergence in how advocates view the court and child welfare system.

Acting as a GAL requires a belief that the court system and child welfare system are fundamentally benign. GALs view children as helpless victims needing protection from their families and themselves. These attorneys view the adults in the court and child welfare systems as those best able to provide that protection. In addition, attorneys working as GALs are seen by themselves and others as having a special mandate to protect their clients.<sup>58</sup> This concept of attorney as heroic protector of the child client trumps legal ethics<sup>59</sup> and children's rights<sup>60</sup> even though it is the judge, not the attorney, with whom ultimate responsibility rests. The attorney as protector is an addictive role that is difficult for attorneys to relinquish.<sup>61</sup> It is not surprising [\*1065] that best interest attorneys, or GALs, are seen more often as "senior social workers" or "junior judges" rather than lawyers.<sup>62</sup>

Acting as a traditional advocate does not require faith in the benevolence of the judicial or child welfare system. An attorney acting as a traditional advocate can represent the child client pursuant to the ethical rules of her profession regardless of whether she sees the court or child welfare system as either benign or as potentially dangerous to her

*Id.*

<sup>57</sup> "Pursuing a child's legal interests is central to rejecting a GAL or hybrid role even for a child unable to direct representation." Jane M. Spinak, *Simon Says Take Three Steps Backwards: The National Conference of Commissioners on Uniform State Laws Recommendations on Child Representation*, 6 *NEV. L.J.* 1385, 1386 (2006) (objecting to the NCCUSL's creation of a "best interest" attorney, which will allow lawyers to see their role as "protecting" their clients instead of representing them); *but cf. infra* note 102 and accompanying text; NAT'L ASSOC. OF COUNSEL FOR CHILDREN, ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (NACC REVISED VERSION), B-2, *Conflict Situations*, available at <http://www.naccchildlaw.org/?page=PracticeStandards>.

Because the child has a right to confidentiality and advocacy of his or her position, the child's attorney can never abandon this role. Once a lawyer has a lawyer-client relationship with a minor, he or she cannot and should not assume any other role for the child, especially as guardian ad litem. When the roles cannot be reconciled, another person must assume the guardian ad litem role.

*Id.*

<sup>58</sup> Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 830 (arguing that children's lawyers are rewarded professionally and emotionally when they step forward and argue for intervention to prevent possible future harm).

<sup>59</sup> See Buss, *supra* note 14, at 1716-17.

Although misleading the client into misunderstanding (or exploiting the child's misconceptions of) the lawyer's role may facilitate good decision making about and advocacy of the child's best interests by the lawyer, it raises serious ethical problems. Lawyers who assume the GAL model may be forced, therefore, to choose between honesty and effectiveness.

*Id.*

<sup>60</sup> See *infra* notes 305-12 and accompanying text.

<sup>61</sup> See Spinak, *supra* note 57, at 1390; Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 *FORDHAM L. REV.* 1505, 1527 (1996) (suggesting that one of the reasons best interest lawyering persists is that the attorneys practicing it enjoy the discretion it affords them because "they are always doing what they believe to be best"); see also Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 *GEO. MASON L. REV.* 255, 299 (1998) ("On the other hand, *guardians ad litem* often find their status a heady one. . . . They may also relish the position of being imbued with special quasi-judicial powers and expect the parties to follow their 'orders' directly without question.").

<sup>62</sup> See Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, N.Y.L.J., Mar. 6, 2008, at 3.

client. Such an attorney does not see her role as that of a judge who determines best interest,<sup>63</sup> but rather that of an attorney representing a client. In addition, a child who understands the traditional attorney role is more likely to be candid, forthcoming, and to invest himself in the attorney-client relationship.<sup>64</sup> An attorney with an active, engaged, and trusting client is far better positioned to protect her queer child client when the system itself becomes the source of danger to her queer child client.

While there is a wide gap between the natures of these very different legal roles, over time the general consensus among commentators and national legal organizations has moved toward a child-directed traditional advocacy model and away from a best interest or GAL approach.<sup>65</sup> This support for traditional advocacy representation with child clients can be traced in large part from case law concerning the right to counsel in delinquency hearings.<sup>66</sup> However, even in that singular type of proceeding, consensus did not come quickly.<sup>67</sup> In addition, state statutes also provide a right to counsel, and while some have specifically required children's counsel to act as GALs, others provide children with the right to an attorney without such limitations.<sup>68</sup>

## B. Constitutional Standards

Prior to 1966, the vast majority of children in juvenile courts were not afforded legal representation.<sup>69</sup> The rationale for depriving juveniles legal [\*1066] counsel reflected the societal view that the proceedings should be rehabilitative and not punitive in nature. Juvenile courts were established by reformers intent on moving from a deterrent-retributive approach to a rehabilitative approach guided by the child's best interests.<sup>70</sup> Because the consequences that children faced in the new rehabilitation-focused juvenile justice system were seen as benign, reformers saw no need for the procedural protections guaranteed to adults.<sup>71</sup> However, as early as the mid 1930s, critics were beginning to point out that the system was inadequate and punitive.<sup>72</sup> By 1967, there was enough evidence suggesting that the "justice" meted out in juvenile courts was sufficiently poor to support Justice Fortas's unfavorable comparison of the juvenile justice system to the Star Chamber.<sup>73</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> See Buss, *supra* note 14, at 1713-14.

<sup>65</sup> Haralambie, *supra* note 12, at 177-78.

<sup>66</sup> [In re Gault, 387 U.S. 1 \(1967\)](#).

<sup>67</sup> Ann M. Haralambie, *In Whose Best Interest?*, TRIAL 43, 47 n.1, June 1998.

<sup>68</sup> See, e.g., [N.M. STAT. ANN. § 32A-4-10](#) (Supp. 2008) (requiring a child age fourteen and up be appointed an attorney and children under fourteen be appointed a GAL); [WASH. REV. CODE § 13.34.100\(6\)](#) (2004) ("If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position.").

<sup>69</sup> Richard Kay & Daniel Segal, *The Role of the Attorney in Juvenile Court Proceedings: A Non-Polar Approach*, 61 GEO. L.J. 1401, 1406 (1972).

<sup>70</sup> Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 583-84 (2002). Those who took up the cause of juvenile justice reform were known as the "child savers" and can either be seen as altruistic humanists or elitists attempting to protect "civilized society," although it seems reasonable that there was a mix of motivations. *Id.*

<sup>71</sup> *Id.* at 587.

<sup>72</sup> *Id.* at 587-88.

<sup>73</sup> [In re Gault, 387 U.S. 1, 18 \(1967\)](#) (quoting Roscoe Pound, *Foreword to PAULINE V. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY* xvii (1st ed. 1937)).

In 1966, in the first of a series of cases applying the Due Process clause of the Fourteenth Amendment to juvenile delinquency proceedings,<sup>74</sup> the Supreme Court declared that the "right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice."<sup>75</sup> The very next year, finding that "[j]uvenile [c]ourt history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure," the Court extended the right to counsel to all juvenile delinquency cases.<sup>76</sup> However, while providing a right to counsel, the Court failed to clarify the role of counsel when representing juveniles.

[\*1067] Even before *In re Gault*, scholarly commentators were actively debating the roles, duties, and loyalties that attorneys in juvenile proceedings owe their child clients. A split arose between those who supported traditional advocacy and those who supported best interest advocacy.<sup>77</sup> However, commentators supporting mandated traditional advocacy quickly became the dominant voice of the legal community. In 1979, the American Bar Association (ABA), in conjunction with the Office of Juvenile Justice and Delinquency Prevention, published standards that instructed counsel to provide zealous advocacy for their child clients at all stages of delinquency proceedings.<sup>78</sup> The legal academy wholeheartedly adopted this position,<sup>79</sup> and it is now understood that, at least "[i]n delinquency cases, best-interests advocacy violates attorney ethical standards, denies children their constitutional rights, and ignores the punitive ramifications of delinquency court involvement."<sup>80</sup>

The academic and bar association consensus that legal ethics required traditional advocacy for child clients has been ignored by the vast majority of judges and attorneys working in family or juvenile courts.<sup>81</sup> During the past decade, states, with the support of the ABA's Juvenile Justice Center, have been assessing juvenile representation

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<sup>74</sup> The Court in *Schall v. Martin*, 467 U.S. 253, 263 (1984), listed the cases holding that "certain basic constitutional protections enjoyed by adults accused of crimes also apply to juveniles" (citing *In re Gault*, 387 U.S. 1; *In re Winship*, 397 U.S. 358 (1970); *Breed v. Jones*, 421 U.S. 519 (1975); *McKiever v. Pennsylvania*, 403 U.S. 528 (1976)). In 1966 the Court had provided the right to counsel in *Kent v. United States*, 383 U.S. 541 (1966), but had based its decision on the wording of the D.C. Juvenile Justice Act. See *In re Gault*, 387 U.S. at 12.

<sup>75</sup> *Kent*, 383 U.S. at 561.

<sup>76</sup> *In re Gault*, 387 U.S. at 18. The decision was limited to the adjudicatory portion of delinquency hearings and did not address the right to counsel in the dispositional phase of the proceeding. *Id.* at 31 n.48. The Court also provided that juveniles had due process rights to the notice of charges, to confrontation and cross-examination of witness, and to the privilege against self-incrimination. *Id.* at 33-34, 55, 57. In 2005, a federal district court found that children in abuse and neglect and termination proceedings are also "entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake." Kenny A. *ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (citations omitted). State courts have similarly found a constitutional right to counsel. See, e.g., *In re Jamie T.T.*, 599 N.Y.S.2d 892, 894 (N.Y. App. Div. 1993).

<sup>77</sup> See Henning, *supra* note 13, at 250-51. There were also nuanced attempts at bridging the roles. See Kay & Segal, *supra* note 69. However, as noted previously, any attempt at creating less than a traditional advocate role is merely a variation of a "best interest" role. Kay and Segal's conclusion illustrates this with their suggestion that lawyers "who fight stubbornly for minimal restraints on [a] juvenile's freedom . . . would be doing a disservice to a troubled child whose only chance for a productive personal and social future depends on the assistance the state could provide." *Id.* at 1424. One would be hard pressed to characterize this as anything more than a paternalistic best interest approach that applauds substitution of judgment.

<sup>78</sup> Henning, *supra* note 13, at 255.

<sup>79</sup> *Id.* at 256; Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 468 n.19 (2007).

<sup>80</sup> Puritz & Majd, *supra* note 79, at 468.

<sup>81</sup> Henning, *supra* note 13, at 257-59.

standards.<sup>82</sup> The results of these reports have been almost uniformly dismal. Huge percentages of youth waive their right to counsel on the basis of extremely limited colloquy by the presiding judge.<sup>83</sup> Even when juveniles are provided with counsel the attorneys are often under funded and over worked, they rarely conduct investigations or motion practice, they often meet their clients on the day of the hearing, and they generally do not provide post-dispositional advocacy.<sup>84</sup> An undercurrent throughout the reports is "evidence of a persistent culture [\*1068] of paternalism"<sup>85</sup> in the juvenile justice system, which allows juvenile defense attorneys to conflate their role as counsel with that of a GAL. This role conflation creates an environment where juveniles systematically receive inadequate representation, a reality the bench and bar seem intent to ignore.<sup>86</sup> Unfortunately, establishing a child's right to effective assistance of counsel though legislation has also been largely unsuccessful.<sup>87</sup>

### C. Legislative Guidance: The Example of New York

In 1962, the New York legislature passed Family Court Act section 241, which provided that children subject to New York's Family Court should be "represented by counsel of their own choosing or by law guardians."<sup>88</sup> While the original act only pertained to juvenile delinquency, child protective, and Person in Need of Supervision proceedings, a 1970 amendment<sup>89</sup> allowed judges to appoint law guardians in all other Family Court cases. This has resulted in a growing trend of appointing attorneys to children in contested custody cases.<sup>90</sup> New York's provision of counsel for children in family court was novel at the time, and the language providing for children to be represented is straightforward and "requires an uncompromised attorney--client relationship between the law guardian/counsel and the child client."<sup>91</sup>

**[\*1069]** Despite the New York statute's clear language, something has unfortunately gone wrong with the implementation of Family Court Act section 241. Two prominent commentators--Merill Sobie and Martin Guggenheim--writing in response to yet another attempt to clarify the role of the attorney for the child, document

<sup>82</sup> See Bookser, *supra* note 7, at 297-300.

<sup>83</sup> *Id.* at 304.

<sup>84</sup> *Id.* at 305-06.

<sup>85</sup> Henning, *supra* note 13, at 258. Henning provides a concise overview of how the history of discretionary paternalism in the juvenile justice system has entrenched best interest advocacy. *Id.* at 249-59.

<sup>86</sup> As one writer despairingly describes it, "[n]ow almost forty years after *Gault*, twenty-five years after the IJA--ABA Standards, twenty years after Guggenheim's article, and ten years after the Fordham conference, best-interest advocacy remains standard practice in many juvenile courts." *Id.* at 259.

<sup>87</sup> There are, however, a few states requiring traditional advocacy for some minors. See, e.g., [N.M. STAT. § 32A-4-10 \(2008\)](#) (requiring a child age fourteen and up be appointed an attorney and children under fourteen be appointed a GAL).

<sup>88</sup> The statute provides:

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

[N.Y. FAM. CT. ACT § 241](#) (McKinney 2008).

<sup>89</sup> 1970 N.Y. LAWS 2992.

<sup>90</sup> Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 786.

<sup>91</sup> Sobie, *supra* note 11, at 835.

how entrenched the "best interest" model of representing children is in New York. <sup>92</sup> Both point to the muddled case law, which "imposes almost no limitations on the discretion accorded to the child's lawyers, beyond that they may not silence the child." <sup>93</sup> However, Sobie and Guggenheim differ to some degree in their identification of why New York attorneys so readily adopt the "best interest" model of representing children.

Sobie points to the failure of the process by which children's attorneys are appointed and paid, which is largely at the discretion of the trial judge. <sup>94</sup> He argues that trial judges view attorneys for children as merely extensions of the court, whose duty lies not with their client, but with assisting the court in its decision-making capacity. <sup>95</sup> He recounts anecdotes and conversations that confirm how fear of losing future appointments may affect the position advocated by children's attorneys. <sup>96</sup> Sobie persuasively argues that the New York statute is clear when he states that "[a]n attorney for a child is simply an attorney, one whose responsibilities are to protect the client's interests and attempt to achieve the client's goals, as refined through consultation and realistic legal assessments." <sup>97</sup> It is his position that the fault lies not with the statute, but with the individual attorneys who must summon the courage to follow the statute. <sup>98</sup>

Guggenheim lays much of the blame for the prevalence of best interest lawyering in New York directly on the judiciary, which views the function of children's attorneys as assisting the court in reaching the correct decision [\*1070] when deciding what is in the child's best interest. <sup>99</sup> He outlines a substantial history of case law specifically citing to the position of the child's attorney as a positive indication of the correctness of the ultimate decision of the trial judge. <sup>100</sup> He argues that the proposal clarifying the role of law guardians does not empower children, but further empowers children's lawyers." <sup>101</sup> In making this argument, Guggenheim suggests that best interest lawyering strips the essence from an attorney's duties. He contends that it is deceptive to call advocates who can substitute their judgment for that of their client attorneys. Describing how a child might perceive such a person, he states that "[i]t is important to agree that when someone chooses to seek an outcome that I have specifically repudiated and made clear I do not wish, it is not a misuse of the language to regard that person as my enemy." <sup>102</sup> Whether or not one views such an attorney as an "enemy," such advocacy clearly suggests inherent

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<sup>92</sup> Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 786-90; Sobie, *supra* note 11, at 833-39. Both pieces are in response to the Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York (2006), which deals with custody representation. However, both articles specifically cite discussions of attorney roles in other types of proceedings, such as child protective and dependency proceedings. In addition, leaving aside attorneys who do not rely on individual appointments from judges, it is very likely that New York attorneys representing juveniles in delinquency and PINS proceedings also regularly substitute judgment and take on a "best interest" role. See *supra* Section I.B.

<sup>93</sup> Sobie, *supra* note 11, at 842 (citing Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 813).

<sup>94</sup> Sobie, *supra* note 11, at 855-63 (arguing that judicial involvement in selecting individual law guardians is a systemic problem that undermines the independence of attorneys representing children in New York).

<sup>95</sup> *Id.* at 854-55.

<sup>96</sup> *Id.* at 861.

<sup>97</sup> *Id.* at 866.

<sup>98</sup> *Id.*

<sup>99</sup> Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 808-13.

<sup>100</sup> *Id.* at 817-18.

<sup>101</sup> *Id.* at 820.

<sup>102</sup> *Id.* at 826.

ethical dilemmas that undermine the concept of a lawyer as one who "provides a client with an informed understanding of the client's legal rights" <sup>103</sup> or "zealously asserts the client's position." <sup>104</sup>

#### D. Ethical Rules

Attorney ethics are governed by the state laws, most of which are based on the ABA Model Rules of Professional Conduct (Rules). <sup>105</sup> The Rules require that attorneys zealously advocate for their client's position, abide by the client's decision concerning the objectives of representation, maintain client confidentiality, communicate and consult with the client about the means by which the client's objectives are to be accomplished, and refrain from testifying in cases in which they are counsel. <sup>106</sup> Each of these rules is seriously undermined by an attorney acting in the role of GAL or by one who substitutes her judgment for that of her child client. <sup>107</sup>

**[\*1071]** Rule 1.2 provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation." <sup>108</sup> There are no special rules governing the representation of children. However, the Comments to Rule 1.2 refer to Rule 1.14 in cases where a client appears to be suffering "diminished capacity." <sup>109</sup> Attorneys seeking ethical support for their decision to substitute their judgment for that of their clients turn to Rule 1.14.

