
Article

**Family Assimilation Demands and Sexual
Minority Youth**

Orly Rachmilovitz[†]

Introduction 1375

I. Assimilation Demands at Home: From a Melting Pot to
a Pressure Cooker..... 1382

 A. Assimilation’s Harms on Children 1384

 1. Children’s Optimal Development..... 1387

 2. Imbalanced Family Dynamics..... 1388

 B. Assimilation’s Harms on LGBT Youth..... 1392

 C. Assimilation Demands in Courts: Are
Assimilation Demands a Parental Right?..... 1398

 1. Outside of Mutability 1400

 2. Vindicating Children’s Identity Interests 1402

II. Inadequacy of Current Family Law..... 1413

 A. Assimilation Demands in Abuse and Neglect
Law 1414

 1. Violent Demands: Sexuality as a Site of
Abuse and Neglect..... 1414

 2. Rejecting Emotional Abuse as a Mechanism
for Litigating Family-Based Assimilation
Demands 1420

[†] Visiting Assistant Professor of Health Law, Boston University School of Law. S.J.D., University of Virginia; LL.M., University of California at Los Angeles; LL.B, B.A., University of Haifa. For their comments and advice, I thank Kerry Abrams, Susan Appleton, John Balzano, Samuel Bray, Luke Boso, Michael Boucai, Khiara Bridges, Anne Coughlin, Martin Guggenheim, Jody Herman, Nan Hunter, Holning Lau, Linda McClain, Abby Moncrieff, Douglas NeJaime, Rachelle Neshkes, Kevin Outterson, Kim Pearson, Edward Stein, and Michael Weinstein. For research assistance and editing, thanks go to Juliaana DiGesù and Maria Kimijima. I also thank participants at the Williams Institute Fellows’ Roundtables and Works-In-Progress series, and the 2013 Law and Society Annual Meeting for helpful feedback. Special thanks to Charles and Holning for their support and friendship. Copyright © 2014 by Orly Rachmilovitz.

2014]	<i>FAMILY ASSIMILATION DEMANDS</i>	1375
	B. Assimilation Demands and the Child in Need of Supervision.....	1424
	III. The Proposed Framework: The Family in Need of Services	1428
	A. Distinguishing Assimilation Demands from Parents' Rights.....	1428
	1. Coercion Versus Exposure.....	1429
	2. The Assimilation Demand Is Harmful to the Child	1432
	B. Promoting Family Cohesion.....	1440
	1. Current Limitations on Remedies.....	1441
	2. Mediation	1444
	C. Potential Challenges to FINS	1446
	1. Which Identity to Protect?.....	1447
	2. Reporting	1449
	3. "Bad Parenting" Claims.....	1450
	Conclusion.....	1451

INTRODUCTION

Family law assumes that parents do what is best for their children—that ties of biology and love position parents to be optimal caregivers.¹ Indeed, parents' rights to the care, custody, and control of their children are fundamental rights in American constitutional law,² implicitly positioning children's interests as identical to those of their parents. Under this parental rights paradigm, parents are the chief decision-makers, and state intervention in the family infringes primarily on *their* rights.³

But parental rights are not absolute, and exceptions to the parental rights paradigm do exist. Despite the broad liberties parents have in childrearing, the state limits those rights when parents cause harm to their children and no longer observe a minimal degree of care for them.⁴ The most notable situations

1. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (“[T]here is a presumption that fit parents act in their children’s best interests.”).

2. E.g., *id.* at 70; *Quilloin v. Walcott*, 434 U.S. 246, 254–55 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 218–19 (1972); *Pierce v. Soc’y of the Sisters of the Holy Names*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

3. See, e.g., *Troxel*, 530 U.S. at 68–69 (suggesting that when a state interjects itself into the realm of the family the state questions the ability of the parent).

4. MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS? 36 (2005).

of state intervention to protect children from their parents are cases of abuse or neglect. Laws pertaining to abuse and neglect are broadly crafted to encompass different types of harm—physical, sexual, and psychological.⁵ Parents who compromise their children’s best interests may find their parental rights limited in custody disputes as well.⁶ Exceptions to the parental rights paradigm are not only concerned with preventing harm to children, but also recognize that, in some instances, parents are not the best decision-makers for their children.⁷ This Article asks whether protecting children’s identity development, a task at the center of children’s self-determination and emotional well-being, might warrant a new exception to parental rights.

The legal system has carved out exceptions to the parental rights paradigm, acknowledging that, occasionally, not only do the interests of parents and children diverge, but following the parental rights paradigm may be detrimental to the child.⁸ The law has recognized that, in some cases, children have the capacity, and thus the right, to autonomous decision-making. Legislators and courts have granted decision-making rights to children seeking care for pregnancy prevention and termination, HIV/AIDS and other sexually transmitted infections, sub-

5. MARTIN GUGGENHEIM ET AL., *THE RIGHTS OF FAMILIES* 94–95 (1996).

6. Courts have restricted divorcing parents from raising their children according to their religion when that is not in the child’s best interest, as well as prohibited parents from engaging in non-marital sexual relationships during and after the divorce. *See infra* notes 30–32 and accompanying text.

7. *See infra* notes 29–31 and accompanying text.

8. Justice Douglas’s dissent in *Wisconsin v. Yoder* first expressed the idea that children should be able to voice and receive legal protection for their interests even when their wishes diverge from their parents’. 406 U.S. 205, 245–46 (1972) (Douglas, J., dissenting). Though not the majority opinion, Justice Douglas’s dissent inspired many of the concepts around children’s rights and opened our eyes to the possibility that children’s interests may not always align with parents’ and that the parental rights paradigm might give rise to abuses. SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM* 157 (3d ed. 2004). He seeks to give children the opportunity to assert their independent interests so that courts can give them adequate consideration. It is important to note that Douglas would not tip the scale in favor of children, but rather would allow for exceptions when parents’ and children’s interests conflict. *See Yoder*, 406 U.S. at 246 (Douglas, J., dissenting) (“The child, therefore, should be given the opportunity to be heard . . .”).

stance abuse, and mental health.⁹ Allowing children to make their own decisions in these instances encourages children to seek and receive medical attention when parental involvement is a highly sensitive matter and could jeopardize the children's welfare or their relationship with their parents.¹⁰