Rule 1.14(b) allows an attorney to take "reasonably necessary protective action" if she "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken" and cannot act in her own interest. <sup>110</sup> Beyond this standard, which is studded with ambiguity, there is very little to guide counsel. There is no definition of "diminished capacity" in the Rules or Comments. There are no examples or explanations of what "reasonable protective action" or "substantial physical harm" might entail. However, the Rules do urge counsel to "as far as reasonably possible maintain a normal client--lawyer relationship with the client." <sup>111</sup>

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<sup>103</sup> See MODEL RULES OF PROF'L CONDUCT, Preamble: A Lawyer's Responsibility (2007).

<sup>104</sup> *Id.*

<sup>105</sup> STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2008) (forty-seven states and the District of Columbia have adopted much of the language of the Model Rules).

<sup>106</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2, R. 1.4, R. 1.6, R. 3.7.

<sup>107</sup> Emily Buss argues that:

to ensure that their clients are adequately protected, GALs abandon the most fundamental aspect of the client--lawyer relationship: They strip their clients of any decision-making control and assume responsibility for ascertaining the child's best interest. What, then, is left of the client--lawyer relationship, and, consequently, the ethical principles that govern a lawyer's conduct?

Buss, *supra* note 14, at 1731-32.

<sup>108</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2.

<sup>109</sup> *Id.*

<sup>110</sup> Rule 1.14 (b) states:

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad item, conservator or guardian.

MODEL RULES OF PROF'L CONDUCT R. 1.14(b).

<sup>111</sup> Rule 1.14(a) states:

This lack of ethical clarity <sup>112</sup> in the Rules of the profession, coupled with the paternalistic history of juvenile courts, has created a situation in [\*1072] which children's lawyers determine "what is best for their clients based on invisible factors that have more to tell us about the values and beliefs of the lawyers" than what is best for their clients. <sup>113</sup> When those beliefs are infected by homophobic and heterosexist bias, as they inevitably will be, <sup>114</sup> queer youth will be harmed by their own attorneys, compounding the harm they suffer in the world.

## II. QUEER KIDS IN ANON-QUEER WORLD

"It's always open season on gay kids." <sup>115</sup>

When they are forced to interact with the court or the child welfare system, queer kids confront open hostility and face more discrimination than any other segment of the youth population. <sup>116</sup> Attorneys, like all professionals working with children, must be cognizant of the multifaceted identities children have and how those identities will be treated in the judicial and child welfare systems. Such cultural competence <sup>117</sup> should be a foundational requirement for those representing queer children because cultural incompetence with this population jeopardizes

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

MODEL RULES OF PROF'L CONDUCT R. 1.14. In addition, the ABA's Standing Committee on Ethics and Professional Responsibility has issued an opinion suggesting that the client's capacity must be judged against the standard set by the client's own habitual or considered standards of behavior, rather than against a general standard. Daniel L. Bray & Michael D. Ensley, *Dealing with the Mentally Incapacitated Client: The Ethical Issues Facing the Attorney*, [33 FAM. L.Q. 329, 334 \(1999\)](#); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 404 (1996).

<sup>112</sup> This lack of clarity is found in the Model Rules, the Model Code, and in more recent proposals. See Subha Lembach, *Representing Children in New York State: An Ethical Exploration of the Role of the Child's Lawyer in Abuse and Neglect Proceedings*, [24 WHITTIER L. REV. 619 \(2003\)](#); see also Spinak, *supra* note 57, at 1388 (objecting to new proposed standards creating a "best interest attorney" in abuse and neglect and custody cases).

<sup>113</sup> Guggenheim, *A Law Guardian by Any Other Name*, *supra* note 43, at 797.

<sup>114</sup> See *infra* note 116.

<sup>115</sup> Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay*, 29 SOCIAL TEXT 18, 18 (1991).

<sup>116</sup> Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, [85 MINN. L. REV. 363, 446 \(2000\)](#) (citation omitted).

Because homophobia and heterosexism remain much more socially acceptable than other forms of bias (such as those based upon gender, race, or religion), many judges do not notice the bias that informs their reactions to and feelings about homosexuality. When such bias is brought to their attention, moreover, many judges lack the embarrassment or shame they might feel if confronted with their own gender or racial bias.

*Id.*; accord Hirschfeld, *supra* note 3, at 617 (arguing that most Americans refrain from outward expressions of overt racism and sexism but do not feel constrained to conceal anti-LGBT sentiments); Todd Brower, *Obstacle Courts: Results of Two Studies on Sexual Orientation Fairness in the California Courts*, [11 AM. U. J. GENDER SOC. POL'Y & L. 39, 48 \(2002\)](#) (citing annual nationwide juror polls that found jurors self reporting that they were three times more likely to be unfair to lesbians and gay men than they are for African-Americans, Asians, Hispanics, or Whites).

<sup>117</sup> Cultural competency is working with people in a way that is respectful and affirming regardless of diversity factors such as race, gender, sexual orientation, and gender identity. See *Report of the Working Group on the Role of Sex and Sexuality*, [6 NEV. L.J. 642, 644 \(2006\)](#); Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, [6 NEV. L.J. 774, 801 \(2006\)](#). For an exploration of the range of sexual identities adopted by queer youth, see Glorianne M. Leck, *Heterosexual or Homosexual? Reconsidering Binary Narratives on Sexual Identities in Urban Schools*, 32 EDUC. & URB. SOC'Y 324 (2000).

their physical safety. Beyond cultural competence, attorneys working with queer youth must recognize the impact of heteronormativity, which, by supporting conceptual [\*1073] liquidation<sup>118</sup> of sexual minorities, creates a society that fosters aggression toward their clients.

Attorneys representing queer children must recognize that it is the home and school environments where fear of, and animosity toward, homosexuality and gender nonconformity create targets of even the youngest child. It is the home and school environments that often lead to queer kids becoming entangled in the court system. It is the home and school environments that make traditional zealous client-directed advocacy for queer youth as critical in custody and abuse and neglect proceedings as it is in juvenile justice proceedings.

An attorney's failure to recognize the importance of supporting the sexuality or gender identity of even very young clients will lead to the placement of those clients with nonsupportive family members or dangerous foster families. Similarly, an attorney who fails to understand the extent of harassment a queer child faces at school will be ineffective in resolving school centered issues that are causing the queer child's involvement in the legal system. Finally, an attorney who fails to comprehend the amount of abuse queer children receive in state custody is complicit in the harm which will befall his or her queer child client in placement. In each of these scenarios, traditional client centered advocacy operates as an effective bulwark by protecting the queer child client when lawyers fail to understand the extent of the harassment and violence queer kids confront. Best interest lawyering in these situations merely exacerbates the dangers queer children face.

#### A. Sexual Children

It is a well-entrenched misconception that children are not sexual beings.<sup>119</sup> For queer children, this mistaken belief is particularly dangerous, especially if it is believed by the attorneys who are appointed to represent them. Adolescents are recognizing their sexuality at very early ages. Studies indicate the age of awareness of same-sex attraction has been steadily [\*1074] declining since the 1960s.<sup>120</sup> The average age adolescents are recognizing same-sex attraction is now between nine and ten years old for males and ten and twelve for females.<sup>121</sup> While in the past lesbian, gay, or bisexual adolescents may have remained "closeted," today they are "coming out" at an earlier age, often announcing their sexuality to peers, parents, and society at large.<sup>122</sup> They are also having sex earlier. In general, gay male adolescents first have sex with a same sex partner shortly after puberty--around fourteen--and lesbians first have sex around the age of fifteen.<sup>123</sup>

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<sup>118</sup> Jose Gabilondo, *Asking the Straight Question: How to Come to Speech in Spite of Conceptual Liquidation as a Homosexual*, [21 WIS. WOMEN'S L.J. 1, 22 n.82 \(2006\)](#) (arguing that "heteronormativity is organized around the conceptual liquidation of homosexuals and other sexual minorities"). This is similar to the concept of lesbian domestication first articulated by Ruthann Robson. Robson argues that "[d]omestication has occurred when the views of the dominant culture, in this case the legal culture, are so internalized that they are considered to be common sense." Ruthann Robson, *Incendiary Categories: Lesbians/Violence/Law*, 2 TEX. J. WOMEN & L. 1, 30 (1993).

<sup>119</sup> See Dana M. Northcraft, *A Nation Scared: Children, Sex, and the Denial of Humanity, a Review Essay on Judith Levine's Harmful to Minors: the Perils of Protecting Children from Sex*, [12 AM. U. J. GENDER SOC. POL'Y & L. 483, 486 n.24 \(2004\)](#) (citing studies indicating normality of sexual behavior in children).

<sup>120</sup> Ritch C. Savin-Williams, *THE NEW GAY TEENAGER* 120-21 (2005).

<sup>121</sup> Caitlin Ryan, *Lesbian, Gay, Bisexual, and Transgender Youth: Health Concerns, Services, and Care*, 20 CLINICAL RES. & REG. AFF. 137, 141 (2003); Savin-Williams, *supra* note 121.

<sup>122</sup> Ryan, *supra* note 121, at 137.

<sup>123</sup> Savin-Williams, *supra* note 120, at 139.



However, reality is far more complex than these figures suggest. Sex and gender identity is fluid, especially in queer youth who may, for various reasons, resist defining themselves.<sup>124</sup> Many queer youth are not sexually experienced and may "come out" before they become sexually active, while others may be primarily heterosexually active.<sup>125</sup> Youth who fear family, peer, or societal responses to their sexuality or gender non-conformity often go to great lengths to appear "straight" by assuming anti-gay postures, establishing heterosexual relationships, attempting to modify their appearances, and adopting other masking behaviors.<sup>126</sup>

For children who are gender-variant or do not conform to society's expectation of gender, self recognition can come much earlier--often as early as five or six.<sup>127</sup> Children as young as three are being labeled gender nonconforming by schools and parents or diagnosed with Gender Identity Disorder (GID) by mental health professionals.<sup>128</sup> Some transgender<sup>129</sup> children [\*1075] have successfully petitioned to medically pursue their self-identified gender as young as thirteen and<sup>130</sup> to wear gender (as opposed to sex) appropriate clothing in high school<sup>131</sup> and in state-run foster care facilities.<sup>132</sup> However, children have also spent years in mental hospitals undergoing forced treatments to "cure" gender non-conforming behavior or GID.<sup>133</sup>

Moreover, it has become increasingly clear that the state is actively involved in enforcing traditional sex and gender roles, especially where children are involved. In *Lofton v. Secretary of the Department of Children & Family*

<sup>124</sup> Ryan, *supra* note 121, at 139.

<sup>125</sup> *Id.*

<sup>126</sup> Ian Rivers & Daniel J. Carragher, *Social-Developmental Factors Affecting Lesbian and Gay Youth: A Review of Cross-National Research Findings*, 17 CHILD. & SOC'Y 374, 382 (2003).

<sup>127</sup> Lauren Smiley, *Girl/Boy Interrupted*, S.F. WEEKLY, July 11, 2007; Julia Reischel, *Queer in the Crib*, VILLAGE VOICE, June 20, 2007, at 81. Both articles document five and six year old children being diagnosed with "Gender Identity Disorder" (GID) or in more supportive nomenclature as "transkids." Children's Hospital in Boston has recently opened a new clinic to assist children who "present as transgendered." Children's Hospital Boston, *New Clinic Addresses Intersex and Gender Issues*, PEDIATRIC VIEWS, Apr. 2007, available at [http://www.childrenshospital.org/views/april07/new\\_clinic\\_addresses\\_intersex\\_and\\_gender\\_issues\\_p.html](http://www.childrenshospital.org/views/april07/new_clinic_addresses_intersex_and_gender_issues_p.html). See also Pagan Kennedy, *Q & A with Norman Spack: A Doctor Helps Children Change Their Gender*, THE BOSTON GLOBE, Mar. 30, 2008, available at [http://www.boston.com/bostonglobe/ideas/articles/2008/03/30/qa\\_with\\_norman\\_spack/](http://www.boston.com/bostonglobe/ideas/articles/2008/03/30/qa_with_norman_spack/).

<sup>128</sup> See Peggy T. Cohen-Kettenis et al., *Demographic Characteristics, Social Competence, and Behavior Problems in Children with Gender Identity Disorder: A Cross-National, Cross-Clinic Comtive Analysis*, 31 J. ABNORMAL CHILD PSYCHOL. 41, 42 (2003) (indicating that the average age of referral for gender identity disorders ranges from three to seven); Patricia Leigh Brown, *Supporting Boys or Girls When the Line Isn't Clear*, N.Y. TIMES, Dec. 2, 2006, available at <http://www.nytimes.com/2006/12/02/us/02child.html>.

<sup>129</sup> Amanda Kennedy, Note, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 HASTINGS WOMEN'S L.J. 281, 282 (2008) (explaining "gender identity disorder" as a "conflict between a person's anatomical sex and his or her gender identity, or self-identification as male or female" and choosing to use the term "transgender" to encompass situations where individuals do not feel comfortable with the societal norms imposed by their genders); Fedders, *supra* note 117, at 778-79 (describing lack of agreement on the definition and understanding of "transgender").

<sup>130</sup> *In re Alex*, 31 Fam. L.R. 503 (Fam. Ct. Austl. 2004).

<sup>131</sup> Doe *ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

<sup>132</sup> *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).

<sup>133</sup> See *supra* note 21.

*Services*,<sup>134</sup> the Eleventh Circuit, in upholding the State of Florida's prohibition on homosexual adoption, specifically cited the state's claim of the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling."<sup>135</sup> Courts addressing the issue of same-sex marriage often fixate on the impact same-sex parents may have on children.<sup>136</sup> The relatively liberal New York Court of Appeals recently identified heterosexual modeling as one of two legislative concerns that could rationally support the limitation on the right to marry.<sup>137</sup> The fear of "creating" homosexual children has been a factor in judicial reasoning in child custody and visitation cases.<sup>138</sup> More recently, parental [\*1076] support for a child's gender nonconforming behavior has similarly become a weapon to be used against the supportive parent in both neglect and custody proceedings.<sup>139</sup> In a legal environment that punishes any deviance from the norm, queer children often become targets and they must have effective representation to maximize their chances for surviving intact.

Regardless of age, the "coming out" process creates unique stressors for queer youth because they must learn to understand and integrate a stigmatized identity, generally without support from family or friends and usually with little accurate information or resources.<sup>140</sup> As one mental health professional described it, these children must learn to "manage stigma, a complex task at any age, and to cope with social, educational, and community environments where victimization and harassment are normative."<sup>141</sup> Unfortunately, as the age at which children either self-identify or are identified by others as queer decreases, so does the age at which families and society begin to punish that queer identity. In the face of an environment in which victimization is the norm, a queer child must be able to rely on her attorney for client-directed advocacy, regardless of whether it is the state or her family that seeks to regulate her identity.

## B. Queer at Home

There is a long and ugly history of criminalizing and persecuting homosexual and lesbian behavior in the United States that is reflected in family life and parenting. While the United States has grown more "queer friendly" in the past decade, support or even tolerance for queer youth tends to be an urban and coastal phenomenon.<sup>142</sup> In

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<sup>134</sup> [358 F.3d 804 \(11th Cir. 2004\)](#).

<sup>135</sup> [Id. at 818](#).

<sup>136</sup> Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, [15 DUKE J. GENDER L. & POL'Y 127, 132-33 \(2008\)](#).

<sup>137</sup> [Hernandez v. Robles, 855 N.E.2d 1, 7 \(2006\)](#) ("The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like.").

<sup>138</sup> See, e.g., [S. v. S., 608 S.W.2d 64, 66 \(Ky. Ct. App. 1980\)](#) (holding that a child being raised by lesbian mother "may have difficulties in achieving a fulfilling heterosexual identity of her own;" this is a sufficient reason to change custody to father); see also Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights from a Different Perspective*, [64 ALB. L. REV. 915, 923-24 \(2001\)](#) (suggesting that the harm envisioned by courts removing children from gay and lesbian parents is a fear that children will develop homosexual interests and behaviors and will come to view homosexuality as normal).

<sup>139</sup> See *infra* notes 207-216 and accompanying text.

<sup>140</sup> Ryan, *supra* note 121, at 138, 141.

<sup>141</sup> [Id. at 138](#).

<sup>142</sup> MacGillivray & Genet Kozik-Rosabal, *Introduction*, 32 EDUC. & URB. SOC'Y 287, 295 (May 2000) ("There is also much research that indicates that many GLBTQ youth flee rural and suburban areas for urban cities."); Fedders, *supra* note 117, at 791 ("In spite of the advent of LGBTQ youth organizations in some areas . . . the overall state of legal protections for LGBTQ

large swaths of the country, victimization and harassment of queer youth by their families is still the norm: descriptions of parental homophobia and violence litter the articles and studies about queer children.<sup>143</sup> The chances of suicide, homelessness, or substance abuse for a queer adolescent vary with the level of tolerance [\*1077] for variation in a child's sexual or gender identification within the home. But the overwhelming majority of youths who leave homes do not go because they are ready to have adult lives of independence and adventure; they are evicted or constructively evicted by their parents or guardians because of the adults' intolerance.<sup>144</sup>

Coming out to family elicits a range of reactions, almost all of which are negative and none of which are positive.<sup>145</sup> Queer kids are routinely ordered to leave their homes, often with little more than the clothes on their backs.<sup>146</sup> One study found that one in four disclosures of homosexuality to parents was met with a demand that the youth leave home.<sup>147</sup> Worse, a number of studies indicate that queer children are at increased risk for both physical and sexual abuse by family members than are their "straight" peers.<sup>148</sup> Stories of beatings, rapes, and assaults are commonplace.<sup>149</sup>

Unfortunately, keeping quiet about their sexuality or gender identification does not mean children will be safe or unharmed. Adolescents who remain closeted by fear of parental rejection face years of isolation and depression.<sup>150</sup> Even when children are merely suspected of being queer, parents [\*1078] can react with fury.<sup>151</sup> For example, in *In re Shane T.*, the level of verbal harassment the father subjected his child to, supported a judicial

youth in schools is dismal."); Rich C. Savin-Williams & Eric M. Dube, *Parental Reactions to Their Child's Disclosure of a Gay/Lesbian Identity*, 47 FAM. REL. 7, 9 (1998) (attributing negative parental reactions attributed to lack of exposure to homosexuality).