While all of the exceptions to the parental rights paradigm are a significant step toward children's autonomy and safety from parental harm, they are limited to very few aspects of children's lives. These exceptions are unable to address a range of situations where parental conduct overly burdens children's self-determination and compromises children's safety and well-being. This Article thus aims to explore one area where the law should carve out an additional exception: family conflicts around children's identity interests—children's freedom to develop, express, and pursue their identities.¹¹ Parents may respond negatively, indeed violently, when children develop or assert identities that diverge from their own or from their views of what a child's desirable identity is. I explore this tension between children's identity interests and parental rights, particularly in the area of children's sexual orientation¹² and gender identity¹³ because of the rampant victimization of lesbi-

9. Cara D. Watts, *Asking Adolescents: Does a Mature Minor Have a Right to Participate in Health Care Decisions?*, 16 HASTINGS WOMEN'S L.J. 221, 235–36 (2005); see also *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979) (reiterating minor girls' abortion rights and establishing a judicial bypass process in which minors who have not secured parental consent to an abortion may petition courts instead); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72–75 (1976) (extending abortion rights to minor girls without requiring them to consult, or even notify, parents); *Newmark v. Williams/DCPS*, 588 A.2d 1108, 1110, 1116–17 (Del. 1991) (ruling, in a dispute between Christian Scientist parents and the child welfare system over the treatment of a three-year-old with cancer, that parents may not sacrifice their children's life and health in the name of religion before the child is old enough to make that decision for herself, and proceeding to a “best interests” analysis).

10. DAVIS ET AL., *supra* note 8, at 157–58.

11. Psychology defines identity as a sense of who we are, what we value, and where we are headed. See CHARLOTTE J. PATTERSON, *CHILD DEVELOPMENT* 543 (2008). Our identity is related to those biological traits or social background that “involve[] learning about, relating to, and committing to, socially constructed meanings associated with [those] biological [or social] status[es].” Holning Lau, *Pluralism: A Principle for Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 331 (2007).

12. “Sexual orientation” is one's predisposition or inclination toward a particular type of romantic or sexual partner, activity, or behavior. BLACK'S LAW DICTIONARY 1407 (8th ed. 2004).

13. “Gender identity” is one's psychological understanding and expression of one's gender as male, female, both, in between, or neither. The Sylvia Rivera Law Project (SRLP), a New York City-based nonprofit organization that

an, gay, bisexual, or trans (LGBT) youth in the home, in society, and in the law.¹⁴

My purpose in this project is to offer a framework for analyzing what makes LGBT youth vulnerable at home and how the law can alleviate that vulnerability by creating a new exception to the parental rights paradigm—the “Family in Need of Services” framework.¹⁵ My analysis relies heavily on a vocabulary of assimilation demands as introduced by Professor Kenji Yoshino.¹⁶ Yoshino criticizes assimilation as costly to the authentic self—denying one the freedom to develop an identity independent of pressures to conform to mainstream society.¹⁷

provides legal services to the transgender community, defines “gender identity” as “how we see ourselves. Some of us see ourselves as women, some as men, some as a combination of both, some as neither. Some of us have complex identities that may even be fluid and change over time.” Jody Marksamer & Dylan Vade, *Trans 101*, SYLVIA RIVERA L. PROJECT, <http://srlp.org/resources/trans-101> (last visited Mar. 11, 2014). SRLP describes “transgender” (or “trans”) as “people . . . whose gender identity and/or expression . . . does not . . . match stereotypical gender norms associated with our assigned gender at birth.” *Id.* I will mostly use the terms “trans” or “gender nonconforming” to refer to people who do not conform to “traditional” or “expected” gender presentation. “Those who are gender nonconforming may or may not identify as part of the trans community or as part of any sexual minority group, such as the lesbian and gay communities.” Jody L. Herman, *Gender Regulation in the Built Environment: Gender-Segregated Public Facilities and the Movement for Change in Washington, DC, A Case Study Approach 4–5* (May 16, 2010) (unpublished Ph.D. dissertation, The George Washington University) (on file with author).

14. These areas of victimization are discussed further in depth below. See *infra* Part I.A.1.

15. A note on terminology: the term I use is inspired by the equivalent “child in need of services,” “child in need of supervision,” or “person in need of supervision.” Different states use any of these terms to refer to the framework dealing with an “incorrigible” child and subjecting her to state intervention in an attempt to correct her behavior and return her to her parents’ custody. Below, I use them according to their use in a specific state (i.e. if State A uses “child in need of services,” so will I; if State B uses “child in need of supervision,” so will I). They all have the same legal meaning, and I find all these terms to connote blame toward the child for the family’s dysfunction. Because I prefer avoiding blame, particularly toward the child, and because I am in search of a holistic solution to parental assimilation demands, I use “family in need of services” for my proposal. I believe this is a better use of this term than that used by the State of Arkansas, which uses it to refer to, essentially, proceedings around an “incorrigible” child, rather than its purported presentation to offer services to families as a whole. Rachel A. Runnels, *Family Law and Practice*, in 5 ARKANSAS PRACTICE SERIES § 17:1 (2013).

16. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (developing a theory of the legal and social costs of coerced assimilation throughout the book).

17. *Id.*

He analyzes assimilation demands on children where the law imposes them on LGBT parents (and thus vicariously on children) out of concern that children might develop sexual minority identities.¹⁸ When gay or lesbian parents are involved in custody disputes with former different-sex partners, these lesbian or gay parents tend to prevail only when they downplay their sexual orientation to the court and conceal it from their children,¹⁹ thus mitigating courts' concerns about the outcome of children's sexual orientation. Anxiety that children will develop sexual minority identities motivates restrictions on LGBT parents' custody rights in an attempt to curb children's undesirable non-heterosexual identities.²⁰ This fear of potential non-heteronormative children insidiously affects LGBT youth themselves because it condones adults' assimilation demands. In Yoshino's example of family assimilation demands on children's sexual identity,²¹ the assimilation demands are superimposed by courts.²² Parents cooperate—presumably reluctantly and at high costs—in order to retain parental rights.

18. According to Yoshino, adults presume children to be “sexual waverers” who must be protected from developing an unfavorable sexual minority identity. *Id.* at 44. As this Article demonstrates, many parents, therefore, try to direct the outcome of their children's sexual identity, sometimes by such aggressive means as abuse or neglect.

19. *Id.* at 101–03.

20. See Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257, 296–97 (2009).

21. To maximize inclusion of identities and their expressive conduct, I use the term “sexual identity” to refer to either or both sexual orientation and gender identity throughout this Article.

22. See YOSHINO, *supra* note 16, at 101–03. Clifford Rosky offers further explanation about courts' concern that LGBT parents will produce LGBT children, and about how this concern motivates courts' severe restrictions on LGBT parents' parental rights. Rosky, *supra* note 20, at 257. Analyzing almost 200 opinions, Rosky found three stereotypes about lesbian and gay parents that courts employ against them in custody decisions: that gay fathers are molesters; that gay fathers are infectors/carriers of sexually transmitted infections; and that both gay fathers and lesbian mothers are “recruiters” or “role-models.” *Id.* at 262. According to the last set of stereotypes, LGBT parents encourage their children to adopt LGBT identities by “taking them to pro-gay events and exposing them to pro-gay media” (recruiters) or by “providing influential models of same-sex relationships” (role-models). *Id.* at 294. Both stereotypes are rooted in the same implicit concern that children of LGBT parents are more likely to develop LGBT identities because children are presumed sexual waverers who mimic adult relationships, primarily those of their parents. Rosky found that straight parents used these stereotypes as a litigation strategy against LGBT parents in 28% of cases studied, and that courts accepted such arguments in 90% of those cases. *Id.* at 296–97.

Yet so far, Yoshino and other legal scholars have not commented on the assimilation demands children suffer at home independent of courts' pressures on LGBT parents. This Article fills that gap in the literature by exploring assimilation demands that are rooted in parents' own desires for children's heterosexuality and gender conformity, and their animus toward sexual minorities. Examples of assimilation demands include verbal harassment and name-calling,²³ threatening a child with rape in order to "cure" her same-sex attractions,²⁴ blocking access to LGBT friends, partners,²⁵ or support groups,²⁶ or subjecting the child to conversion therapy.²⁷ These assimilation demands range in their severity, with physical beatings and conversion therapy falling in the extremely egregious end of the spectrum. However, since children experience assimilation demands as a form of family rejection, milder assimilation demands may often harm children as well. This Article will focus on the more subtle assimilation demands that the law has yet to effectively address. With the premise that non-heteronormative identities ought not to be disfavored, devalued, or delegitimized by society or the law, this Article challenges how families, at their own will, pressure children into mainstream sexual identities. Such conduct harms children, infringes upon their identity interests, compromises their self-determination, and should join the existing categories of exceptions to parental rights. A critical examination of reasoning in the few cases in which courts have considered assimilation demands made on children reveals that children's identity interests are currently under-protected in the law. This Article proposes a new framework that courts could use to analyze cases involving children's identity interests and parental assimilation demands. This framework would develop a jurisprudence better suited to children's needs and identity interests.

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

24. See, e.g., *C.O. v. B.C.*, No. B206425, 2008 WL 4670513, at *1 (Cal. App. Oct. 23, 2008).

25. See, e.g., *Landreneau v. Fruge*, 94-553, p.13 (La. App. 3 Cir. 6/12/96); 676 So. 2d 701, 711 (Thibodeaux, J., dissenting) (blocking access to partner by reporting relationship to authorities).

26. See, e.g., *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282, at *3 (Ct. App. Mar. 23, 2007).

27. Conversion therapy (also "reparative therapy" or "ex-gay therapy") attempts to eliminate one's same-sex sexual orientation through counseling and is generally practiced by religious groups. See *infra* note 139.

This Article proceeds in three parts. Part I explains Yoshino's theory of assimilation demands and demonstrates why these demands are so harmful to children, particularly to LGBT youth. It then provides an overview of the case law to show how assimilation demands cases have fared in courts and concludes that while courts attempt to protect children's identity interests—with some even ruling such interests are fundamental rights—the *de facto* results of these cases under-protect, and even harm, children. Part II addresses current family law, including abuse and neglect, and "child in need of services" (CHINS) jurisprudence, and finds both inadequate to protect children's identity interests from parental assimilation demands. Part III details how courts are to distinguish acceptable parental behavior from assimilation demands, proposing that courts restrict parental behavior that is strictly coercive and sufficiently harmful to the child. Next, Part III proposes the "family in need of services" (FINS) framework as an alternative to CHINS that preserves family cohesion and suggests mediation as one practical tool for constructive, less adversarial dispute resolution. Part III concludes by contending with possible concerns to the arguments and proposals laid out in the Article.

One initial objection readers might raise is the potential classification of parents' religious inculcation as an assimilation demand.²⁸ Would adopting the assimilation demands framework bar parents from passing on their beliefs about sexuality to their children or put them at risk of state intervention through FINS? While parents' religious rights certainly deserve weighty consideration, the balance between those rights and children's identity interest depends on the nature and severity of the family conflict. The test Part III offers—which distinguishes between assimilation demands and acceptable parenting contingent on how coercive and harmful parents' demands are—can limit intervention only to truly troubling cases. There are several examples in family law where fundamental rights that parents would hold as non-parents yield to children's interests: parents' property rights take a back seat to their obligation to financially support their children,²⁹ and their exercise of the right to engage in non-marital relationships may cost

28. This concern might very well merit its own independent piece of scholarship and thus is out of the scope of this Article, which merely aims to start a conversation in the literature about assimilation demands in families.

29. See, e.g., *Dzierson v. Dzierson*, 661 N.Y.S.2d 779, 781 (N.Y. Fam. Ct. 1997).

them custody rights.³⁰ The case law on custody in interfaith families restricts parents' rights to inculcate children in their religion when that religion has adverse effects on the child's well-being.³¹ More importantly, the Supreme Court has put restrictions on parents' religious rights when those implicate the child's welfare and safety.³² With the wealth of empirical evidence on the victimization of LGBT youth,³³ in instances of extreme family conflict, parents' religious rights should not take precedence over the child's identity interests and well-being. In short, when a family is bitterly conflicted over the parents' religion and the child's sexual identity, it would be a FINS, which may ultimately present an opportunity for family repair.

I. ASSIMILATION DEMANDS AT HOME: FROM A MELTING POT TO A PRESSURE COOKER

One goal of the parental rights paradigm, and the cases that establish it, is to prevent the assimilation of children into a monolithic American identity.³⁴ But the result of this doctrine is the assimilation of children into their family and community identities, thereby restricting their independent identity interests.³⁵ To fully understand this point, and thus the need for a new legal framework that will protect children from parent's assimilation demands, it is important to understand how coerced assimilation impacts identity, why LGBT youth are particularly vulnerable to assimilation demands, and whether children facing such demands have been able to find relief in court.