<sup>143</sup> See *supra* notes 18-25 and accompanying text; see also *infra* notes 145-149 and accompanying text.

<sup>144</sup> Robson, *supra* note 138, at 933-34.

<sup>145</sup> Even Savin-Williams, who is one of the more optimistic researchers studying queer youth, admits parental reaction to a child's disclosure of same-sex attraction may be very similar to that of Kubler-Ross's grief mourning progression, consisting of Shock (where "things are said . . . or done . . . that may forever impair the parent-child relationship"), Denial and Isolation (which "[m]ore commonly, however, . . . leads to anger and sometimes rage"), Anger (parents react with "rejection or physical abuse"), Bargaining ("[a]s parents move towards acceptance they bargain with the child to tell absolutely no one . . . and to never again discuss the issue"), Depression ("[t]his is the anger of stage two turned inward, a guilt parents feel for not recognizing their child's 'condition' early enough to change the outcome or for being the kind of parent that 'causes' a child to be gay or lesbian"), and finally Acceptance ("[a]cceptance is easier than fighting, although future battles are likely to emerge"). Savin-Williams & Dube, *supra* note 142, at 7-8. While this study indicates that not all parental reactions to their child's coming out may neatly fit in the grief mourning progression, it must be noted that none of the reactions described in the individual stages are anything that could be remotely described as positive.

<sup>146</sup> AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 16.

<sup>147</sup> *Id.*

<sup>148</sup> Elizabeth M. Saewyc, et al., *Hazards of Stigma: The Sexual and Physical Abuse of Gay, Lesbian, and Bisexual Adolescents in the United States and Canada*, 85 CHILD WELFARE 195, 200 (2006).

<sup>149</sup> See generally Ruthann Robson, *The Missing Word in Lawrence v. Texas*, [10 CARDOZO WOMEN'S L.J. 397, 398 n.9 \(2004\)](#) (noting studies indicating that three-fifths of reported assaults on queer youth occurred in the home); Colleen A. Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31, 45 (1996) (discussing parental violence against queer youth); AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 18 ("LGBT youth become an easy target for adult caretakers. According to one study, more than 30 percent of lesbian and gay people have suffered physical violence at the hands of a family member.").

<sup>150</sup> Arriola, *supra* note 149, at 439-42.

<sup>151</sup> Saewyc, *supra* note 148, at 198.

finding of child abuse. <sup>152</sup> The father attempted to justify his actions by arguing it was legitimate parental discipline intended to cure the child of "girlie" behavior and claiming he would be "embarrassed" if Shane were queer. <sup>153</sup> While the court in *In re Shane T.* found the father's actions abusive, another New York court found similar, if not quite as severe, parental behavior not "inimical to [the child's] physical or emotional wellbeing." <sup>154</sup> Neither of the children in these cases had acknowledged any queer identity and in at least one of the cases, the child adamantly denied the father's allegations. <sup>155</sup>

There is extensive overlap between parental and societal reactions to youth identified as queer by their sexuality and those who are stigmatized by their gender non-conformity. <sup>156</sup> Society often equates gender nonconformity with sexual orientation and uses gender nonconformity as a marker by which to target those thought to harbor same-sex attraction. However, the relatively new pathologizing of gender nonconformity in young children has created an especially high-risk environment for this segment of the queer child population, regardless of their actual sexuality.

**[\*1079]** Gender Identity Disorder (GID) was a previously unknown disorder placed into the American Psychiatric Association's (APA) Diagnostic and Statistical Manual when homosexuality was removed as a psychiatric disorder in 1980. <sup>157</sup> GID is described as a "strong and persistent cross-gender identification" accompanied by "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." <sup>158</sup> It was

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<sup>152</sup> In reaching this decision the court said:

Over the course of the last several years, Shane has been subjected to an unrelenting torrent of verbal abuse by his father directed at his sexual identity. Specifically, he has been regularly called a "fag", "faggot", and "queer". In desperation, the boy pleaded with his mother to intervene on his behalf and prevail upon his father to cease making these accusations. However, the mother's efforts were abortive, resulting only in a repetition of the taunts by the father with the added assertion that they were true.

Nor were these accusations limited to the home. On one particular occasion, the respondent father humiliated the boy by calling him a "fag" while they were shopping in a store.

[\*In re Shane T.\*, 453 N.Y.S.2d 590, 592 \(Fam. Ct. 1982\).](#)

<sup>153</sup> *Id.* at 493.

<sup>154</sup> [\*Catherine W. v. Robert F.\*, 455 N.Y.S.2d 519, 520 \(Fam. Ct. 1982\).](#) The father in *Catherine W.* also admitted to calling the child "faggot" and "queer" but at issue was whether or not the father would have to pay child support based on the child's refusal to visit because of the harassment. The court held that the behavior of the father did not rise to the level of harm necessary to require him to continue to pay child support when the child refused visitation. While the court acknowledged, "[u]ndoubtedly the remarks should never have been made, particularly to a boy of Robbie's sensitivity," the judge held that "[g]iving Robbie the unilateral power [to cut off visitation] for all time strikes the court as beyond his best interests." [Id. at 521-22.](#)

<sup>155</sup> [\*In re Shane T.\*, 453 N.Y.S.2d at 593.](#)

<sup>156</sup> Ryan, *supra* note 121, at 140 (discussing children who later identify as lesbian or gay describing gender atypical preferences in childhood and explaining that transgender individuals may be heterosexual, homosexual, or bisexual); Fedders, *supra* note 129, at 779 (use of the term queer to be inclusive enough to overcome theoretical problems surrounding labels of lesbian, gay, bisexual, and transgender).

<sup>157</sup> Valentine, *supra* note 1, at 463; Patience W. Crozier, *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth*, [21 B.C. THIRD WORLD L.J. 123, 134 \(2001\)](#); PHYLLIS BURKE, GENDER SHOCK 60-66 (1996).

<sup>158</sup> AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-33 (4th ed. 1994). The "distress" necessary for a diagnosis of GID in children can be as amorphous as stating their unhappiness with their assigned sex, or failure to develop age appropriate peer relationships because of peer teasing and pressure to dress in a manner that conforms to their sex. *Id.* at 534. Such elastic diagnostic criteria also pathologizes the victim's feelings rather than the tormentor's attacks and creates a diagnosis ripe for misuse.

listed as a disorder even though at the time the APA noted that "some of these children, particularly the girls, show no other sign of psychopathology."<sup>159</sup> The listing and treatment of GID was justified in the name of preventing transexualism though activists, and scholars believe it is often enlisted as a cover for treatment of "future homosexuality."<sup>160</sup> Psychiatrists involved in developing and documenting the disorder freely admit that parents seek treatment for GID "because they don't want their kid to be gay."<sup>161</sup>

A GID diagnosis has been used to support the self-chosen treatment of some transgender individuals.<sup>162</sup> However, the diagnosis is a two-edged sword that more often than not provides medical support for the involuntary treatment and commitment of children, frequently with horrifying results.<sup>163</sup> [\*1080] This diagnosis often stigmatizes normal childhood activity by creating and pathologizing an entire category of children based on little more than beliefs about normative gender behavior.<sup>164</sup> It also provides support for another diagnosis to support institutionalizing minors, a diagnosis specifically targeting queer kids.

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<sup>159</sup> Gerald P. Mallon & Teresa DeCrescenzo, *Transgender Children and Youth: A Child Welfare Perspective*, 85 CHILD WELFARE 215, 220 (2006).

<sup>160</sup> *Id.*; see also Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 104-06 (2002). Hong argues for ending the childhood diagnosis of GID because although most medical professionals only administer treatment of gender identity disorder to adults, non-mainstream doctors still rely upon the diagnosis to prevent a child from growing up gay or transsexual. Parents and professionals have administered aversion therapy and behavior modification to effeminate boys and masculine girls for the purpose of keeping girls feminine and boys masculine. Other queer "[a]ctivists are concerned that in practice, the removal of homosexuality from the DSM is disingenuous since a newly found disorder will be used to cure children of 'gender non-conformity' through the same discredited techniques that were used to cure gay adults of their 'sexual orientation.'" *Id. at 104.*

<sup>161</sup> Fedders, *supra* note 117, at 786.

<sup>162</sup> GID is also a diagnosis that has been used successfully to support a minor's right to gender nonconformity. See *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003); *In re Alex*, 31 Fam. L.R. 503 (Fam. Ct. Austl. 2004). See also Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 24 (2003) (discussing the dangerous implications of using GID claims to support disability discrimination allegations).

<sup>163</sup> As Karolyn Ann Hicks described it:

Those who have gone through "retive" therapy and have been involved in "ex-gay" ministries speak of the medically unsound methods employed by these therapists and organizations, such as behavioral therapy, electrical shock therapy, chemical aversive therapy, drug and hormone therapy, surgery, and psychotherapy. Other accounts are similar and include homophobic counseling, religious propaganda, isolation, unnecessary medication (including hormone treatment), subliminal therapies designed to inculcate "feminine" or "masculine" behavior, and "covert desensitization" therapies that teach a young person to associate homosexual feelings with disgusting images. These forms of "treatment" frequently result in nervous breakdowns and feelings of guilt; some patients have witnessed others in their programs commit suicide and mutilate their genitals. Many "retive" therapy tactics are likely to cause mental breakdowns in otherwise healthy gay, lesbian, bisexual, and transgender persons.

Karolyn Ann Hicks, *"Retive" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse*, 49 AM. U.L. REV. 505, 515 (1999).

<sup>164</sup> See Spade, *supra* note 162; Brown, *supra* note 128; Julia Reischel, *See Tom Be Jane: The Country's Youngest Transgender Child is Ready for School. But is School Ready for Her?*, VILLAGE VOICE, May 30 2006, available at <http://www.villagevoice.com/news/0623,reischel,73391,6.html>. The articles by Brown and Reischel discuss the deep and often vehement divide between educational and mental health professionals supportive of gender variance in children and those who are strongly antagonistic towards it and go so far as to claim parents who support gender variance in their children could be considered abusive or neglectful.

There has been a dramatic increase in children being placed into residential treatment facilities and institutions by their parents over the past quarter-century.<sup>165</sup> While many of these facilities may be considered well operated, others are "overcrowded and understaffed and . . . seem[] to place the imperatives of the placement agency or operating corporate entity (or both) over the clinical and psychosocial needs of the youth residing within them."<sup>166</sup> The placements most often linked to mistreatment, abuse, and even deaths of minors are privately run programs not licensed by the states or other organizations.<sup>167</sup> Most of the children placed in these facilities are there not for serious psychiatric issues, but for unruly and ungovernable [\*1081] behavior.<sup>168</sup> Often there is an unusually high correlation between the insurance coverage for the individual child and the length of time the residential treatment facilities deem it is necessary that the child remain a patient.<sup>169</sup> Marketing plays a large role in ensuring a ready supply of anxious parents willing to commit their children. Private psychiatric facilities attempt to frighten parents with inappropriate and misleading billboard, magazine, and television ads.<sup>170</sup>

In a fairly recent trend, conservative Christian groups are actively marketing services to the parents of queer youth. The religious right has embraced retive therapy, a treatment aimed at "curing" homosexuality or preventing "pre-homosexuality."<sup>171</sup> Scholars attribute much of the depression, homelessness, conflict, and suicide afflicting queer youth to being raised in homophobic families that equate heterosexuality with normalcy and homosexuality with immorality and sin.<sup>172</sup> These are the families susceptible to the so-called "ex-gay movement,"<sup>173</sup> especially

<sup>165</sup> Alexander V. Tsesis, *Protecting Children Against Unnecessary Institutionalization*, [39 S. TEX. L. REV. 995, 1005 \(1998\)](#) (noting that children with relatively mild behavior disorders are routinely institutionalized); Lois A. Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, [40 STAN. L. REV. 773 \(1988\)](#) (admission rates increasing four-fold between 1980 and 1984 alone).

<sup>166</sup> Andres J. Pumariega, *Residential Treatment for Youth: Introduction and a Cautionary Tale*, 76 AM. J. ORTHOPSYCHIATRY 281 (2006).

<sup>167</sup> Robert M. Freidman et al., *Unlicensed Residential Programs: The Next Challenge in Protecting Youth*, 76 AM. J. ORTHOPSYCHIATRY 295 (2006).

<sup>168</sup> Tsesis, *supra* note 165, at 1005.

<sup>169</sup> *Id.* at 1009-10. This is not lost on the youths themselves who recognize that insurance coverage is often what determines how long they will remain in a residential treatment program. One youth, when asked how he got out of placement seeking to cure his homosexuality responded, "[d]uh, my insurance ran out. How else?" Beth E. Molnar, *Juveniles and Psychiatric Institutionalization: Toward a Better Due Process and Treatment Review in the United States*, 2 HEALTH & HUM. RTS. 98, 104-05 (1997).

<sup>170</sup> See Tsesis, *supra* note 165, at 1013-14 (describing advertisements and direct marketing aimed at worried parents targeting children having premarital sex or scholastic trouble, but also directed at children who are "irresponsible, rebellious, or . . . [r]unning with the wrong crowd").

<sup>171</sup> For an excellent exploration of retive therapy (also known as "conversion therapy") and potential arguments for holding conversion therapist's liable for their actions, see Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, [8 B.U. PUB. INT. L.J. 219, 220-21 \(1999\)](#).

<sup>172</sup> See Arriola, *supra* note 150, at 439-42.

<sup>173</sup> The ex-gay movement is based on the premise that with enough willpower, religiosity, and treatment someone who is gay can change their sexual orientation. The movement cites a series of outcome determinative social science studies that scientists have continually debunked by "demonstrating that they are based on unsound scientific principles and conducted using faulty research methods." Justin T. Wilson, *Preservationism, or the Elephant in the Room: How Opponents of Same-Sex Marriage Deceive us into Establishing Religion*, [14 DUKE J. GENDER L. & POL'Y 561, 621 \(2007\)](#). Wilson states:

Perhaps calling these pieces "studies" gives them more credit than they merit--most of the literature claiming that homosexuality is a chosen, mutable condition comes in the form of opinion pieces. For example, Exodus International--one of the earliest and most famous of the Christianity-based conversion-therapy groups--has a series of articles posted on its

when it is supported [\*1082] and sanctioned by well-known religious groups such as Focus on the Family,<sup>174</sup> the Christian Coalition of America,<sup>175</sup> and the Family Research Council.<sup>176</sup>

Although retive therapy has long been repudiated by all major mental health, psychiatric, and psychological associations,<sup>177</sup> it has been embraced as a panacea by the ex-gay movement and their supporters.<sup>178</sup> Retive therapy is sold as treatment not just for homosexual teens and adults, but as treatment for "pre-homosexuality." With frightening warnings such as, "[i]f your child has already reached puberty, change is difficult," Focus on the Family urges that no age is too young for a child to receive conversion therapy.<sup>179</sup> Parents are urged to seek professional help for children as young as five<sup>180</sup> who present signs of gender confusion, an alleged indication of "pre-homosexuality." According to Focus on the Family, signs of gender confusion for boys include "a susceptibility to be bullied by other boys, who may tease them unmercifully and call them 'queer,' 'fag,' and 'gay,'" as well as "[a] tendency to walk, talk, dress and even think effeminately."<sup>181</sup> Proponents of retive therapy and the ex-gay movement are actively targeting parents and are further vowing to carry the fight from the private sphere into the public schools.<sup>182</sup>

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website that constitute nothing more than opinions written by various proponents of the "ex-gay" movement; many of these authors have chosen to remain anonymous, and most of the articles are uncited and have not been peer-reviewed. Moreover, the religious content of these "studies" is beyond dispute.

*Id.* at 621 n.365.

<sup>174</sup> See Focus on the Family, [www.focusonthefamily.com](http://www.focusonthefamily.com).

<sup>175</sup> See Christian Coalition of America, <http://www.cc.org>.

<sup>176</sup> See Family Research Council, <http://www.frc.org>.

<sup>177</sup> The APA states that the "most important fact" about retive therapy, also known as conversion therapy, is that it is "based on an understanding of homosexuality that has been rejected by all the major health and mental health professions." AM. PSYCHOL. ASS'N, JUST THE FACTS ABOUT SEXUAL ORIENTATION & YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS AND SCHOOL PERSONNEL (2008), available at <http://www.apa.org/pi/lgbc/publications/justthefacts.pdf>.

<sup>178</sup> See, e.g., Mark Benjamin, *Turning Off Gays*, SALON, July 18, 2005, <http://dir.salon.com/story/news/feature/2005/07/18/ungay/index.html>; YOUTH IN THE CROSSHAIRS, *supra* note 21, at 16.

<sup>179</sup> YOUTH IN THE CROSSHAIRS, *supra* note 21, at 16.

<sup>180</sup> *Id.* at 16-19.

<sup>181</sup> *Id.* at 16.

<sup>182</sup> See Sandra G. Boodman, *Vowing to Set the World Straight*, WASH. POST, Aug. 16, 2005, at HE01 ("Parents and Friends of Ex-Gays and Gays (PFOX), a national group in Fairfax County, have sponsored highway billboards in Rockville and Richmond that state 'Ex-Gays Prove That Change Is Possible.'"); see also YOUTH IN THE CROSSHAIRS, *supra* note 21, at 21 ("We believe that this focus of programming and resources targeting youth and parents, which we are calling the 'third wave of ex-gay activism,' represents a coordinated strategy that will, in the very least, lead to more youth [forced by their parents into ex-gay programs]."). According to the cultural director of the Family Research Council (FRC), the organization:

[F]or the last five years has been openly and enthusiastically aiding the ex-gay movement. Initially here in Washington, DC, through Anthony Falzarano's group, Transformation Ex-Gay Ministries, we've given grants to them and publishing assistance and we have helped publicize their availability. I will do my best to speak out on their behalf. We will provide financial aid. We are doing publications and videos to show the importance of ex-gay ministry. And we are going to make a major effort in the schools to turn back the homosexual propoganda that students are getting and show them that that's only one side of the story.