The ideal of assimilation—conforming to the mainstream—is embodied in the metaphor of American society as a melting pot.³⁶ According to this metaphor, minorities are encouraged to

30. See Rosky, *supra* note 20, at 283.

31. See, e.g., Sagar v. Sagar, 781 N.E.2d 54, 59 (Mass. App. Ct. 2003) (finding that courts will generally maintain parents' fundamental rights in free exercise of religion unless there is a compelling state interest—harm to the child); see also, e.g., Siegel v. Siegel, 472 N.Y.S.2d 272, 273 (N.Y. Spec. Term 1984); Munoz v. Munoz, 489 P.2d 1133, 1134–35 (Wash. 1971).

32. E.g., Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

33. See *infra* Part I.B.

34. Orly Rachel Rachmilovitz, Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention 26–27 (May 2012) (unpublished S.J.D. dissertation, University of Virginia School of Law) (on file with author).

35. *Id.* at 60–61.

36. YOSHINO, *supra* note 16, at x–xi.

assimilate into a neutral, American identity, which incorporates traits from different identity groups.³⁷ Yoshino criticizes assimilation as costly to one's authentic self—denying one's freedom to develop an identity independent of pressures to conform.³⁸ Thus, Yoshino distinguishes between assimilation that is necessary for citizenship, socialization, and peaceful social order, such as speaking a language or obeying the law, from assimilation that is coerced by others and may be motivated by animus toward a particular group or identity category.³⁹

Yoshino articulates three types of coerced assimilation, or assimilation demands: conversion, passing, and covering.⁴⁰ Conversion is the demand to assimilate by changing unfavorable identities or identity traits into more acceptable ones.⁴¹ Passing is the demand to assimilate by concealing one's unfavorable identity and misleading others into believing that the individual identifies with the mainstream.⁴² Lastly, covering is the demand to assimilate by muting or downplaying the unfavorable identity that one has *made known* to others.⁴³ While conversion and passing target one's status as a member of a minority group, covering is a demand that focuses on conduct that expresses a minority identity.⁴⁴ Another aspect of covering, reverse-covering, is the demand that the individual perform according to stereotypes associated with her identity group.⁴⁵ It equally compromises one's authentic identity and conduct. All assimilation demands are harmful to identity and to the authentic self.⁴⁶ Assimilation demands and their pressures con-

37. *Id.* at 140, 179.

38. *Id.* at 178.

39. *Id.* at 26–27. Yoshino gives examples of racial minorities required to “act white” due to white supremacy, women expected to downplay their family responsibilities at work because of patriarchy, and LGBT persons asked not to “flaunt” because of homophobia. *Id.* at xi.

40. *Id.* at 17–18. Erving Goffman describes how socially unfavorable groups navigate the performance of their “spoiled identities” to escape social burdens such as stigmatization and discrimination. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITIES 42 (1962).

41. YOSHINO, *supra* note 16, at 46–47.

42. *Id.* at 17–18.

43. *Id.* at 18.

44. *Id.* at 22 (“[D]iscrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons.”).

45. *Id.* at 23. Yoshino elaborates on reverse-covering with the example of women in the workplace. *Id.* at 143–52.

46. Lau, *supra* note 11, at 324.

flict with an individual's sense-of-self, and her expression of that self, and undermine the consistency between the authentic self and the outwardly expressed self.⁴⁷ Therefore, assimilation demands create psychological burdens, such as feelings of inferiority or self-hatred.⁴⁸

Yoshino's work illustrates the unique obstacles that minorities face when confronting assimilation demands. He focuses extensively on the divide assimilation demands create within one's sense-of-self—a dichotomy between the authentic, true self and a false self whose purpose is to mediate between the true self and the world.⁴⁹ When assimilation demands undermine or suppress an authentic identity, one cannot achieve full emotional health by appreciating and expressing one's identity. Thus, assimilation demands compromise the process of identity development in the psychological sense—the development of understanding who we are, what we value, and where we are headed—by undermining the achievement of a coherent sense-of-self.⁵⁰

A. ASSIMILATION'S HARMS ON CHILDREN

Assimilation demands on children are highly troubling, as multiple factors increase children's vulnerability to such demands. Factors such as children's stage of identity and emotional development, their attachment and dependence on family, and the power structure within families leave children vulnerable to harmful assimilation demands at home. Assimi-

47. *Id.*

48. *Id.* at 324–25.

49. YOSHINO, *supra* note 16, at 184–85 (presenting D.W. Winnicott's theory regarding true and false selves and the relationship between them as measures of psychological health). Both Winnicott's work and Yoshino's use of this dichotomy have been criticized by legal scholars. Paul Horwitz suggested that “[t]here is reason to be skeptical of Winnicott's simple schema of the true and false selves [T]hese vague and amorphous terms . . . are not much help in identifying precisely what, if anything, the True Self means.” Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283, 1289 (2007) (internal quotation marks omitted) (book review). Marc Poirier questions Yoshino's assertion that authenticity is a universal goal, and therefore assimilation is a universal harm. Marc R. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 3, 37–39 (2008). I mention Winnicott's theory here because it is the psychological foundation for Yoshino's argument. However, I make better use of Erik Erikson's analysis of harms to identity because of identity foreclosure, confusion, and assimilation demands' general challenge to identity achievement and intimacy. *See infra* Part I.A.

50. *See* PATTERSON, *supra* note 11, at 543–44.

lation demands at home are compounded by the high level of control parents have on children's environment and interactions outside the family. Parents can control which schools children attend⁵¹ as well as children's associations outside of school and the home.⁵² Thus, parents have extensive power and oversight over the community to which children belong and the values and norms to which they are exposed, making children more dependent on protection from sources outside their families and immediate communities, such as the legal system. To conclude that assimilation's harms should be mitigated by the law first requires the examination of the premise that children are in fact harmed, and severely so, by assimilation demands. The extreme level and quality of harm children suffer warrants the state intervention I advocate.

Though Yoshino couches his arguments about assimilation's harms to identity in the idea of the authentic self,⁵³ the work of psychologist and identity theorist Erik Erikson adds to the understanding of assimilation's harms to identity, and particularly children's identity development. Erikson suggested that experimentation is pivotal to a healthy identity.⁵⁴ Exploring different talents and skills facilitates industry in place of inferiority.⁵⁵ Beyond belonging to a social group, one's identity is also a result of one's interests and capabilities.⁵⁶ If one is unable to develop her identity through exploration, she is at risk of identity confusion or foreclosure and the resulting harms: "Youth after youth, bewildered by the incapacity to assume a role forced on him by the inexorable standardization of American adolescence, runs away in one form or another, dropping out of school, leaving jobs, staying out all night, or withdrawing into bizarre and inaccessible moods."⁵⁷ Thus, exploration helps achieve a coherent and stable identity and is necessary for adults to enjoy higher levels of mental health. Healthy identity

51. *Pierce v. Soc'y of the Sisters of the Holy Names*, 268 U.S. 510, 534 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (holding that parents have the right to choose their children's lingual and cultural education).

52. *Troxel v. Granville*, 530 U.S. 57, 66–69 (2000).

53. *See supra* notes 16–17 and accompanying text.

54. *See infra* notes 57–61 and accompanying text.

55. ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 123–25 (1968).

56. *Id.* at 124–25.

57. *Id.* at 132.

achievement is further crucial for accomplishing what Erikson viewed as true intimacy—the merging of identities.⁵⁸

Erikson touches on what are, in effect, assimilation demands on youth's identities.⁵⁹ While adolescents struggle to forge a coherent identity that is natural and authentic to them, outside pressures to assimilate into an expected, more desirable identity may result in a range of harms.⁶⁰ Assimilation demands threaten identity achievement because they discourage the exploration and experimentation necessary for committing to an authentic identity.⁶¹ Without exploration of the authentic self, identity foreclosure occurs, and with it comes the inability to accomplish intimacy as well as an overall weakened emotional health.⁶²

Though under Yoshino and Erikson's theories we are all harmed by assimilation demands that foreclose our identity exploration and compromise our healthy identity development or stable identity once identity formation is achieved, children are especially vulnerable to assimilation demands because of their incomplete development.⁶³ A legal framework that aspires to end assimilation demands must deflect the particular and exacerbated harm assimilation demands create for children. Though Yoshino makes a compelling case for protecting adults from assimilation demands that violate their civil rights,⁶⁴ the case for children's protection faces unique challenges. The fact that harms to children are different and worse than harms to adults may not, alone, be persuasive enough to overcome the parental rights paradigm or family privacy policies. However, parental rights do not justify a blanket rule against protection, but rather require the development of more refined legal tools that can identify the cases where protection is needed, and the form that said protection should take.⁶⁵ Illustrated below are two reasons for legal intervention to protect children from as-

58. *Id.* at 135. Erikson focuses on “a true and mutual psychological intimacy with another person,” rather than sexual intimacy. See PATTERSON, *supra* note 11, at 544.

59. See ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 131–32 (1964) (describing attempts to assimilate Sioux children and the resulting difficulties for those children to form either Indian or American identities).

60. *Id.*

61. *Id.*

62. See ERIKSON, *supra* note 55, at 135.

63. See *infra* Part I.A.

64. See YOSHINO, *supra* note 16, at 173–83.

65. See *infra* Parts I.C.2., II.

similation demands despite the parental rights paradigm: ensuring children's optimal development, and compensating for imbalanced family dynamics. This Article focuses on the distinct experience of LGBT youth, the current availability of legal protections for children's identity interests and autonomy, and the inadequacy of these and other existing frameworks, such as abuse or neglect law, to fully guarantee children are safe from assimilation demands in the home.

1. Children's Optimal Development

The distinct and elevated harms children's identities suffer when subject to assimilation demands are a result of their developmental stage.⁶⁶ Children are particularly prone to assimilation demands that impose identities that may not ring true.⁶⁷ Since children have yet to fully develop coping skills and lack the resources that allow them to handle assimilation demands and their harms,⁶⁸ the law should take it upon itself to compensate for children's inability to deflect harmful assimilation demands. Yoshino's concern about assimilation demands restricting opportunities for exploration and experimentation with identity and authenticity is perhaps most relevant to children.⁶⁹

Because children's identity has not yet formed, adults consider them sexual waverers who must be protected from developing an unfavorable identity and converted to comply with expectations of what their identity should be.⁷⁰ Accordingly, parents may wish to indoctrinate or expose children only to values and goals that parents see as appropriate. Presented with imminent failure, some parents utilize aggressive tactics in the context of sexuality, such as conversion therapy, which attempts to change same-sex sexual orientation or gender non-conformity "back" to heterosexuality or gender conformity.⁷¹ That children are most vulnerable to assimilation demands in

66. Lau, *supra* note 11, at 327; *see also* Mary Jane Rotheram-Borus & Kris A. Langabeer, *Developmental Trajectories of Gay, Lesbian and Bisexual Youth*, in *LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH* 97, 105 (D'Augelli & Patterson eds., 2001).

67. *See* Lau, *supra* note 11, at 333.

68. *Id.* at 327–29.

69. *See* YOSHINO, *supra* note 16, at 17–21.

70. *Id.* at 44.

71. Because I am more interested in the less overt forms assimilation demands take, I do not explore conversion therapy here. Conversion therapy, its futility, and harms have received vast attention from scholars, including Yoshino. *See infra* note 139 and accompanying text.

their most severe form (conversion) and from the most coercive and harm-inflicting source (the family) establishes the need to better protect children from conversion, as well as other forms of assimilation demands.

Conformity to assimilation demands cause children and youth to abandon their sense-of-self and commit to goals and values they are expected to adopt, even when these are inconsistent with their identity.⁷² As teens struggle with developing their identity, assimilation demands jeopardize a strong sense-of-self and psychological health, resulting in a young person's reduced productivity, depression, and difficulty forming and sustaining intimate relationships.⁷³ Other unfortunate consequences of victimization⁷⁴ are high rates of suicidality,⁷⁵ substance abuse,⁷⁶ and homelessness due to either running away from home or being cast out by parents.⁷⁷ Faced with assimilation demands, children realize they cannot depend on parents, friends, or other close contacts for support in their identity explorations.⁷⁸

2. Imbalanced Family Dynamics

Warm and attentive relationships with parents foster trust, a sense of safety, and high levels of self-esteem while allowing for exploration without shame or self-doubt.⁷⁹ According to attachment theory, the close interactions between a child

72. Lau, *supra* note 11, at 332.

73. *Id.* at 329–30.