[\*1083] Negative parental reactions to a child's sexual orientation or gender nonconformity can end disastrously for a child. Parents are often seen as being uniquely qualified to make decisions on behalf of their minor children, and thus, attorneys representing these children are encouraged not to interfere with the parental decision making process.<sup>183</sup> However, the danger in which a parent's homophobia and heterosexism can place a child is severe and well documented.<sup>184</sup> Attorneys representing queer children must be aware of the dangers they face and work to protect their clients from parental bias and anger.

### C. Queer in School

The danger faced by queer children is not confined to the privacy of their homes. In the "safe haven" of school, queer youth have been bullied, spat on, laughed at, ostracized, beaten, and even murdered by their peers.<sup>185</sup> While murder is relatively rare,<sup>186</sup> assaults and bodily injuries are not.<sup>187</sup> Nowhere has the state's disinterest in protecting queer youth been more evident than in the education systems. This is not to say that other areas, such as the child welfare system, are less dangerous to queer kids, but in part because of the actions of queer youth themselves, the hostility and abuse they face in school has been brought to the attention of society at large. Queer youth have organized and sued for the right to establish queer [\*1084] friendly school groups<sup>188</sup> and sought legal redress for the harm they have endured.<sup>189</sup> Unfortunately, as the recent in-school murder of Larry King<sup>190</sup> indicates, safety at school for queer youth cannot be taken for granted.

There has been a concerted effort to remedy the treatment queer youth face when they enter the public school system with numerous studies, reports, and articles attempting to document and address the problems.<sup>191</sup> As early as 1986, Donna Dennis and Ruth Harlow collected some of the anecdotal evidence indicating that queer

SURINA KHAN, *CALCULATED COMPASSION: HOW THE EX-GAY MOVEMENT SERVES THE RIGHT'S ATTACK ON DEMOCRACY* 11 n.32 (1998) (quoting Interview with Robert Knight, Cultural Dir., Family Research Counsel (FRC) (May 14, 1998), available at <http://www.thetaskforce.org/downloads/reports/reports/CalculatedCompassion.pdf>).

<sup>183</sup> Jonathan O. Hafen, *Children's Rights and Legal Representation--The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 427 (1993) (asserting that "deserving parents are uniquely qualified, and have the constitutional right to make decisions on behalf of their minor child").

<sup>184</sup> See *supra* Section II.B. In addition, attempts to force a child into retive therapy have been described as a form of child abuse. See Hicks, *supra* note 164, at 505.

<sup>185</sup> HATRED IN THE HALLWAYS, *supra* note 19, at 58; Ramin Setoodeh, *Young, Gay and Murdered*, NEWSWEEK, July 28, **2008**, at 41.

<sup>186</sup> See THE GENDER PUBLIC ADVOCACY COALITION, *50 UNDER 30: MASCULINITY AND THE WAR ON AMERICA'S YOUTH* (2005) (documenting fifty murders of transgender or gender non-conforming youth, sixteen of whom were teenagers), available at <http://www.gpac.org/50under30/50u30.pdf>.

<sup>187</sup> See *Nabozny v. Podlesny*, 92 F.3d 446, 451-53 (7th Cir. 1996) (documenting verbal and physical assaults on a gay student); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1069-70 (D. Nev. 2001) (documenting verbal and physical assaults on a gay student); see also HATRED IN THE HALLWAYS, *supra* note 19.

<sup>188</sup> See Valentine, *supra* note 1, at 475.

<sup>189</sup> See, e.g., *Nabozny*, 92 F.3d at 446 (alleging failure of school officials to protect plaintiff from harassment because of his sexual orientation under Equal Protection Clause).

<sup>190</sup> See Setoodeh, *supra* note 185, at 41.

<sup>191</sup> See Valentine, *supra* note 1, at 474-90 (documenting the large number of studies and articles discussing queer youth in educational settings).



youth were being systematically harassed and harmed in the school system.<sup>192</sup> In 1995, Jaime Nabozny sued a local school board and individual administrators for the anti-gay violence inflicted upon him by fellow students.<sup>193</sup> His claim against local school officials and the school board was based on their extensive knowledge of the harassment directed at him and their failure to investigate and take any action to protect him.<sup>194</sup> Shortly after a jury found intentional discrimination on the part of individual school administrators, the matter settled for approximately one million dollars.<sup>195</sup> This highly publicized case led some schools to recognize the issue of anti-queer harassment and to adopt anti-bully policies aimed at protecting queer students.<sup>196</sup>

Also in 1995, what is now known as the Gay Lesbian and Straight Education Network (GLSEN) became a national organization whose objective was to advocate for safer schools for students perceived to be gay, lesbian, bisexual, or transgender.<sup>197</sup> Since 1999, GLSEN has regularly surveyed students on the violence, harassment, and bullying they face in American schools.<sup>198</sup> GLSEN's findings and the findings of others<sup>199</sup> paint a picture [\*\*\*1085] of an educational system where queer kids still feel threatened and unsafe. Over a third of students report experiences of physical harassment and two-thirds report experiences of sexual harassment during school.<sup>200</sup>

While there has been some progress in reducing anti-queer peer harassment, the problem has not disappeared. In addition, it has often taken a significant amount of litigation to allow the formation of Gay/Straight Alliances (GSAs) or to establish protocols to reduce anti-queer violence in schools.<sup>201</sup> Harassment and violence against queer students continues, and school administrators continue to blame queer youth for many of the problems they face; in

<sup>192</sup> Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446, 448-53 (1986).

<sup>193</sup> Nabozny was open about his sexual orientation. [Nabozny, 92 F.3d at 451-52](#). The harassment began as name calling but soon progressed to a mock rape in middle school, and assault in high school where he was tripped, knocked down, urinated on, had bolts thrown at him, and finally beaten to the point that he had internal bleeding. *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> See *Gay Ashland Student Awarded Nearly \$ 1 Million*, CAP. TIMES (Madison, Wis.), Nov. 21, 1996, at 7A.

<sup>196</sup> Jeffrey I. Bedell, *Personal Liability of School Officials Under § 1983 Who Ignore Peer Harassment of Gay Students*, 2003 U. ILL. L. REV. 829, 857.

<sup>197</sup> History of GLSEN, available at <http://www.glsen.org/cgi-bin/iowa/all/about/history/index.html>.

<sup>198</sup> GAY, LESBIAN & STRAIGHT EDUCATION NETWORK (GLSEN), THE 2005 NATIONAL SCHOOL CLIMATE SURVEY, available at [http://www.glsen.org/binarydata/GLSEN\\_ATTACHMENTS/file/585-1.pdf](http://www.glsen.org/binarydata/GLSEN_ATTACHMENTS/file/585-1.pdf) [hereinafter GLSEN, 2005]. GLSEN has published this survey, which documents the educational experiences of students who self-identify as queer, every other year since 1999. Each survey provides a wealth of statistical information and is often cited in articles addressing the need for education reforms to curtail in-school violence, harassment, and bullying directed at queer kids.

<sup>199</sup> See, e.g., CAL. SAFE SCHOOLS COALITION & 4-H CENTER FOR YOUTH DEV., UNIV. OF CAL., DAVIS, SAFE PLACE TO LEARN: CONSEQUENCES OF HARASSMENT BASED ON ACTUAL OR PERCEIVED SEXUAL ORIENTATION AND GENDER NON-CONFORMITY AND STEPS FOR MAKING SCHOOLS SAFER 6-23 (2004), available at <http://www.casafeschools.org/SafePlacetoLearnLow.pdf>; AM. ASS'N OF UNIV. WOMEN, HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL (2001), available at <http://www.aauw.org/research/upload/hostilehallways.pdf>; HATRED IN THE HALLWAYS, *supra* note 19.

<sup>200</sup> GLSEN, 2005, *supra* note 198, at xiii.

<sup>201</sup> See Carolyn Pratt, *Protecting the Marketplace of Ideas in the Classroom: Why the Equal Access Act and the First Amendment Require the Recognition of Gay/Straight Alliances in America's Public Schools*, 5 FIRST AMENDMENT L. REV. 370, 371-72 (2007); Katie Feiock, *The State to the Rescue: Using State Statutes to Protect Children from Peer Harassment in School*, 35 COLUM. J.L. & SOC. PROBS. 317, 318 (2002).

some cases they attempt to force queer students back into the closet.<sup>202</sup> Given the treatment many queer youth receive at school, combined with parental animosity and anger, it is unsurprising that queer youth are over-represented in the juvenile justice system.<sup>203</sup>

#### D. Routes to Court

Queer children may become involved in the legal system in a variety of ways. They may be the subject of a custody, adoption, or abuse and neglect [\*1086] proceeding, or they may be the targets of the state in juvenile delinquency or PINS cases. Any one of these proceedings has the ability to dramatically alter a queer child's life for the worse, including custody and visitation matters.

While there are no statistics suggesting that queer youth are more often the subjects of custody disputes, sexuality and gender-nonconformity can become an issue during custody litigation. Parents often have strong reactions to a child's queerness,<sup>204</sup> and those reactions are exacerbated in custody and visitation disputes. Parental sexual orientation and gender-nonconformity have long been used as weapons in custody proceedings.<sup>205</sup> It is not surprising that a child's sexual orientation or gender non-conformity would likewise become an issue. A parent who is supportive of his or her child's sexual or gender identity risks a custody battle if the other parent disagrees.<sup>206</sup>

In 2007, the Ohio Court of Appeals affirmed a change of custody of two children based on the mother's acceptance and support of the older child's gender nonconformity.<sup>207</sup> The father had admitted to knowing [\*1087] about the

<sup>202</sup> See [Henkle v. Gregory, 150 F. Supp. 2d 1067, 1070, 1076 \(D. Nev. 2001\)](#) (upholding a First Amendment claim against a principal who told a student to keep quiet about his sexual orientation and "stop acting like a fag"); Complaint at 2, *Ramirez v. L.A. Unified Sch. Dist.*, available at [http://www.nclrights.org/site/PageServer?pagename=issue\\_caseDocket\\_ramirez\\_v\\_laUSD](http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_ramirez_v_laUSD) (C.D. Cal. Oct. 28, 2004) (alleging anti-gay verbal harassment by school administrators and students and physical harassment by students). See also Barbara Osborne, "No Drinking, No Drugs, No Lesbians": *Sexual Orientation Discrimination in Intercollegiate Athletics*, [17 MARQ. SPORTS L. REV. 481, 481-86 \(2007\)](#) (discussing treatment of lesbian athletes in college situations); Setoodeh, *supra* note 185, at 46 (stating that school officials attitudes toward the child who murdered gender non-conforming student "not unsympathetic").

<sup>203</sup> YOUTH IN THE MARGINS, *supra* note 23, at 11 (LGBT youth make up a disproportionate part of the foster care pool).

<sup>204</sup> See *supra* Section II.B.

<sup>205</sup> See generally Robson, *supra* note 138, at 918-33 (discussing the effect of parental sexuality in custody cases as courts use a variety of arguments to hold that queer sexuality is harmful to children); Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, [71 IND. L.J. 623, 625 \(1996\)](#) (stating that although courts have been increasingly unwilling to adopt rules explicitly penalizing queer parents, lesbian and gay parents continue to routinely lose custody cases because of their sexuality).

<sup>206</sup> Amanda Kennedy, *Because We Say So: The Unfortunate Denial of Transgender Minors Regarding Transition*, [19 HASTINGS WOMEN'S L.J. 281, 289-90 \(2008\)](#). Cf. Nancy D. Polikoff, *Resisting "Don't Ask, Don't Tell" in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth*, [48 HASTINGS L.J. 1183 \(1997\)](#). As Polikoff recounts:

The first gay family law case I ever litigated was in 1976. It was a case in which a gay teenager had been kicked out of his home by his parents, after which he was placed by the Montgomery County, Maryland social services agency with an adult gay man as a foster parent. The teenager's parents opposed the placement and asked the judge to remove him. Mind you, they didn't want him to come home. They just didn't want him in a home with an adult gay man.

[Id. at 1183-84.](#)

<sup>207</sup> *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599 (Ohio App. Mar. 23, 2007) *appeal denied*, [873 N.E.2d 1315 \(Ohio 2007\)](#) (unpublished table decision). The decision seemed to turn on the extensive expert testimony of GID and its treatment. However, while not rejecting the possibility that the son fit the DSM-IV definition of GID, the trial court faulted the mother for "clouding the issue of what [the boy's] feelings would have been at this point had Mother been more supportive of [his] masculine identity or

child's feelings prior to the divorce and had very little contact with either child for three years after the divorce was finalized.<sup>208</sup> However, upon learning that the mother was going to allow the eldest child to enroll in school as a girl, the father denied his son was transgendered and successfully petitioned for a change of custody.<sup>209</sup> Along with the change in custody, the trial court ordered that the child was "not to be encouraged or permitted to wear girl's clothes. He was not permitted to go by a girl's name or be referred to as 'she' or 'her.'" <sup>210</sup> The court also ordered that the child was not to be permitted to "attend transgender support groups and was to become 'disassociated with that lifestyle,' absent agreement of both parties or further order of the court."<sup>211</sup>

A child's sexual or gender identity can also be the impetus for the state to charge the parents with abuse and neglect. In 2000, an Ohio family acquiesced to their son's longstanding request to be viewed as a girl.<sup>212</sup> With the support of a transgender support group, the parents hired an attorney to change his name and attempted to register him in school as a female child named "Aurora."<sup>213</sup> This attempt to register a biological male child as a female student created an uproar in the town, which brought the child to the attention of the child welfare authorities.<sup>214</sup> The child was subsequently removed from the parents' custody.<sup>215</sup> A magistrate, in upholding the removal, cited "reasonable grounds to believe that the child is suffering from illness . . . and is not receiving proper care."<sup>216</sup>

Even when they remain at home, conflict with parents can bring queer youth into the court system. Like other youth, queer kids enter the juvenile justice system because of truancy or behavioral problems that may stem from their isolation, depression, and victimization, which in turn is often caused or exacerbated by parental, peer, or societal rejection. Parents of queer youth also attempt to use the justice system to keep their children from pursuing same-sex relationships.<sup>217</sup> However, families generally ask [\*1088] the court system to become involved for

even remained neutral." The court concluded that two of the doctors found the boy to be suffering from GID, and two did not. None of the doctors recommended full-time "real-life experience," at least not without further study, and none of the doctors recommended hormonal treatment, at least not in the near future and not without further study. The court believed that [the mother] was determined to carry out both types of treatment, despite the conclusions of the medical experts. *Id.* at \*5.

<sup>208</sup> *Id.* at \*2-\*3.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at \*5.

<sup>211</sup> *Id.*

<sup>212</sup> John Cloud, *His Name is Aurora: When a Boy is Raised as a Girl, an Ohio Suburb is Suddenly in the Throes of Transgender Politics*, TIME, Sept. 25, 2000, at 90.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See *id.*; see also Noa Ben-Asher, *Paradoxes of Health and Equality: When a Boy Becomes a Girl*, [16 YALE J.L. & FEMINISM 275, 276 \(2004\)](#).

<sup>216</sup> Cloud, *supra* note 212, at 90.

<sup>217</sup> See [In re Lori M., 496 N.Y.S.2d 940, 940 \(Fam. Ct. 1985\)](#) (mother attempted to have her daughter adjudged a "person in need of supervision" because she was in a lesbian relationship); *Acevedo v. Williams ex rel Jaquita Wiggins*, No. 1D08-0370 (Fla. Dist. Ct. App. June 20, **2008**), available at <http://opinions.1dca.org/written/opinions2008/06-30-08/>. In *Acevedo*, the mother argued and the trial court agreed that if the eighteen-year-old defendant had been intimate with the seventeen-year-old juvenile, the defendant had committed sexual battery as a matter of law. *Id.* at 1-2. The trial court issued an order of protection forbidding contact between the two lovers. *Id.* at 3. The appellate court reversed stating that the record revealed that the younger woman "knowingly and voluntarily consented to the relationship." *Id.* at 5. According to the National Center for Lesbian Rights, who filed the appeal on behalf of the defendant, the mother of the seventeen-year-old sought the restraining order because she objected

"incorrigible" or disobedient behavior even when the underlying issue is the child's sexual orientation or gender non-conformity. <sup>218</sup>

It is not hard to see why queer youth enter the juvenile justice system in disproportionately high numbers compared to their straight peers. <sup>219</sup> Coming out to parents can create angry and violent responses, <sup>220</sup> which force queer youth into homelessness. <sup>221</sup> Even if one or both parents are supportive, the child still risks being removed from a supportive and loving home solely because of his or her perceived sexual or gender identity. When faced with an unsupportive or violent home life, queer children often take to the street. <sup>222</sup>

Organizations working with runaways estimate between twenty and forty-percent of youth who become homeless each year are queer. <sup>223</sup> The numbers are higher for those who are "street involved," as opposed to being truly homeless. <sup>224</sup> Once on the street, queer youth come to the attention of the authorities in ways that their straight counterparts do not. Scholars have begun to document a subtle change in the way in which youth come to the [\*1089] attention of the police and argue that the state is now actively punishing gender transgressions. <sup>225</sup> Authorities often focus on the violent or masculine behavior of girls <sup>226</sup> and the sexualized or feminine behavior of boys <sup>227</sup> to the detriment of the gender nonconforming individual. <sup>228</sup> Transgender advocates argue that the

to her daughter's lesbian relationship. See, National Center for Lesbian Rights, Case Docket for D.A. v. J.W., [http://www.nclrights.org/site/PageServer?pagename=issue\\_caseDocket\\_da\\_v\\_jw](http://www.nclrights.org/site/PageServer?pagename=issue_caseDocket_da_v_jw) (last visited Mar. 3, 2009).

<sup>218</sup> JUSTICE FOR ALL?, *supra* note 16, at 17.

<sup>219</sup> Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice System Safe for All Youth Through Litigation, Advocacy, and Education*, [79 TEMP. L. REV. 415, 420 \(2006\)](#); YOUTH IN THE MARGINS, *supra* note 23, at 11; JUSTICE FOR ALL?, *supra* note 16, at 6.