74. I use “victimization” as an umbrella term for abuse, neglect, harassment, discrimination, or other forms of mistreatment youth experience, whether at school, home, or other spaces.

75. Rotheram-Borus & Langabeer, *supra* note 66, at 111–13; *see also* Caitlin Ryan et al., *Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults*, 123 *PEDIATRICS* 346, 349 (2009) (presenting data regarding depression, suicidality and the link between them). Additional studies show that youth at the intersection of sexual orientation and race/ethnicity are at even greater risk for depression and suicidality.

76. Rotheram-Borus & Langabeer, *supra* note 66, at 113–15.

77. PATTERSON, *supra* note 11, at 491–92; *see also* Rotheram-Borus & Langabeer, *supra* note 66, at 104 (reporting high rates of negative reactions from parents upon children's disclosure of same-sex sexual orientation, including high rates of children being expelled from home after coming out).

78. Rotheram-Borus & Langabeer, *supra* note 66, at 105.

79. ERIKSON, *supra* note 59, at 249, 252–55 (defining shame as self-consciousness and warning about shame turning into self-rage and self-hatred causing the child—and later, the adult—to rid herself of that within herself which causes such shame).

and parent help them to form emotional bonds essential to the child's survival.⁸⁰ Attachments ensure that parents care for their children and keep them safe.⁸¹ Indeed, the parental rights paradigm reflects the law's support for healthy attachment bonds (termed "secure attachment") between parents and their children. Yet, not all attachment patterns are alike. Types of attachment vary in degree of protection and comfort parents provide, as well as in the child's resulting happiness and confidence.⁸² Secure attachment is the most common and healthy type of attachment.⁸³ It is characterized by the child's sense of security⁸⁴ and the ability to create well-balanced relationships with others in ways that foster both autonomy and closeness.⁸⁵ Other types of attachments are generally categorized as insecure attachments. In these attachment patterns, a child learns that parents are unresponsive or unable to fulfill her needs.⁸⁶ Because insecure attachments implicate the ability to accurately understand relationships and conduct them appropriately, they cause social skills and functioning to deteriorate in the long run,⁸⁷ as well as negative expectations regarding others, distorted communication patterns,⁸⁸ or otherwise hostile interactions.⁸⁹

While attachment styles are usually stable throughout life, stressful events such as conflicts around a child's independent

80. See Mary D. Salter Ainsworth, *Infant Mother Attachment*, 34 AM. PSYCHOLOGIST 932, 936 (1979).

81. PATTERSON, *supra* note 11, at 228.

82. See R. Chris Fraley, *A Brief Overview of Adult Attachment Theory and Research*, U. ILL. (2010), <http://internal.psychology.illinois.edu/~rcfraley/attachment.htm>.

83. *Id.*

84. PATTERSON, *supra* note 11, at 230.

85. Joseph P. Allen et al., *The Relation of Attachment Security to Adolescents' Parental and Peer Relationships, Depression, and Externalizing Behavior*, 78 CHILD DEV. 1222, 1235 (2007); Robert J. Waldinger et al., *Attachment and Core Relationship Themes: Wishes for Autonomy and Closeness in the Narratives of Securely and Insecurely Attached Adults*, 13 PSYCHOTHERAPY RES. 77, 79 (2003).

86. PATTERSON, *supra* note 11, at 232.

87. Joseph P. Allen et al., *Attachment and Autonomy as Predictors of the Development of Social Skills and Delinquency During Midadolescence*, 70 J. CONSULTING & CLINICAL PSYCHOL. 56, 63 (2002).

88. Allen et al., *supra* note 85, at 1223.

89. Joseph P. Allen et al., *Prediction of Peer-Rated Adult Hostility from Autonomy Struggles in Adolescent-Family Interactions*, 14 DEV. & PSYCHOPATHOLOGY 123, 133 (2002).

identity may impact security.⁹⁰ When parents do not support the child during conflicts and instead impose assimilation demands, attachment suffers. Assimilation demands put a strain on relationships because they are a form of rejection. The loss of trust and intimacy caused by the erosion of attachments render children less free to explore their identity and exercise their autonomy.

The concern here is twofold. The direct result of assimilation demands and the coinciding decrease in attachments could lead children to engage in at-risk behavior.⁹¹ An indirect result is that children become less capable of coping well with assimilation demands. Attachments that become insecure exacerbate families' imbalanced power structures.⁹² This leaves children more isolated within the family, suffering from weakened emotional health, and more likely to be mistreated by family members (or less likely to be resilient in the face of mistreatment).

Family power dynamics already disadvantage children. Children are dependent on parents emotionally, physically, and financially, as well as in other ways. A minority identity that parents may not share can further disadvantage children in families by adding a power struggle between minority and mainstream identities to the parent-child relationship. But even when family dynamics are not abusive *per se*, the child might find that the loss of trust and intimacy in her relationships with her parents hinder her healthy development or her

90. Stressful life events that impact security include: illness, divorce, incarceration, addiction, a deterioration in parenting skills due to parental mental health concerns, adolescents own mental health, and struggles between adolescents and parents about the child's need for autonomy on the one hand and her continued need for support. PATTERSON, *supra* note 11, at 232–33, 336; Joseph P. Allen et al., *Stability and Change in Attachment Security Across Adolescence*, 75 CHILD DEV. 1792, 1793–94, 1802 (2004); Allen et al., *supra* note 85, at 1223.

91. Social scientists have linked insecure attachments and hostile family conflicts to teenage delinquency, drug use, depression, anxiety, unsafe sexual practices, and poor academic achievement. Joseph P. Allen et al., *The Connection of Observed Hostile Family Conflict to Adolescents' Developing Autonomy and Relatedness with Parents*, 8 DEV. & PSYCHOPATHOLOGY 425, 425–26 (1996) [hereinafter Allen et al., *Conflicts in Families*] (explaining that in extreme situations where a relationship does not satisfy parties' needs, hostile conflicts may ensue); Joseph P. Allen et al., *Adolescent Problem Behavior: The Influence of Attachment and Autonomy*, 13 PSYCHIATRIC CLINICS N. AM. 455, 456 (1990) [hereinafter Allen et al., *Adolescent Problem Behavior*].

92. On imbalanced relationships, loss of trust, and their contribution to maltreatment and abuse of weaker parties, see generally Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance over Form in Personalized Abuse*, 14 WM. & MARY J. WOMEN & L. 495, 502–05 (2008).

ability to challenge assimilation demands. In the adult context, Yoshino's work supports social solutions in the form of reason-forcing conversations,⁹³ but this is unhelpful to children. Social change that is dependent exclusively on conversations initiated by the subject of the demand puts additional burdens on disadvantaged parties. Requiring children to do this work, without the assistance of legal or social institutions, further cements the imbalance between children and parents. Because such solutions burden the less powerful party, they may prove impossible for children confronting parents' assimilation demands.⁹⁴

A healthy identity depends on supportive social networks.⁹⁵ Indeed, warm and close relationships with parents help mitigate other stressors that teens may experience growing up.⁹⁶ Yet positive parent-child relationships often suffer when children exhibit identities that are objectionable to parents.⁹⁷ Parents who impose assimilation demands create a stressful, un-supportive environment, increasing the likelihood that adolescents will engage in unhealthy conduct.⁹⁸ Because the family is the most significant and most immediate social network, hostility in the home increases the risk of identity foreclosure and is therefore most detrimental to identity achieve-

93. Yoshino warns that the law cannot be the ultimate solution for assimilation demands. Where the law's work ends, he claims, society must step in. Personal connections and reason-forcing conversations in which people confront each other and their demands of assimilation will facilitate compassion and understanding about the harm of assimilation demands. This in turn will lead to the abandonment of such demands. YOSHINO, *supra* note 16, at 24. Such reason-forcing conversations would allow the subject of the demands to challenge the motivation behind the demand and its legitimacy. Yoshino foresees the result of these conversations to be a middle ground between assimilation and authenticity that he doubts the law can reach alone. *Id.* at 193–95.

94. *See infra* Part II.

95. Lau, *supra* note 11, at 328–29.

96. PATTERSON, *supra* note 11, at 566; *see also* Ryan et al., *supra* note 75, at 349–50 (finding that stressors from family because of sexual identity exacerbate unrelated negative health outcomes).

97. Julia A. Graber & Andrea Bastiani Archibald, *Psychosocial Change at Puberty and Beyond: Understanding Adolescent Sexuality and Sexual Orientation*, in LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH, *supra* note 66, at 3, 11 (“Given the Polarization of the reality of the adolescent's world and parental beliefs and expectations [regarding the adolescent's sexual identity], parent-adolescent relationships may involve significant change.”).

98. *See* Ryan et al., *supra* note 75, at 350 (based on data that suicide rates increase after coming out to parents, arguing that children's dependency on parents worsens severity of consequences and stressors related to coming out to parents); *see also* Graber & Archibald, *supra* note 97, at 13 (describing negative responses from parents after learning of their children's sexual identity).

ment and a healthy sense-of-self. This makes coping with assimilation demands from parents all the more challenging to children and adolescents. If assimilation demands imposed by mainstream society on adults are likened to a melting pot, then assimilation demands imposed by parents on children can be analogized to a pressure cooker.

B. ASSIMILATION'S HARMS ON LGBT YOUTH

While Yoshino centers his theory primarily on sexual minorities because he believes some assimilation demands apply to this group more than others, I concentrate on sexual minority youth because they are more vulnerable to assimilation demands *by parents* than other groups are. Unfortunately, many sexual minority children are not raised in supportive families who stand by them regardless of their sexual orientation or gender identity.⁹⁹ So far the law, both in academia and in practice, has mainly been concerned with the struggles LGBT youth face in the public sphere—in public education, foster care, or the juvenile system.¹⁰⁰ LGBT youth are overrepresented among at-risk youth but are under-protected by the legal system, which suggests that the crisis of LGBT youth extends beyond the public sphere. Presumably, children who grow up in supportive and caring households are less likely to experience the hardships and rejection that lead to their victimization outside of the home, or are more likely to lean on parents for protection when victimization occurs. This is not to say that other children are not victimized by parents, or that parents do not victimize their children based on other diverging identities related to race or religion. Yet the empirical data presented below strongly supports the notion that LGBT youth are more commonly, more uniquely, and more aggressively victimized by their families.¹⁰¹ The data also suggest that LGBT youth have less access

99. See Ryan et al., *supra* note 75, at 350–51.

100. For legal scholarship discussing the rights of LGBT youth in the public education system, see generally STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS* 23–46 (2010); Lau, *supra* note 11. Many non-profit organizations have directed their efforts to LGBT youth issues, including the Gay, Lesbian and Straight Education Network, the Gay Straight Alliance Network (both dedicated to issues at school), and Lambda Legal Defense and Education Fund's youth project (focusing both on schools and out-of-home care).

101. See *infra* Part I.C.; see also *supra* notes 77–86 and accompanying text (citing studies revealing similar trends).

to legal recourse.¹⁰² These studies are consistent with studies finding that LGBT status, stigmatization, and discrimination cause negative mental health outcomes in adults.¹⁰³

A parent's response to a child's disclosure of an LGBT identity impacts the parent-child relationship, as well as the child's healthy development.¹⁰⁴ Social science research identifies a variety of increased negative outcomes and risks for LGBT youth and ties those outcomes to troubled relationships with parents and other family members. A study conducted by the San Francisco State University Family Acceptance Project (FAP) found marked differences in the physical and mental health outcomes of LGBT youth who have experienced high, moderate, or low levels of family rejection.¹⁰⁵ FAP defines rejecting behaviors by families as behavior designed to change a child's sexual identity, convey messages that gender nonconformity or same-sex orientation is shameful, sinful, or otherwise devalued, or isolate a child from LGBT associations or resources.¹⁰⁶ Low-rejection families exhibit only few, or none, of these behaviors, while moderate-rejection families exhibit some negative behaviors, but also express some positive reactions to a child's sexual identity.¹⁰⁷ Lastly, high-rejection families are those who exhibit extremely negative behaviors and express their disappointment

102. See *infra* Part I.C.

103. Ilan H. Meyer, *Prejudice and Discrimination as Social Stressors*, in *THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER POPULATIONS* 242–67 (Ilan H. Meyer & M.E. Northridge eds., 2007) (describing the nature and effect of discrimination and stigma on the LGBT community).

104. See LAMBDA LEGAL & CHILD WELFARE LEAGUE OF AMERICA, *FAMILIES SUPPORTING AN LGBTQ CHILD* (2006), available at http://data.lambdalegal.org/publications/downloads/gdtb_families-supporting-an-lgbtq-child.pdf (recommending healthy responses for parents learning their child's sexual minority identity).