<sup>220</sup> Studies have shown that "more than 30 percent of lesbian and gay people have suffered physical violence at the hands of a family member." AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 18; YOUTH IN THE MARGINS, *supra* note 23, at 11.

<sup>221</sup> AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 16 (2006); Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist*, [8 YALE J.L. & FEMINISM 269, 270 \(1996\)](#).

<sup>222</sup> SHANNAN WILBER ET AL., CWLA BEST PRACTICES GUIDELINES: SERVING LGBT YOUTH IN OUT OF HOME CARE 4-5 (2006) (noting high percentage of LGBT youth prefer the street because of violence at home or in placement); AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 2 (noting that "famil[y] conflict over . . . sexual orientation or gender identity is a significant factor" in homelessness of queer youth).

<sup>223</sup> AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 13; YOUTH IN THE MARGINS, *supra* note 23, at 11.

<sup>224</sup> AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 13 n.60 (defining "street involved youth" as those who are heavily involved and associated with the homeless youth community even though they have a home to which they could return to at night).

<sup>225</sup> See, e.g., Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, [14 BERKELEY WOMEN'S L.J. 40, 47-52 \(1999\)](#); Crozier, *supra* note 157, at 133.

<sup>226</sup> Schaffner, *supra* note 227, at 51-52.

<sup>227</sup> See Maribel Morey, *The Civil Commitment of State Dependent Minors: Resonating Discourses that Leave Her Heterosexuality and His Homosexuality Vulnerable to Scrutiny*, [81 N.Y.U. L. Rev. 2129, 2150 \(2006\)](#); see also *State v. Limon*, [122 P.3d 22, 25, 40-41 \(Kan. 2005\)](#) (holding Kansas's three-year attempt to disproportionately punish consensual homosexual sex unconstitutional). Persecution of Limon continued even after the Kansas Supreme Court invalidated the state law under which he was charged. *State v. Limon*, No. 96,013, 2007 WL 1042154, at \*1 (Kan. Ct. App. Apr. 6, 2007). After the decision, Limon settled the case by pleading to one count of unlawful voluntary sexual relations. *Id.* at \*2. The state prosecutor attempted, through an upward departure of the sentencing guidelines, to triple Limon's post-release supervision time. *Id.* at \*4. The State argued that because the facts of the case could support a charge of felony sodomy, Limon should be treated as a sex offender.

quality of specific police interactions with transgender adults directly reflects the degree of gender nonconformity presented by the gender variant individual.<sup>229</sup> Gender nonconforming youth often end up on the street and are targeted by the police in a similar manner.<sup>230</sup> Transgender [\*1090] youth also face the additional danger of illicit purchase and use of hormones in an attempt to have their bodies better conform to their gender identity.<sup>231</sup>

The courtroom is as fraught for gender nonconforming youth as are encounters with police. Juvenile court judges tend to perpetuate traditional gender norms, especially those concerning the sexual behavior of the youth that appear before them.<sup>232</sup> Some advocates argue that the judicial system often "reserve[s its] harshest judgment for the girls who stray from the feminine ideal."<sup>233</sup> Others suggest juvenile judges are equally hostile no matter the gender to which the child is failing to conform.<sup>234</sup>

Many circumstances funnel queer youth into the juvenile justice system where they are subsequently placed into state sponsored care. Once in the system, it is extremely difficult for any child, even those with supportive parents,

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The trial court agreed and Limon appealed. *Id.* The Appellate Court vacated the sentence, scolded both the lower court and the prosecutor, and stated:

In arguing that Limon's crime was identical to or inclusive of criminal sodomy, the State disregards not only the clear statutory language focusing on the crime of conviction, but it disregards the reversal of Limon's prior conviction. The State may not attempt to achieve indirectly what it was prohibited from doing directly.

*Id.* at \*7.

<sup>228</sup> An example of this is the treatment Teena Brandon received at the hands of law enforcement officers when he attempted to report his rape and threats to his life by the rapists, one of which was later convicted of his murder. Brandon *ex rel. Brandon v. County of Richardson*, 624 N.W.2d 604, 614-15 (Neb. 2001). Brandon was transgendered and his life and murder were the basis for the movie "Boys Don't Cry." Tseming Yang, *Choice and Fraud in Racial Identification: The Dilemma of Policing Race in Affirmative Action, the Census, and a Color-Blind Society*, 11 MICH. J. RACE & L. 369, 370 n.18 (2006). An appeals court found the sheriff's crude and dehumanizing treatment of Brandon (evidenced in part by his discriminatory remarks concerning his gender non-conformity) was conduct that was, as a matter of law, "extreme and outrageous, beyond all possible bounds of decency, and is to be regarded as atrocious and utterly intolerable in a civilized community." *Brandon*, 624 N.W.2d at 624.

<sup>229</sup> AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDERED PEOPLE IN THE U.S. 13 (2005), available at [www.amnestyusa.org/outfront/stonewalled/report.pdf](http://www.amnestyusa.org/outfront/stonewalled/report.pdf).

<sup>230</sup> Jody Marksamer, *And By the Way, Do you Know He Thinks He's a Girl?, The Failures of Law, Policy, and Legal Representation for Transgender Youth in Juvenile Delinquency Courts*, 5 SEXUALITY RES. & SOC. POLICY 72, 73-74 (2008) [hereinafter Marksamer, *And By the Way*].

<sup>231</sup> AN EPIDEMIC OF HOMELESSNESS, *supra* note 18, at 61.

<sup>232</sup> Soma R. Kedia, *Creating an Adolescent Criminal Class: Juvenile Court Jurisdiction Over Status Offenders*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 543, 552 (2007). While Kedia is specifically discussing the enforcement of female gender norms, these are heterosexist norms that are as detrimental to queer youth as they are to females appearing in juvenile court, regardless of their sexual orientation.

<sup>233</sup> Kim Taylor-Thompson, *Girl Talk--Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1138-39 (2006).

<sup>234</sup> See OUT OF THE MARGINS, *supra* note 23, at 95 (quoting a transgendered youth who explained, "[t]here was follow-up after I . . . came out as queer within the court system. The follow up was the judge sentencing me to 'gender therapy'"); accord Sonja Shield, *The Doctor Won't See You Now: Rights of Transgender Adolescents to Sex Reassignment Treatment*, 31 N.Y.U. REV. L. & SOC. CHANGE 361, 432 (2007) ("[J]udges may be at best unknowledgeable and at worst hostile to the needs of transgender youth."); Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2544 (1994) (stating that courts often reference social and community norms that simply reinforce and legitimize gender stereotypes).

to return home. <sup>235</sup> Without parental support, state custody becomes the default placement solution. <sup>236</sup> For queer youth, their sexual orientation or gender nonconformity increases the likelihood that they will receive an extended stay in state custody and that they will be harmed while there. <sup>237</sup>

#### [\*1091] E. Queer in State Custody

After a child is removed from her home by the legal system, she becomes a ward of the state and may be placed in a foster home, a group home, or a secure detention facility for her own safety, protection, and rehabilitation. <sup>238</sup> While each of these is a different type of placement, they are all part of the state-administered child welfare system, and each is inherently dangerous for queer youth--especially youth who are perceived as being lesbian, gay, bisexual, transgendered, or gender nonconforming. <sup>239</sup> Not surprisingly, one study "indicates that 78% percent of lesbian, gay, bisexual, transgender, questioning, or intersex . . . youth were removed or ran away from their placements as a result of the hostility toward their sexuality, gender identity, or gender expressions." <sup>240</sup>

Once in the custody of the child welfare system, queer youth can be held in seemingly never-ending, vaguely defined, therapeutic confinement. This is especially true if their behavior fails to meet hetero-normative behavioral standards of judges, foster families, probation officers, group home officials, or detention facility personnel. <sup>241</sup> The child welfare system commonly considers gender nonconformity transgressive behavior that must be modified. Staff in placement facilities may force gender conformity on transgender youth in the guise of treatment plans. <sup>242</sup> A

<sup>235</sup> Randy Frances Kandel & Anne Griffiths, *Reconfiguring Personhood: From Ungovernability to Parent Adolescent Autonomy Conflict Actions*, [53 SYRACUSE L. REV. 995 \(2003\)](#). The authors describe how the protective and therapeutic goals of the juvenile justice system create an environment where social workers and group home officials can continue to detain children whose parents requested intervention long after the family sees a need for the state to be involved. See *id.* at 1005-16.

<sup>236</sup> See JUSTICE FOR ALL?, *supra* note 16, at 13 (explaining that LGBT youth are less likely to have supportive parental involvement and therefore are more likely to be sentenced to out of home placement).

<sup>237</sup> Miriam Aviva Friedland, *Too Close to the Edge: Lesbian, Gay, Bisexual and Transgender Youth in the Child Welfare System*, [3 GEO. J. GENDER & L. 777, 802-03 \(2002\)](#) (noting both the harm queer youth face in group homes and staff refusal of privileges); Mary Curtin, *Lesbian and Bisexual Girls in the Juvenile Justice System*, 19 CHILD & ADOLESCENT SOC. WORK J. 285, 291-92 (2002) (describing inequities of punishments for the same rule infractions, including the doubling of extensions of sentences for lesbians caught having sex compared with sentences for heterosexual girls caught having sex); JUSTICE FOR ALL?, *supra* note 16, at 7 (noting petitions for extension of placements based on girls holding hands).

<sup>238</sup> Sullivan, *supra* note 150, at 31 (providing an overview of how queer youth enter state custody and the type of placements that may result).

<sup>239</sup> See JUSTICE FOR ALL?, *supra* note 16, at 27 (stating that child welfare agents often identify children as queer based on appearances); Curtin, *supra* note 237, at 291 ("Because of the danger associated with being out, often lesbian and bisexual girls tried to hide their [sexual] orientation while in the system.").

<sup>240</sup> Robin Passariello McHaelen, *Bridges, Barriers, and Boundaries: A Model Curriculum for Training Youth Service Professionals to Provide Culturally Competent Service for Sexual and Gender Minority Youth in Care*, 85 CHILD WELFARE 407, 408 (2006).

<sup>241</sup> Kandel & Griffiths, *supra* note 235, at 1021 (quoting NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 111-12 (1971)) ("[T]he juvenile process was conceived . . . as a system of diagnosis and treatment of social diseases . . . . [Therefore,] the nature and length of the treatment" is tailored to the individual child.). Sydney Tarzwell, *The Gender Lines are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, [38 COLUM. HUM. RTS. L. REV. 167, 171-72 \(2006\)](#) ("Compliance with gender norms is . . . seen as part of rehabilitation.").

<sup>242</sup> See Marksamer, *And by the Way*, *supra* note 230, at 73; accord Curtin, *supra* note 238, at 291 (gender-atypical lesbian and bisexual girls encouraged to wear make-up and prohibited from shaving their heads).

youth's refusal to alter his or her appearance is seen as a refusal to conform, to follow rules, or to become rehabilitated--all of which lead to punishments such as revocation [\*1092] of privileges and extensions of placements.<sup>243</sup> Unfortunately, foster families may be as problematic for queer youth as more institutional placements.

While individual foster families are considered optimal placements for children in state custody, they are not without significant danger to queer youth. Religious conflict with individual foster families is not uncommon.<sup>244</sup> Such conflicts can result in a range of negative consequences, from rejection of the child by the foster family to attempts to convert the child to heterosexuality or to enforce gender conformity.<sup>245</sup> Queer kids in foster care also face physical harassment and violence. They may be punished for otherwise age-appropriate behaviors such as dating or attending queer friendly school groups.<sup>246</sup> Transgender youth are often refused gender appropriate clothing and access to supportive mental health or medical care.<sup>247</sup>

Group homes are less restrictive and arguably less dangerous than secure detention facilities; however, they are often run by religious organizations<sup>248</sup> with negative beliefs about homosexuality. For example, the "largest private residential child care provider in Kentucky" is the Kentucky Baptist Home for Children, which claims that "homosexuality is contrary to the religious morals that it attempts to instill in the youth in its care."<sup>249</sup> This particular organization fired an otherwise satisfactory employee because she was discovered to be a lesbian.<sup>250</sup> Unfortunately, this is not an isolated incident,<sup>251</sup> and queer youth in such facilities would understandably find their placements frightening and demoralizing. Even non-religious group homes are rarely prepared to address and protect the needs of queer youth given the lack of supervision, poor staff training, and homophobic [\*1093] atmosphere that tends to permeate these facilities.<sup>252</sup> The programs offered to children in placement range from blatantly anti-gay to merely reinforcing normative heterosexuality. Both approaches are harmful to queer children forced to participate in them.<sup>253</sup>

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<sup>243</sup> Tarzwell, *supra* note 241, at 171-72.

<sup>244</sup> Anne Tamar-Mattis, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 L. & SEXUALITY 149, 162 (2005).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 165-66.

<sup>247</sup> *Id.* at 157. The general dangers of foster care have been documented elsewhere. See Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, [36 NEW ENG. L. REV. 129, 136-38 \(2001\)](#). However, queer youth, because of their queer identity, are far more likely to be harmed in foster care placements than other children.

<sup>248</sup> Theresa V. Gorski, *Kendrick and Beyond: Re-Establishing Establishment Clause Limits on Government Aid to Religious Social Welfare Organizations*, 23 COLUM. J.L. & SOC. PROBS. 171, 211 n.268 (1990).

<sup>249</sup> James W. Gilliam, Jr., *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System*, [37 LOY. L.A. L. REV. 1037, 1043 \(2004\)](#).

<sup>250</sup> [Pedreira v. Ky. Baptist Homes for Children, Inc., 186 F. Supp. 2d 757, 762 \(W.D. Ky. 2001\)](#).

<sup>251</sup> See, e.g., [Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 233 \(S.D.N.Y. 2005\)](#) (alleging in part that Salvation Army's religious requirements for workers in child welfare facilities conflict with the ethical and professional obligation of social workers to serve homosexual, sexually active, and HIV diagnosed children).

<sup>252</sup> Friedland, *supra* note 237, at 802-04.

<sup>253</sup> Curtin, *supra* note 238, at 294-95.

Correctional facilities and secure detention centers are generally the most dangerous for queer youth, if only because escape is so difficult. <sup>254</sup> In these placements, queer children are often punished for being queer. They receive extension of their placement for showing even mild lesbian or gay behaviors such as holding hands, letter writing, or blowing kisses. <sup>255</sup> Same-sex sexual contact is punished more severely than is heterosexual sex, <sup>256</sup> and queer youth are subject to discrimination, harassment, and assault by other juveniles and by staff. In a surreal catch twenty-two, queer youth who complain, fight back, or attempt to protect themselves are often punished further by being isolated for their own safety. Similarly, queer youth are often charged with rule infractions that have the ability to either extend their sentence or to send them to more secure, prison-like facilities. <sup>257</sup>

Inappropriate isolation is a major issue facing queer youth in the juvenile justice system. Being placed in solitary confinement, protective custody, or in some other way being seted from their peers is routine, especially for children who are transgendered or gender nonconforming. <sup>258</sup> The judge in *R.G. v. Koller* focused at length on the practice of isolating queer youth. <sup>259</sup> Citing the defendant state's own experts, the court stated that "long-term segregation or isolation of youth is inherently punitive" and found that imposing such isolation as a form of protection is "not an acceptable correctional practice for juveniles." <sup>260</sup>

**[\*1094]** Acceptable or not, isolation is a routine practice and may even be court-ordered if a judge becomes concerned for the safety of a queer child. <sup>261</sup> For safety reasons, judges may order queer youth to more secure and heavily supervised facilities than are appropriate for their crimes or behaviors. <sup>262</sup> Regardless of why a queer

<sup>254</sup> See, e.g., HUM. RTS. WATCH & AM. CIV. LIBERTIES UNION, CUSTODY AND CONTROL 78-80 (2006), available at <http://www.hrw.org/sites/default/files/reports/us0906webwcover.pdf> (describing two New York correction facilities for juvenile girls and the inappropriate and excessive use of force by staff against the girls housed there, and also describing the singling out of those girls perceived as queer).

<sup>255</sup> *Id.* at 79 (2006); JUSTICE FOR ALL?, *supra* note 16, at 7-8.

<sup>256</sup> Peter A. Hahn, *The Kids are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities*, *14 B.U. PUB. INT. L.J. 117, 125 (2004)*; accord CUSTODY AND CONTROL, *supra* note 254, at 79.

<sup>257</sup> See, e.g., Marksamer, *And By The Way*, *supra* note 230, at 82-83 (describing staff members who threatened to punish a transgender youth with isolation if she complained or filed a grievance).

<sup>258</sup> JUSTICE FOR ALL?, *supra* note 16, at 29.

<sup>259</sup> *415 F. Supp. 2d 1129, 1148-49 (D. Haw. 2006)* (queer youth sued state-run correctional facility alleging due process, equal protection, establishment clause, and access-to-counsel violations).

<sup>260</sup> *Id.* The description of how one of the plaintiffs was treated is illustrative:

[I]n response to C.P.'s complaints of harassment, defendants first subjected her to social isolation by physically segregating her from the other wards in the module and later by sending her to a holding cell. When not locked down, C.P. was instructed by YCOs not to have anything to do with any of the male wards--she was not supposed to sit with or near them, speak with them, look at them, or interact with them in any way. . . . When C.P. returned to HYCF in August 2005, defendants held her in solitary confinement for six days, again, allegedly for her "protection." She was isolated in a holding cell under video surveillance for twenty-three hours a day, with nothing in her cell other than her pillow and a blanket. She was allowed one hour a day to leave the cell for recreation and showering. She was not permitted letters, writing instruments, radio, or television, nor was she allowed to interact with any other wards.

*Id.* at 1148 (citations to record omitted).

<sup>261</sup> JUSTICE FOR ALL?, *supra* note 16, at 28-29. In interviews, judges expressed concern and frustration about the lack of safe placements, and one said, "do you reinforce segregation? I don't know. I don't have the feedback from the kids I don't know how they feel, how they've been treated. I usually don't see them again." *Id.* at 30.

<sup>262</sup> See *id.* at 31.



youth is placed into isolation, such treatment punishes them because they are queer, because they are different, and because of who they are, as opposed to what offenses they may have committed.

Beyond isolation, queer youth also face the distinct possibility of being labeled, housed, and treated as sex offenders based solely on the perception of their queerness rather than any sexually aggressive behavior on their part.<sup>263</sup> One of the more egregious aspects of being labeled a sex offender is that queer youth are housed with dangerous and more aggressive offenders and thus subjected to increased probability of sexual assault victimization.<sup>264</sup> One California youth facility published a policy that indicated that its sex offender program primarily housed those who committed sex offenses against others, but also housed those who "have a history of being sexually victimized."<sup>265</sup> Queer youth frequently take the brunt of sexual assaults once in placement, and transsexual or gender nonconforming minors are more often inappropriately labeled sex offenders than other youth. This results in the disastorous situation of a population that is more prone to sexual [\*1095] assault being placed in with a population that is known to have sexually assaulted others.

Since 1991, there have been various reports, studies, and calls for reform that have documented the little systematic success at remedying the discrimination, neglect, and harm that queer youth face in the child welfare system.<sup>266</sup> Similar to the harassment queer students face in the public school system, it is likely that litigation and money damages will prove to be the lever that begins to force change, albeit slowly. One of the first attempts to force the state to protect queer youth was a 1999 class action suit on behalf of queer youth in the New York City Child Welfare system.<sup>267</sup> The complaint described experiences of homophobic abuse ranging from unrelenting harassment, to broken bones, to rape by peers, foster parents, and staff members of child welfare agencies.<sup>268</sup> Unfortunately, the case was subsumed into a broader class action proceeding on behalf of all children in the New York City Child Welfare system.<sup>269</sup> While the broader suit addressed necessary issues facing all children in state care--by expanding the suit to encompass all children--the specific needs of queer youth were largely forgotten.<sup>270</sup>

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<sup>263</sup> *Id.* at 7; Jody Marksamer et al., *Practitioner's Section: Juvenile Delinquent's Options and Rights*, [12 U.C. DAVIS J. JUV. L. & POL'Y 263, 266 \(2008\)](#); Fedders, *supra* note 117, at 797 (describing a lesbian whose probation officer attempted to have her placed in a residential treatment facility for female sex offenders because she talked to some boys about the breasts of another girl). The boys who entered into the conversation were not so much as reprimanded.

<sup>264</sup> Rudy Estrada & Jody Marksamer, *The Legal Rights of LGBT Youth in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know*, 85 CHILD WELFARE 171, 181-82 (2006).

<sup>265</sup> Marksamer, *supra* note 263, at 266 n.5.

<sup>266</sup> YOUTH IN THE MARGINS, *supra* note 23, at 10 (referencing several earlier reports and noting that "in the intervening years, while a generation of LGBT foster care youth have suffered through adolescence, little has been done anywhere in the nation to remedy these problems.").

<sup>267</sup> See Bernstein, *supra* note 20. The lawsuit was [Joel A. v. Giuliani, 218 F.3d 132 \(2nd Cir. 2000\)](#).

<sup>268</sup> [Joel A., 218 F.3d 132](#).

<sup>269</sup> See [Marisol A. v. Giuliani, 126 F.3d 372, 374-75 \(2d Cir. 1997\)](#).

<sup>270</sup> Counsel for Joel A. et al., unsuccessfully objected to the settlement of *Marisol A.*, asserting that queer children:

[C]ould not be adequately represented within the Marisol subclass three, since the class consists of the very peers who have been victimizing them, and that the district court took insufficient steps to ensure that they were adequately represented in settlement discussions. The objectors allege that the Settlement Agreements impose unduly broad restrictions on their right of access to the courts, in violation of Rule 23(e) and the Due Process Clause of the United States Constitution. They further allege that the concessions made to the Marisol defendants were granted in exchange for illusory relief of practically no value to class members.

Queer youth are different from other children in the juvenile justice system. They confront all of the harms that non-queer children face and are also the targets of pervasive anti-queer harassment. This additional danger, which is a direct consequence of their perceived "queerness," will not be addressed by attempts to fix general problems in the existing system. This is evident from the continued problems queer youth face in New York, long [\*1096] after the foster care class action settlement was signed.<sup>271</sup> That little or nothing has changed for queer youth in state custody is also evident from recent cases arising in New York,<sup>272</sup> California,<sup>273</sup> and Hawaii.<sup>274</sup> Queer youth still face verbal abuse, assault, inappropriate isolation, and sexual assault while in state custody. In each case, the abuse suffered was significant and the child welfare system's response was typically poor.<sup>275</sup>

Thus, queer youth are a vulnerable and mistreated population. They face significant dangers at home, in school, on the street, and in state custody. While there have been attempts to ameliorate the discrimination faced by this population, it remains a significant problem with potential life threatening repercussions. Attorneys who represent queer youth should be aware of the discrimination their clients face and be ready to advocate on their behalf in ways that attempt to protect their clients from the systemic and dangerous biases of the judicial and child welfare system.

Allowing attorneys to provide best interest lawyering for queer children or to substitute judgment for a queer child is likely to increase the danger the child faces from the judicial system. The effects of homophobia and heterosexual biases on children are profound. Instead of simply waiting for anti-queer bias to vanish, traditional client-directed advocacy is the only assertive and effective way to provide adequate representation for this population. While traditional advocacy does not in and of itself eliminate the dangers the queer child will face from the judicial system, it may prevent some harm from occurring. More importantly, it would ensure that the child's attorney is not a source of that harm.

### [\*1097] III. ATTORNEYS REPRESENTING QUEER YOUTH MUST BE REQUIRED TO ACT AS TRADITIONAL ZEALOUS ADVOCATES

*"We tolerate the injustice, settle for promises, and boast about incremental improvements."*<sup>276</sup>

[Joel A.](#), 218 F.3d at 138. Cf. YOUTH IN THE MARGINS, *supra* note 23, at 17 n.9 (explaining the outcome of *Joel A.*).

<sup>271</sup> See YOUTH IN THE MARGINS, *supra* note 23, at 10 ("Yet in the intervening years, while a generation of LGBT foster youth have suffered through adolescence, little has been done anywhere in the nation to remedy these problems.").

<sup>272</sup> *Rodriguez v. Johnson*, No. 06 CV 00214, (S.D. N.Y. Nov. 9, 2006) (stipulated order of settlement) (settling a claim against the New York State Office of Children and Family Services for discriminatory treatment of transgender youth while in state custody).

<sup>273</sup> *In re Antoine D.*, 40 Cal. Rptr. 3d 885, 885-90 (Cal. Ct. App. 2006).

<sup>274</sup> *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1148-49 (D. Haw. 2006).

<sup>275</sup> In *Rodriguez*, a transgendered youth was punished for expressions of gender nonconformity, had her medically prescribed hormone treatment abruptly terminated, restarted, and terminated multiple times, and was denied psychological counseling. The case settled for \$ 25,000. *Rodriguez*, No. 06 CV 00214, at 3. In *In re Antoine D.*, the youth suffered a razor attack, solitary confinement, isolation, and harassing treatment by both staff and other wards because of his sexual orientation. 40 Cal. Rptr. 3d at 887-89. The youth successfully challenged his commitment to the California Youth Authority alleging that he would continue to be subjected to serious acts of physical and mental abuse if he were to remain in state custody. *Id.* at 885-92. In *R.G. v. Koller*, queer youth sued a state run correctional facility alleging multiple counts of mental and physical abuse as well as inappropriate treatment including isolation. 415 F. Supp. 2d at 1148-49. The matter settled for \$ 625,000. *Id.* See ACLU, *Hawai'i Youth Correctional Facility to Pay Over Half a Million Dollars for "Relentless Campaign of Harassment" of Gay and Transgender Youth* (June 15, 2006), available at [www.aclu.org/lgbt/youth/25915prs20060615.html](http://www.aclu.org/lgbt/youth/25915prs20060615.html).

<sup>276</sup> Shari Shink, *Justice for Our Children: Justice for a Change*, 82 DENV. U. L. REV. 629, 652 (2005).

Heterosexism, homophobia, and other more virulent reactions to a child's queerness can manifest in many ways. Such biases can be aggressive and overt, or more subtle and hidden. Sadly, the harm a biased attorney can do to his or her queer child client does not depend on whether the bias is easily recognized; instead, the harm depends on the attorney's actions. This Part discusses the dangers of best interest lawyering and the advantages of traditional advocacy for the queer child client. It also raises potential objections to requiring that attorneys provide traditional zealous advocacy to their queer children clients.

#### A. Dangers of Best Interest Lawyering for Queer Children

Attorney biases toward queer youth clients coupled with best interest lawyering endangers the physical and mental safety of queer children. Jody Marksamer, staff attorney at the National Center for Lesbian Rights' Youth Project, provides a particularly detailed account of the pernicious effects of an attorney's bias toward his client's gender non-conformity.<sup>277</sup> Destiny, a sixteen year old transgender girl, had been sent "to T-Max the state's highest security juvenile facility for boys because no other program would accept a transgender girl."<sup>278</sup> Destiny's therapist who was worried about her safety had contacted Marksamer. The child was a target of the other juveniles at the facility and was sexually assaulted on more than one occasion while there.<sup>279</sup> According to Marksamer, the child's attorney "failed her in many respects" and "coloring all aspects" of his representation was his failure to represent her stated interest and his bias against her transgender identity.<sup>280</sup>

Appearing at a review hearing, Marksamer filed a report documenting the abuse Destiny was encountering at T-Max. Destiny testified that the report was true and further testified that she was being sexually assaulted at [\*1098] T-Max, wanted to be moved to another facility, and was scared that the abuse would continue if she returned.<sup>281</sup> Not only did Destiny's court appointed attorney not support her wish to leave T-Max, but he warned the court against granting his client's request, stating "I think this young man has a lot of things--and I use the word *man*--to think about so I would just ask the court to be cautious in any decisions that it makes."<sup>282</sup>

Destiny's attorney obviously substituted his judgment for that of his client, a practice apparently allowed by the jurisdiction.<sup>283</sup> In so doing, his actions threatened Destiny's physical safety and undermined her credibility. The attorney's biases and the potentially devastating affect they had on his client was much worse than the treatment

<sup>277</sup> Marksamer, *And By the Way*, *supra* note 230. Any suggestion that Destiny's attorney's actions rise to the level of professional misconduct is mine alone.

<sup>278</sup> *Id.* at 77.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* "When I first contacted him to inquire about what he was doing to address the assaults [on Destiny] at T-Max, knowing that I was calling from an LGBT organization, he said to me with a chuckle and a hint of disgust, "[a]nd by the way, do you know he thinks he's a girl?" *Id.* at 78.

<sup>281</sup> *Id.* at 77.

<sup>282</sup> *Id.* (emphasis added).

<sup>283</sup> Marksamer intentionally kept jurisdictional information out of the article. *Id.* at 76 n.5. However, there is no indication that the court saw anything unusual with the child's attorney completely undermining the testimony of his own client. Further, Marksamer suggests that the attorney's failure to provide traditional advocacy was very problematic but not remarkable:

This lack of understanding directly informed what Destiny's attorney believed was in Destiny's best interest--that Destiny should stop acting like a girl . . . , that she needed to get treatment for her so-called sexual problem, and that she needed protection from herself because she was too immature to comprehend the consequences and safety risks of telling people she was a girl.

*Id.* at 78. The reference to "best interest" by Marksamer implies that the child's attorney was substituting his judgment for that of his sixteen-year-old client.

Teena Brandon received from law enforcement personnel when attempting to report his rape. There a court found the sheriff's actions toward Brandon "extreme and outrageous."<sup>284</sup> However, in the case described by Marksamer, the lawyer's actions were much more egregious, particularly because he was the child's own attorney. He was familiar with her circumstances and he was making a calculated decision, perhaps based on a belief that it was in Destiny's "best interest," to keep her in a facility where she endured violence based on her queer identity.<sup>285</sup>

The danger of best interest lawyering is evident in Destiny's hearing, but the solution to eliminate this danger is clear as well. If Destiny's attorney had been required to act as a traditional advocate, he could not have attempted to subvert her plea for safety. If Destiny's attorney was required by law to provide the ethical representation due an adult client,<sup>286</sup> he would, [\*1099] at a minimum, not undermine her testimony and stated position. Had he done so, Destiny's attorney would have been liable for misconduct or malpractice. In addition, the court would have been aware of the statutory authority requiring zealous advocacy and thus would have stopped any attempt by counsel to sabotage the interests of his client.

While queer children can be harmed by overt acts of their own lawyer, they can also be harmed by non-action. In *Smith v. Smith*, the father sued for change of custody based entirely on the mother's support for the child's gender nonconformity.<sup>287</sup> While there is no indication that there was an attorney for the children in the case, the trial court transcript seemed to indicate that much of the judicial animosity toward the mother stemmed from her refusal to follow a court order concerning the child.<sup>288</sup> It is quite possible that if the child at issue had an attorney who zealously represented his position, there may have been a different outcome in the proceeding. Such an attorney may have been able to set the child from his mother in the judge's mind. Additionally, he would have been able to educate the judge on gender nonconformity and possibly keep the child with the supportive parent. Similarly, in *Catherine W.*, a law guardian for a child who was repeatedly called "faggot" and "queer" by his father could have brought the effects of such harassment on the child to the attention of the court and potentially altered the outcome of the case.<sup>289</sup>

Finally, a child's right to be queer should not depend on whether she is lucky enough to be appointed an attorney who is not biased. In *In re Lori M.*, the court refused to find that a fifteen-year-old who was in a lesbian relationship, against the wishes of her mother, was a "person in need of supervision."<sup>290</sup> The teen had a law guardian who

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<sup>284</sup> Brandon *ex rel. Estate of Brandon v. County of Richardson*, 624 N.W.2d 604, 624 (Neb. 2001) (describing the bigoted and belittling treatment Brandon received was as "extreme and outrageous, beyond all possible bounds of decency, and is to be regarded as atrocious and utterly intolerable in a civilized community").

<sup>285</sup> Marksamer, *And By the Way*, *supra* note 230, at 77.

<sup>286</sup> Several states require traditional advocacy for children like Destiny. See, e.g., [N.M. STAT. ANN. § 32A-1-7.1](#) (2005).

Child's Attorney; powers and duties:

A. An attorney shall represent a child in a proceeding for which the attorney has been retained or appointed. The attorney shall provide the same manner of legal representation and be bound by the same duties to the child as is due and adult client, in accordance with the rules of professional conduct.

*Id.*

<sup>287</sup> *Smith v. Smith*, No. 05 JE 42, 2007 WL 901599, at \*1-\*3 (Ohio Ct. App. Mar. 23, 2007), *appeal denied*, **873 N.E.2d 1315 (2007)**.

<sup>288</sup> "Based on these four findings, the court concluded that Appellant could not be counted on to follow any court order that she might disagree with." *Smith*, 2007 WL 901599, at \*3.

<sup>289</sup> [Catherine W. v. Robert F.](#), 455 N.Y.S.2d 519 (Fam. Ct. 1982).

<sup>290</sup> See [In re Lori M.](#), 496 N.Y.S.2d 940, 942-43 (Fam. Ct. 1985).

provided traditional advocacy and argued that her client's sexual orientation and choices in pursuit thereof were constitutionally protected.<sup>291</sup> It is extremely likely that with a different law guardian, one who believed homosexuality was immoral<sup>292</sup> or [\*1100] one who mocked his client's sexuality,<sup>293</sup> the case would have been decided quite differently. A potentially different (and dangerous) outcome would be possible only because New York, like many other states, allows a child's attorney to practice best interest lawyering or to substitute her judgment for that of her client.<sup>294</sup> While it is possible that the law guardian in *Lori M.* was acting as a best interest attorney, her position supported that of the child.<sup>295</sup> By removing the option of best interest lawyering for queer children, attorneys would always support the position of their queer child client.

#### B. Advantages of Traditional Advocacy for Queer Children

Traditional advocacy is the model of representation that best minimizes the risks of harm to queer children. It does so in the following ways: first, it is the model that best insulates the child from her attorney's homophobia and heterosexism; second, it is the type of advocacy that best ensures that queer children's constitutional rights are protected; third, it is the model of representation with which attorneys are most familiar; lastly, traditional advocacy is more likely to foster a superior attorney--client relationship by providing an environment in which a queer child can feel safe and respected.

Traditional advocacy protects queer children from the homophobia and heterosexism of their attorneys. It has long been recognized that class and cultural differences between the attorney and the child client effectively silences the child<sup>296</sup> and inhibits the attorney's ability to make good judgments.<sup>297</sup> It is also clear that anti-gay biases permeate our society and our court systems.<sup>298</sup> It is extremely difficult, if not impossible, for attorneys to keep anti-queer biases from seeping into their best interest lawyering.<sup>299</sup> However, traditional advocacy does not require attorneys to endorse the [\*1101] behavior of their queer child clients. The Model Rules explicitly state that representation is not an endorsement of the client.<sup>300</sup> Rather, traditional advocacy removes any potential negative reactions an attorney may have toward his or her child client's "queerness" from the representation equation.<sup>301</sup>

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<sup>291</sup> [Id. at 941.](#)

<sup>292</sup> See *Boys Can Stay In Foster Home*, *supra* note 28 (attorney for children objecting to placement with lesbian couple on grounds he believed homosexuality was immoral).

<sup>293</sup> Marksamer, *And By the Way*, *supra* note 230, at 77-78.

<sup>294</sup> See *supra* note 49.

<sup>295</sup> [In re Lori M., 496 N.Y.S.2d at 941.](#)

<sup>296</sup> Martin Guggenheim, *The Right to be Represented but Not Heard: Reflections on Legal Representation for Children*, [59 N.Y.U. L. REV. 76, 154-55 \(1984\)](#) [hereinafter Guggenheim, *The Right to be Represented*].

<sup>297</sup> Haralambie, *supra* note 12, at 195-96 (stating that attorneys generally lack the expertise to choose the best among generally unattractive options for their child clients, and that the socio-economic gulf between lawyer and client further undermines lawyers' abilities to make good judgments on their client's behalf).

<sup>298</sup> See Browner, *supra* note 116, at 65 (reviewing reports studying sexual orientation bias in the court system and concluding that "[w]e might expect that the courts are one area of modern society in which legal doctrine and protections for gay people persuasively create fairness and equality of treatment. They are not.").

<sup>299</sup> Tippins, *supra* note 62 ("The reality is that it is impossible to apply the best interest standard without that application being contaminated by personal values or biases for the simple reason that the standard itself is infused with socio-moral values.").

<sup>300</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2007) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

The extent to which Destiny's attorney's biases compromised the child's safety is shocking--but not surprising--given the treatment of queer adults in the court system<sup>302</sup> and the treatment of queer children in the child welfare system.<sup>303</sup> If Destiny's attorney had been required to advocate as a traditional attorney, his personal belief that his client should stop acting female would not have been pertinent to the litigation.<sup>304</sup> Obviously an attorney's beliefs might affect representation in some respects, although under the Model Rules they should not. However, this attorney's actions could easily be viewed as unethical if he were held to the standard of a traditional [\*1102] advocate. It is only because he was acting as a GAL that his actions were countenanced by the legal system. Requiring that attorneys provide queer youth clients traditional advocacy would greatly reduce the risk that either overt homophobia or an internalized belief in the superiority of heterosexuality would harm their clients.

Traditional advocacy is also necessary to secure the constitutionally protected rights of queer children. Courts have held that queer youth have a constitutional right to privacy to pursue their relationships,<sup>305</sup> a First Amendment right to discuss their sexuality without interference,<sup>306</sup> and a right to dress in gender nonconforming clothing.<sup>307</sup> The Due Process Clause of the Fourteenth Amendment protects queer youth from anti-gay violence in state-run facilities.<sup>308</sup> In addition, courts have held that queer youth are protected from discriminatory treatment under a

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<sup>301</sup> This is similar to the strict rules governing behavior toward queer youth adopted by other institutions in the child welfare system:

Adoption of a nondiscrimination policy does not infringe on the individual rights of agency employees nor does it force the employees to change their personal beliefs about homosexuality or gender roles. Providers and staff members are free to hold any beliefs they choose, so long as they adhere to and enforce the facilities non-discrimination policy.

Shannan Wilber et al., *The Model Standards Project: Creating Inclusive Systems for LGBT Youth in Out-of-Home Care*, 85 CHILD WELFARE 133, 137 (2006).

<sup>302</sup> Brower, *supra* note 116, at 48. In 1996, both a law guardian and a judge objected to lesbian foster parents with the judge ready to "go to war" against the state for placing children in their home. Polikoff, *supra* note 206, at 1191. In 2004, a judge in Mississippi wrote a letter to a local paper in response to a news story on California domestic partnership laws. [Miss. Comm'n on Judicial Performance v. Wilkerson](#), 876 So. 2d 1006 (Miss. 2004). His statement that "in my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them" was later held to be protected speech, and thus not sanctionable under the Mississippi Code of Judicial Conduct. *Id.* at 1009, 1013-14. Also in 2004, an Alabama appeals court upheld the removal of a child from a lesbian mother based almost entirely on the fact that she was living with a women lover. [L.A.M. v. B.M.](#), 906 So. 2d 942 (Ala. Civ. App. 2004). The court chose to cite from a prior case which held "the evidence shows that the mother loves the child and has provided her with good care, it also shows that she has chosen to expose the child continuously to a lifestyle that is 'neither legal in this state, nor moral in the eyes of most of its citizens.'" *Id.* at 946 (citing [Ex parte J.M.F.](#), 730 So. 2d 1190, 1196 (Ala. 1998)). It is axiomatic that a queer child appearing for any reason in front of a judge with views consistent with those of the judges in these three examples would need the full support and zealous advocacy of his attorney to escape with even minimal harm.

<sup>303</sup> See discussion *supra* Section III.E.

<sup>304</sup> Cf. [Fisher v. Gibson](#), 282 F.3d 1283 (10th Cir. 2002) (finding that an attorney who allowed his homophobic bias toward his client to jeopardize representation violated his duty of loyalty to the client).

<sup>305</sup> [In re Lori M.](#), 496 N.Y.S.2d 940, 940, 942 (Fam. Ct. 1985).

<sup>306</sup> [Henkle v. Gregory](#), 150 F. Supp. 2d 1067 (D. Nev. 2001).

<sup>307</sup> [Doe ex rel. Doe v. Yunits](#), No. 001060A, 2000 WL 33162199 (Mass. Sup. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

<sup>308</sup> [R.G. v. Koller](#), 415 F. Supp. 2d 1129 (D. Haw. 2006).

rational basis application of the Equal Protection Clause of the Fourteenth Amendment.<sup>309</sup> While the rational basis review is seen as the easiest standard for officials to meet, it is not met, as the *Nabozny* court acerbically pointed out, by allowing harm to befall on queer youth on the basis of their sexual orientation.<sup>310</sup>

Allowing an attorney to expressly argue (or keep silent in the face of arguments by others) that a queer child should be forced to reside where it is unsafe to express her sexual orientation or gender nonconformity, renders these rights illusory.<sup>311</sup> Such actions on the part of an attorney would effectively strip the queer child of her constitutional rights. A requirement that attorneys provide queer youth with traditional advocacy would prevent an attorney from negating the queer child's constitutional rights. It would also enhance the ability for a queer child to protect her constitutional rights by [\*1103] providing her with counsel who will fight to secure those rights: that is what traditional attorneys do--they fight for their client's rights.

Traditional advocacy is the model of representation with which attorneys are most familiar--it is how attorneys are trained and it is the generally accepted form of practice in the United States. Shifting from that digm of practice to another is not easy<sup>312</sup> and often results in less than optimal performance.<sup>313</sup> On the other hand, best interest lawyering requires specialized training in such non-legal areas of knowledge as child development, psychology, and education.<sup>314</sup> Further, best interest lawyering exacerbates an attorney's lack of expertise in these areas because it allows attorneys to make decisions based on individual experiences and biases.<sup>315</sup>

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<sup>309</sup> See *Nabozny v. Podlesny*, 92 F.3d 446, 458 (Wis. 1996) ("Absent any rational basis for their alleged discrimination . . ."); *State v. Limon*, 122 P.3d 22, 38 (Kan. 1995) ("We conclude that K.S.A. 2004 Supp. 21-3522, the Kansas unlawful voluntary sexual relations statute, does not pass rational basis scrutiny under the United States Constitution Equal Protection Clause . . .").

<sup>310</sup> "We are unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation, and the defendants do not offer us one." *Nabozny*, 92 F.3d at 458.

<sup>311</sup> Guggenheim, *The Right to be Represented*, *supra* note 296, at 86. Guggenheim argues that allowing an attorney to substitute his judgment for a juvenile delinquent makes a mockery of the holding of *In re Gault* because it allows the attorney to determine whether or not the child would exercise the rights provided by the Supreme Court. *Id.*; accord, Federle, *supra* note 48, at 1661 (noting that for a lawyer to find a client incompetent is to declare that the client has no status as a rights holder).

<sup>312</sup> Judge Leonard Edwards, *Comments on the Miller Commission Report: A California Perspective*, 27 PACE L. REV. 627, 674 (2007) ("It is a challenge to change a legal culture, one that has been educated and trained in the adversarial process and that believes that judges and lawyers have the best answers for seting families.").

<sup>313</sup> As Mary Kay Kisthardt has pointed out:

Attempts to reduce adve[r]sarialness in the [child welfare court] system have left professionals, particularly attorneys and judges, in an awkward void. Trained in the adversary process and the zealous advocate role, lawyers are concerned about the role they are to play in an undefined, but less adversarial process. Often, the result is that they do not zealously advocate, but do retain their adversarial posture, a confusing situation for all involved. Trial skills become sloppy, and records on appeal are incomplete and/or undiscernible. Role confusion creates tension and results in counter-accusations of poor performance.

Mary Kay Kisthardt, *Working in the Best Interest of Children: Facilitating the Collaboration of Lawyers and Social Workers in Abuse and Neglect Cases*, 30 RUTGERS L. REC. 1, 26 n.88 (2006).

<sup>314</sup> See, e.g., Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should Be Represented By Lawyers*, 32 LOY. U. CHI. L.J. 1, 24 n.76 (2000).

<sup>315</sup> "The best interests standard, which has been criticized for being vague and for being an illusory determinant of the child's welfare, exaggerates the training deficiencies because those who make the decisions are often forced to rely on their personal biases, experience, and intuition." Gregory Firestone & Janet Weinstein, *In the Best Interests of Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 206 (2004).

Even scholars who support best interest lawyering agree that attorneys cannot be expected to master what is needed to serve children well. These writers argue that a multidisciplinary team approach is what is needed to best serve children. <sup>316</sup> A team approach to representation (consisting of an [\*1104] attorney, social workers, Court Appointed Special Advocates (CASA), volunteers, and investigators, or some combination thereof) would obviously increase the level of advocacy children receive from their attorneys and might be considered ideal. <sup>317</sup> Unfortunately, history suggests that the necessary funding will not be attainable to create such an approach in the vast majority of jurisdictions. <sup>318</sup> Thus, traditional advocacy has the advantage of allowing an attorney to work within a known model of representation, which is important "given the likely continuation of forces that militate against ideal representation--poor compensation, large caseloads, occasional recalcitrant judges, little in the way of investigative and other resources--a role that is familiar to the lawyer is more apt to be performed competently." <sup>319</sup>

Traditional advocacy is also more likely to foster a working attorney--client relationship with a queer child than is best interest lawyering. Competent representation depends on a solid attorney--client relationship in which the child client has confidence and trust in her attorney. A large component of building that relationship is garnering the trust of the child who has been thrust into the legal system--this allows attorneys to gain the knowledge that only their clients can provide. <sup>320</sup> Queer youth, like other [\*1105] children in the legal system, have family secrets that they may be hesitant to share with an adult. <sup>321</sup> However, queer youth often have many more secrets about their

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<sup>316</sup> Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, [6 NEV. L.J. 1284, 1293 \(2006\)](#) ("It is difficult for a single attorney to master all of the fields (social work, psychology, medicine, education) that serve children in child protection cases. Best practices should include a multidisciplinary team comprised of those fields."); Hollis R. Peterson, *In Search of the Best Interest of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, [13 GEO. MASON L. REV. 1083, 1104 \(2006\)](#) (suggesting CASA volunteers are better trained and equipped than GAL attorneys to determine the best interest of the child, and suggesting that GALs working without CASA volunteers take it upon themselves to become educated in areas such as child development, chemical dependency, and cultural diversity, which are not addressed in law school).

<sup>317</sup> Assuming any potential internalized homophobia and heterosexism of these additional professionals was addressed and ameliorated.

<sup>318</sup> See, e.g., Nora Meltzer, *Dismissing the Foster Children: The Eleventh Circuit's Misapplication and Improper Expansion of the Younger Abstention Doctrine in Bonnie L. v. Bush*, [70 BROOK. L. REV. 635, 669-70 \(2004-2005\)](#) (describing Florida's failure to appropriately fund the Department of Children and Families); Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POLY & L. 231, 249 (2002) (describing funding crisis in juvenile justice programs).

<sup>319</sup> Shepherd & England, *supra* note 39, at 1941.

<sup>320</sup> Gail Chang Bohr argues that:

"[c]onfidentiality of information is key to any attorney--client relationship and more so when the client is a child. The child who is the subject of the child protection proceeding has had her trust broken. Knowing that there is someone she can confide in helps to begin to rebuild that trust in adult figures and encourages the flow of information."

Gail Chang Bohr, *Ethics and the Standards of Practice for the Representation of Children in Abuse and Neglect Proceedings*, [32 WM. MITCHELL L. REV. 989, 1003 \(2006\)](#); accord Gabriella Celeste & Patricia Puritz, *The Children Left Behind: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Louisiana*, [30 S.U. L. REV. 395, 443 \(2003\)](#) ("In order to be effective, both in meeting charges against clients and in dealing with social and family issues, juvenile defenders must establish trusting relationships with their clients . . . The importance of maintaining confidentiality with adolescents cannot be overstated . . . Because arrested children are often distrustful of adults, defense attorneys must build relationships with clients that will enable them to share deeply personal information.").

<sup>321</sup> Buss, *supra* note 14, at 1726 ("[C]hildren generally have no reason to expect that adults will keep their secrets. Indeed, many children have become involved in the court system precisely *because* they shared secret information about their parents' misdeeds with doctors, teachers, or social workers . . . and their parents themselves.").



sexuality, their sex life, the clothes they wear or want to wear, and the anti-queer abuse they face. When outlining best practices for representing queer youth, the UNLV Working Group on Sex and Sexuality called information concerning sexual conduct, gender identity, and sexual orientation, sensitive and uniquely personal and often important to the representation. <sup>322</sup>

Best interest advocacy is an impediment to gaining the trust of queer children. Once a queer child knows that her attorney may break her confidence and breach her trust, it is highly unlikely that she will share pertinent information. <sup>323</sup> Traditional advocacy, which requires client confidentiality, supports the development of a lawyer--client relationship in which queer children can feel comfortable and safe sharing information about their sexuality or gender identity. This in turn increases the attorney's ability to provide better representation to his or her queer child client. <sup>324</sup>

Zealously representing a queer child merely provides the court with the child's position so that the court will consider it along with the position of the other participants. In addition, providing the child's own perspective creates a more informed judicial decision-making process. <sup>325</sup> While some individual attorneys and jurisdictions provide traditional advocacy for children, it is usually done as a matter of principle and not because it is required. <sup>326</sup> Unfortunately, absent a requirement that attorneys provide traditional [\*1106] advocacy, there is no way for the courts to enforce the practice. Traditional advocacy for the queer child must be legally mandated. <sup>327</sup>

### C. Potential Objections to Requiring Traditional Advocacy for Queer Children

Any proposal to require traditional advocacy for queer youth will provoke several objections. Many lawyers may object to being required to identify children as queer. Similarly, some attorneys may be reluctant to create specific requirements for any particular population of children. Others will suggest that the better solution would be educating attorneys to reduce homophobia and heterosexism rather than regulating their behavior. Still others may advocate for simpler solutions such as requiring traditional advocacy based on age or type of proceeding.

These objections are inadequate when compared to the dangers best interest advocacy creates for queer youth. Attorneys, like everyone else, view their clients through their own specific lens of bias and prejudice. The requirement that they provide traditional advocacy to their queer child clients who either self-identify as queer or are

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<sup>322</sup> See *Report of the Working Group on Sex and Sexuality*, *supra* note 117, at 645.

<sup>323</sup> As Emily Buss pointed out:

If a child understands (rightly or wrongly) that his lawyer's role is to represent his best interest as the lawyer perceives them, he may chose to be quite strategic about when he speaks to his lawyer and what information he shares, in an attempt to shape his lawyer's views. If, on the other hand, the child understands (again, rightly or wrongly) that the lawyer is acting in the traditional attorney role, he may choose to be considerably more candid, and less strategic, in the hope that the lawyer will assist him in developing a strategy, and with the understanding that the lawyer will not use any of the information he provides in a manner contrary to his stated interests.

Buss, *supra* note 14, at 1714-15.

<sup>324</sup> *Id.* at 1715-16 ("When a child is convinced . . . that his secrets are safe with his lawyer, he is likely to share information more candidly, and this greater candor, in turn, will enhance his lawyer's ability to assess the merits of his case, provide good legal advice, and advocate effectively on his behalf.").

<sup>325</sup> Haralambie, *Humility and Child Autonomy*, *supra* note 12, at 194.

<sup>326</sup> See examples cited *supra* note 68.

<sup>327</sup> See Duquette, *supra* note 53, at 1244 ("It has become good practice in many jurisdictions using a 'best interests of the child model' for lawyers to defer to the older and mature child even where they disagree with the result sought. But a good practice does not have the same force as law. Individual lawyers need the focus, discipline and protection that a best interests approach for the older child does not bring. A client-directed approach should be legally mandated for the older child.").

perceived by others to be queer does not require attorneys to determine their client's sexual orientation or gender identity as a matter of certainty. Any attempt to do so could be alienating and threatening to the child client.<sup>328</sup> However, an attorney can easily determine if a child is perceived to be queer without extended cross-examination. It merely requires that counsel attempt to determine if some of the problems the client is facing are related to perceptions about their gender nonconformity, sexual behavior, or sexual identity.<sup>329</sup>

Creating special requirements to protect a particular population is done frequently, both in and out of the legal arena. The rules allowing for other than traditional advocacy for children are but one example. Vulnerable [\*1107] populations such as Native American children, those incapacitated by age or disability, and even otherwise competent adults have been provided special protection in particular types of litigation.<sup>330</sup> Ethical rules have been revised to prohibit attorneys from discriminating against queer adults,<sup>331</sup> and compelling arguments have been made to single out other at-risk populations for protection from attorney incompetence.<sup>332</sup>

In addition, professionals working with children in other fields have found it necessary to provide specific protections for queer youth because of the level of abuse and harassment queer children face.<sup>333</sup> Recently, as a result of a law suit brought by a queer child injured in placement, the New York Office of Children and Family Services issued new rules specifically designed to create a "safe and discrimination free environment" for lesbian, gay, bisexual, transgender, and questioning youth in its custody.<sup>334</sup> The rules are necessary because education alone is ineffective in altering discriminatory and injurious attitudes.

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<sup>328</sup> Fedders, *supra* note 117, at 801-02.

<sup>329</sup> Fedders provides a particularly illuminating example of the ease in which an attorney can discern problems stemming from other people perceiving a client as queer. *Id.* An "effeminate" male child was a behavioral problem at school and faced suspension. By determining that much of the problem stemmed from the child's reluctance to change in front of peers in gym class because of fear of harassment--the attorney was able to change the client's class schedule and resolve the issue. *Id.* It was unnecessary for the attorney to engage the client about his sexual orientation or his gender identity. She merely discerned that the problem stemmed from other people perceiving the child as "queer," regardless of whether or not it was true. *Id.* at 802.

<sup>330</sup> See, e.g., Indian Child Welfare Act of 1978, Pub. L. No. 95-608, [92 Stat. 3069](#) (codified at [25 U.S.C. §§ 1901-1934](#) (2000)); Ny. Mental Hyg. Law Article 81 (McKinney [2008](#)); N.Y. COMP. CODES & REGS. tit. 22, § 1200.29-a(b)(3) (2007) (prohibiting sexual relations between attorneys and clients in domestic relations matters only). Additionally, within the field of child advocacy, commentators often suggest treating children differently based on the type of proceeding or age of the child. See *supra* note 55.

<sup>331</sup> See, e.g., ARIZ. RULES OF PROF'L CONDUCT R. 8.4 (2007) (misconduct for a lawyer who knowingly manifests by words or conduct, bias or prejudice based upon sexual orientation or gender identity).

<sup>332</sup> Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, [26 HARV. WOMEN'S L.J. 217 \(2003\)](#) (arguing that the potential for harm to battered women by inept counsel requires special consideration).

<sup>333</sup> See, e.g., Ernst Hunter, *hat's Good for the Gays is Good for the Gander: Making Homeless Youth Housing Safer for Lesbian, Gay, Bisexual, and Transgender Youth*, [46 FAM. CT. REV. 543, 551 \(2008\)](#) (discussing the creation of sete facilities and programs for queer homeless youth by various administrative agencies as a way to protect them); Nicolyn Harris & Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, [7 U. PA. J. CONST. L. 183 \(2005\)](#) (concluding sete schools for queer youth are not ideal but recognizing there may be cases where the level of anti-gay harassment is so severe sete schools may be required to protect queer students).

<sup>334</sup> N.Y. STATE OFFICE OF CHILD. & FAM. SERVS. PPM 3442.00, LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH (updated Policy and Procedures Manual pages for the Office of Children and Family Services, available at [www.ct.gov/dcf/lib/dcf/safe\\_harbor/pdf/ny\\_2008-03-17\\_ocfs\\_lgbt\\_policy.pdf](http://www.ct.gov/dcf/lib/dcf/safe_harbor/pdf/ny_2008-03-17_ocfs_lgbt_policy.pdf)); see also Maria Luisa Tucker, *The State Adopts New Rules for LGBT Youths in Juvenile Detention; But Mum's the Word on the Good Treatment of Transgendered Kids*, VILLAGE VOICE, June 3, [2008](#), available at <http://www.villagevoice.com/2008-06-03/news/doing-right-keepingquiet/>.

The failure of legal education, best practice trainings, or continuing education classes to change the behavior of significant portions of the legal community is evident from the individual state reports on juvenile justice. [\*1108] Years after best practice guidelines were first articulated by the ABA, most states identified systemic problems with the representation provided to juvenile delinquents.<sup>335</sup> Neither society nor the legal community has ever changed quickly in response to children's issues and it is doubtful that they would do so in response to the needs of queer children.<sup>336</sup> Thus, while the promulgation of standards and the recommendations for best practices are valuable and may help in creating a more just court system, they are not enough. The lives of queer children should not have to await the individual changes of heart of their attorneys.

If education alone is not the answer to securing traditional advocacy for queer kids, neither is a bright line rule based on age or type of proceeding. Several commentators have suggested that lawyers representing children above the age of seven<sup>337</sup> do so by providing traditional client directed advocacy. Children under that age would be appointed a GAL or best interest attorney. The bright-line rule is suggested because "a case by case assessment" of individual children's capabilities is cumbersome and too inconsistent to be fair.<sup>338</sup> Children younger than seven would automatically be presumed unable to make considered judgments.<sup>339</sup> However, bright line rules are inapplicable to queer youth, especially those who exhibit gender non-conforming behavior prior to age seven. For these children, a best interest [\*1109] attorney or GAL may be predisposed to argue for outcomes that support forcing the child to conform to his or her biological gender.<sup>340</sup>

Suggestions that the type of proceeding should dictate the type of representation a child receives<sup>341</sup> are similarly problematic for queer children. While out-of-home placements are dangerous to queer youth,<sup>342</sup> so too is

<sup>335</sup> States' studies found that dispositional hearings are routinely marked by lack of strong advocacy with heavy reliance on probationary reports. Hearings frequently "rubberstamp" recommendations from the state department of juvenile justice. Youth are sentenced without any investigation by defenders. These assessment results are in sharp contrast to the best practice guidelines articulated in the 1995 national study that supports counsel proactively engaging throughout the detention process. Bookser, *supra* note 7, at 305-06.

<sup>336</sup> For example, one of the earliest articles recognizing the dangers queer youth face is Alan K. Malyon's *The Homosexual Adolescent: Developmental Issues and Social Bias*, 60 CHILD WELFARE 321 (1981). This and other early social science articles are cited in Virginia Uribe, *The Silent Majority: Rethinking Our Commitment to Gay and Lesbian Youth*, 33 THEORY INTO PRACTICE 167 (1994). In 1986, Project 10 became the first school support group for queer adolescents and the earliest law review article championing queer youth. Donna I. Dennis & Ruth E. Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446 (1986). Unfortunately, as of 2006, one commentator comparing the small number of statutes that provide any legal protection for queer youth in schools with the number of states, which have laws specifically prohibiting any positive portrayal of LGBTQ people or issues, calls the overall state of protections for queer students "dismal." Fedders, *supra* note 117, at 791.

<sup>337</sup> Guggenheim, *The Right to be Represented*, *supra* note 296, at 86, 92 (suggesting that age seven be the age at which children should be able to direct their attorneys in all types of proceedings because that is generally the age at which a child can be charged with delinquency); Duquette, *supra* note 53, at 1240 ("At age seven (or eight or ten) and above the youth would receive a client directed advocate . . .").

<sup>338</sup> Duquette, *supra* note 53, at 1241.

<sup>339</sup> This is somewhat simplified. For a detailed explanation of the several permutations on the difficulties of representing young and preverbal children, see *id.* at 1241-43.

<sup>340</sup> See, e.g., Ben-Asher, *supra* note 215, at 279 (GAL attorney appointed to represent boy who was allowed to act like a girl by her parents, supporting removal of child, and blaming parents for child's behavior).

<sup>341</sup> In New York's Rules for the Chief Judge, the role of the attorney is different for attorneys representing children in juvenile delinquency and PINS proceedings ("the attorney for the child must zealously defend the child"), than for other proceedings ("the attorney for the child must zealously advocate the child's position."). The Rules also further states that if the child is "capable of knowing, voluntary and considered judgment," the advocacy should be child directed but if not, the attorney may substitute

placement with an unsupportive parent or other family member.<sup>343</sup> Thus, a queer child needs an attorney who is client directed no matter the type of proceeding. It is the outcome, not the type of proceeding, which is dangerous to the child. Likewise, the relatively new emphasis on supporting the "family"<sup>344</sup> is troublesome for queer children. It is "family" that often forces queer children onto the street or into the juvenile justice system.<sup>345</sup> Similarly, it is often "family" that sends queer children to therapists to be cured of "pre-homosexuality."<sup>346</sup> Any unexplored adoption of the concept of "family" as a generally positive construct endangers queer children, just as it endangers queer adults.<sup>347</sup> Requiring client directed advocacy for queer children would allow the child's perception of her family to guide the representation. Thus, support for the queer child, not the family's belief about the child's queerness, would be maximized in the litigation. There are a variety of relatively straightforward mechanisms with which to compel traditional advocacy for queer children.

#### [\*1110] IV. MECHANISMS FOR REQUIRING TRADITIONAL ADVOCACY FOR QUEER CHILDREN

Requiring traditional client directed advocacy for queer youth could be achieved by a variety of methods, including case law, statutes, court regulations, or state rules governing professional responsibility. Defining "queer youth" is relatively simple. Recent New York state regulatory changes aimed at reducing the discrimination queer youth face in juvenile facilities are illustrative. Lesbian, Gay, Bisexual, Transgender, or Questioning youth are defined as "youth who have self-identified or are perceived by others as lesbian, gay, bisexual, transgender or questioning their sexual orientation or gender identity."<sup>348</sup> Other authors use similar perception-based definitions for sexual minority youth<sup>349</sup> that maximize protection for the child while minimizing the need for interrogation concerning how the child self-identifies. Thus, if a child faces harm because she is either perceived or self identifies as queer, she is treated by the attorney as if she is queer for the purposes of providing client-directed advocacy.

Courts could require that attorneys provide traditional advocacy for their queer child clients. Courts have held attorneys for children to a particular standard of representation on a case-by-case basis.<sup>350</sup> A judge who

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judgment for the child as long as the child's wishes are made known to the court. N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2 (2007).

<sup>342</sup> See *supra* Section III.E.

<sup>343</sup> See *supra* Section III.B.

<sup>344</sup> See, e.g., Bruce A. Green & Annette R. Appell, *Representing Children in Families--Foreword*, [6 NEV. L.J. 571, 582 \(2006\)](#) (listing as one of the themes of the conference the importance of children's lawyers to take into account children's families, especially their parents); Christine Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, [6 NEV. L.J. 1263 \(2006\)](#) (suggesting that the child's family is the expert children's attorneys should look to when representing their clients).

<sup>345</sup> See *supra* section III.B.

<sup>346</sup> *Id.*

<sup>347</sup> RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL* 153 (1998).

<sup>348</sup> See LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING YOUTH PPM 3442.00, *supra* note 334.

<sup>349</sup> See Marksamer, *And By the Way*, *supra* note 230, at 72 n.1 (defining transgender as including those who "do not fit gender stereotypes, such as women who are seen as masculine, men who are seen as feminine, and people whose gender expression is not clearly definable as masculine or feminine."); Fedders, *supra* note 117, at 775 (describing those youth who "publicly identify as LGBTQ as well as those whose sexual behaviors and attractions, and/or feelings about their gender identity place them outside the heterosexual and gender--conforming norm, no matter how they publicly identify").

<sup>350</sup> See, e.g., *In re Colleen C.C.*, [648 N.Y.S.2d 754 \(N.Y. App. Div. 1996\)](#) (attorney for child impeached child's testimony and expressed doubt as to whether state had established its case in abuse and neglect proceeding); *In re Jamie T.T.*, [599 N.Y.S.2d 892 \(N.Y. App. Div. 1993\)](#) (duty of child's attorney to take an active role in abuse case to make up for lapses of County Attorney).

becomes aware of the harm queer children face in state custody could, for example, require that the child's attorney not only continue representing the child after the initial proceeding, but that the attorney specifically represents the child's position when challenging placement options.<sup>351</sup> Unfortunately, given the support for best interest lawyering by most judges,<sup>352</sup> and the internalized [\*1111] heterosexism of the judicial system, it is unlikely that widespread judicial support for traditional advocacy for queer youth is forthcoming. It is far more likely that state legislatures would recognize the need to protect this vulnerable population in a systemic fashion.

Several states have statutes that specifically protect queer youth from discrimination in a variety of environments.<sup>353</sup> Other states specifically require traditional advocacy for at least some of the children appearing in court. For example, New Mexico now requires that children ages fourteen and older receive the same type of legal representation as do adult clients.<sup>354</sup> Some states provide for the appointment of an attorney for a child when a conflict arises between the position of the GAL and that of the child.<sup>355</sup> Once a state legislature recognizes queer youth as a vulnerable population, it could move to provide the protection of traditional advocacy for queer children who are the subject of court proceedings and currently are appointed GALs or best interest attorneys.

Court rules are another mechanism whereby states have attempted to define the role of children's attorneys. The chief judge of New York's [\*1112] Court of Appeals recently issued a rule attempting to clarify the role of the "law

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<sup>351</sup> There are indications that the judge in Destiny's case requested that the attorney take part in her attempt to change her placement. Marksamer, *supra* note 230, at 80.

<sup>352</sup> See Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court-A Promised Unfulfilled*, 44 CRIM. L. BULLETIN 5, n.35 (2008).

I have practiced juvenile delinquency law for over thirty years and have spoken to hundreds of lawyers about the Gault case. We have all seen the hostility directed at lawyers who refuse to accept the best interest model and the ways judges manipulate lawyers, parents, and children into accepting the best interest model of representation.

*Id.*

<sup>353</sup> See, e.g., [CAL. WELF. & INST. CODE § 16001.9 \(23\)](#) (West 2008).

To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment on the basis of actual or perceived race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability, or HIV status.

*Id.*

<sup>354</sup> [N.M. STAT. § 32A-4-10 \(2008\)](#) (requiring a child age 14 and up be appointed an attorney and children under 14 be appointed a GAL); [N.M. STAT. § 32A-1-7.1 \(A\) \(2008\)](#) ("An attorney shall represent a child in a proceeding for which the attorney has been retained or appointed. The attorney shall provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, in accordance with the rules of professional conduct."); see also [WASH. REV. CODE § 13.34.100\(6\)](#) ("If the child requests legal counsel and is age twelve or older, or if the guardian ad litem or the court determines that the child needs to be independently represented by counsel, the court may appoint an attorney to represent the child's position."); [MINN. STAT. § 260C.163](#) subd. 3(d) (2008) ("Counsel for the child shall not also act as the child's guardian ad litem.").

<sup>355</sup> See, e.g., [MICH. COMP. LAWS § 712A.17d\(2\)](#).

If, after discussion between the child and his or her lawyer--guardian ad litem, the lawyer--guardian ad litem determines that the child's interests as identified by the child are inconsistent with the lawyer--guardian ad litem's determination of the child's best interests, the lawyer--guardian ad litem shall communicate the child's position to the court. If the court considers the appointment appropriate considering the child's age and maturity and the nature of the inconsistency between the child's and the lawyer--guardian ad litem's identification of the child's interests, the court may appoint an attorney for the child. An attorney appointed under this subsection serves in addition to the child's lawyer--guardian ad litem.

guardian" in New York. <sup>356</sup> The rule provides for slightly different standards for advocacy depending on the type of case. It also allows for substitution of judgment in cases where an attorney believes the child is not capable of considered judgment. <sup>357</sup> However, when representing youth in delinquency proceedings, the attorney must, without exception, "zealously defend the child." <sup>358</sup> Rules of professional conduct are also a mechanism for guiding attorney practice and regulating attorney actions in particular types of cases <sup>359</sup> by prohibiting discrimination against queer clients. <sup>360</sup>

Thus, whether it is by statute, court rule, or rule of professional responsibility, a state could require that attorneys representing queer children provide them with the traditional zealous advocacy provided to adult clients. Some states already provide protections for queer children in the education and child welfare systems. Likewise, other states have required traditional advocacy for specific populations of children. <sup>361</sup> A statute or rule combining these concepts would be fairly straightforward.

This Article proposes a model statute or rule as follows:

1. An attorney appointed to represent a child who identifies as or is perceived to be lesbian, gay, bisexual, transgender, or gender nonconforming shall act as a traditional attorney providing the same manner of legal representation and being bound by the same duties to the child as is due an adult client.
2. An attorney appointed to represent a child who identifies as or is perceived to be lesbian, gay, bisexual, transgender, or gender nonconforming shall not act as the child's guardian ad litem.
3. An attorney appointed to represent a child who identifies as or is perceived to be lesbian, gay, bisexual, transgender, or gender nonconforming should always presumptively function as a traditional attorney. If the child is pre-verbal, or is unable because of mental incapacity to meaningfully participate in an attorney-client relationship, then the attorney may, in accordance with subsection (4) below, advocate for the child's legal interests.
4. It is unethical for an attorney appointed to represent a child to discriminate in any manner based on the child's perceived sexual orientation or gender identity. It is unethical for an attorney appointed to represent a child **[\*1113]** to advocate a position on behalf of that child based on the attorney's personal beliefs about sexual orientation or gender nonconformity. In addition, an attorney appointed to represent a child who identifies as or is perceived to be, lesbian, gay, bisexual, transgender, or gender nonconforming must at all times strive to protect his or her client from discrimination and harassment on the basis of sexual orientation or gender nonconformity.

## CONCLUSION

Queer youth are a highly vulnerable and at-risk population that faces dangers other children do not. They often appear in court, charged as delinquents or being in need of supervision, or the subject of child welfare proceedings or the object of a custody disputes. At some point during their interaction with family court, the juvenile justice system, or the child welfare system, queer children are likely to be harmed because of their sexuality or gender non-conformity.

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<sup>356</sup> Elliot Wiener, *The Chief Judge Clarifies the Role of Attorneys for Children*, 40 N.Y. STATE BAR ASSOC. FAM. L. REV. 4 (Summer **2008**), available at [www.nysba.org/AM/TemplateRedirect.cfm?Template=/CM/ContentDisplay.cfm&ContentID=16704](http://www.nysba.org/AM/TemplateRedirect.cfm?Template=/CM/ContentDisplay.cfm&ContentID=16704).

<sup>357</sup> See *supra* note 341.

<sup>358</sup> *Id.*

<sup>359</sup> See *supra* note 330.

<sup>360</sup> See *supra* note 331.

<sup>361</sup> See *supra* note 354.

Queer children, like other children, are often appointed attorneys to represent them in their journey through the court system and beyond. Unfortunately, their attorneys often fail at their jobs. They harm their clients because they are encouraged to substitute their own beliefs and judgments about what is "best" for their queer child client over the interests and rights of that child. This is often a result of personal bias and of the current best-interest of the child requirement that is in effect in most jurisdictions.

It does not have to be like this. The answer is simple and straightforward: attorneys who are appointed to represent queer kids must be required to act as traditional advocates. Queer youth cannot wait for their attorneys to become enlightened. They cannot wait for progressive advocacy groups to sue on their behalf. They need attorneys who will represent their interests today because they are being injured today. Anything less is intolerable, not only to queer youth, but to society at large.

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