105. See Ryan et al., *supra* note 75, at 349–50.

106. CAITLIN RYAN ET AL., *SUPPORTIVE FAMILIES, HEALTHY CHILDREN: HELPING FAMILIES WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER CHILDREN* 6, 8 (2009), available at http://familyproject.sfsu.edu/files/English_Final_Print_Version_Last.pdf. This publication provides additional examples of rejecting behaviors and recommends parents avoid them, including: physical violence, verbal harassment or name-calling, excluding from family activities, blocking access to friends or resources, blaming the child for her mistreatment, pressuring the child to present consistently with heterosexuality or the sex assigned at birth, saying God will punish the child for her sexual identity, telling a child she is a source of shame to the family. *Id.* at 8.

107. *Id.*

or shame, sometimes by attempting to change a child's identity.¹⁰⁸

The FAP studies show significant disparities for health outcomes between LGBT youth from low-, moderate-, or high-rejection families.¹⁰⁹ For example, 19.7% of LGBT youth in low-rejection families have attempted suicide, compared to 35.1% in moderate-rejection families and 67.6% of LGBT youth in high-rejection families.¹¹⁰ Depression rates reflect similar disparities: 22.4% of LGBT youth in low-rejection families reported suffering from depression, with 44.6% of LGBT youth in moderate-rejection families and 63.5% of LGBT youth in high-rejection families reporting the same.¹¹¹ While only a marginal difference exists in rates of substance abuse¹¹² between LGBT youth from low-rejection and moderate-rejection families—48% and 47.3%, respectively—there is a considerable increase in substance abuse for LGBT youth in high-rejection families, where the rate of substance abuse climbs to 68.9%.¹¹³ Lastly, this study found LGBT youth in high-rejection families had an increased risk of engaging in unprotected sexual activity with casual partners within the six months prior to the study; 23.7% of LGBT youth from low-rejection families reported having such unprotected sex, with 12.2% of LGBT youth from moderate-rejection families and 45.9% of LGBT youth from high-rejection families reporting such unprotected sexual encounters.¹¹⁴ Therefore, the quantity and quality of family rejection that youth experience significantly compromise their emotional health and endanger their physical well-being.

A National Gay and Lesbian Task Force report compiled statistics about LGBT homeless youth that tell a similar story about the grave results of family rejection.¹¹⁵ Between 20 and 40% of American homeless youth identified as LGBT.¹¹⁶ Twen-

108. *See id.* at 6.

109. Ryan et al., *supra* note 75, at 350.

110. *Id.*

111. *Id.*

112. Defined by FAP as the abuse of any substance at any point in time throughout life. *Id.*

113. *Id.*

114. *Id.*

115. NICHOLAS RAY, NATIONAL GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 2 (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

116. *Id.* at 13.

ty-six percent of these teens were forced to leave home upon disclosure of their sexual identity to their families.¹¹⁷ Others chose to leave home after experiencing other forms of rejection. Studies estimate that half of all gay male youth experienced some form of negative reaction from their families,¹¹⁸ and as much as one-third of all LGBT homeless youth suffered physical violence, including sexual assault from family members.¹¹⁹ The report also explains some of the reasons why homeless LGBT youth remain homeless. Family rejection coupled with school-based mistreatment leads to a lack of educational opportunities, and thus lower income potential.¹²⁰ The experience of homophobia inspires romanticized ideas of living in more tolerant communities, usually urban environments.¹²¹ For this reason, LGBT youth tend to leave their hometowns for cities like New York, Los Angeles, and San Francisco,¹²² where affordable housing is scarce.¹²³ The difficulty in securing employment that pays a livable wage often prohibits LGBT youth from escaping homelessness.¹²⁴ Moreover, in an attempt to drive the homeless, including homeless youth, out of public view and spaces, city ordinances and state laws criminalize survival-focused activity associated with homelessness, such as theft, drug use, drug possession and dealing, and sex work.¹²⁵ These studies on the state of LGBT youth¹²⁶ reflect the pervasive and egregious consequences that LGBT youth suffer because of family rejection and illustrate the urgency of systemic change to end the disempowerment and vulnerability of LGBT youth.

But what is it about sexual orientation or gender identity that makes LGBT youth so vulnerable to harmful home environments? Sexual orientation and gender identity, as identity categories, are independent of the sexual orientation or gender

117. *Id.* at 16.

118. *Id.*

119. *Id.* at 18.

120. *Id.* at 20–22.

121. Luke A. Boso, *Urban Bias, Rural Sexual Minorities and the Courts*, 60 UCLA L. REV. 562, 576–78 (2013).

122. *Id.*

123. RAY, *supra* note 115, at 22.

124. *Id.*

125. *Cf. id.* at 59, 71.

126. For a study on the vulnerability of LGBT youth for over-involvement in and higher penalties from the juvenile system, see Kathryn Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 52 (2011).

identity of family members.¹²⁷ As opposed to racial minority youth, whose family members usually share their racial identity and can therefore provide guidance, support, and encouragement during the stages of identity development,¹²⁸ LGBT youth usually have no such inherent support system.¹²⁹ LGBT youth are faced with exploring, forming, disclosing, and performing their sexual identity without assistance, and often with hostility, from parents.¹³⁰ This makes these youth extremely prone to assimilation demands from parents, whereas other teens are able to make sense of their identities with parents serving as role models.

Heteronormative culture translates into LGBT youth often suffering through the most extreme type of assimilation demands, which in turn renders them prone to the most severe harms. American society and its legal system tend to be uncomfortable with the sexuality of children and youth, and particularly with the prospect of young people developing sexual minority identities.¹³¹ This “moral panic”¹³² guides courts deciding

127. See William R. Rice et al., *Homosexuality as a Consequence of Epigenetically Canalized Sexual Development*, 87 Q.R. BIOLOGY 343, 344 (2012) (arguing that sexual orientation is a result of the interaction between DNA and environmental factors and thus is only partially hereditary); see also George Dvorsky, *Scientists Claim that Homosexuality Is Not Genetic—But It Arises in the Womb*, IO9.COM (Dec. 11, 2012, 8:00 AM), <http://io9.com/5967426/scientists-confirm-that-homosexuality-is-not-genetic-but-it-arises-in-the-womb> (explaining the findings of the Rice study).

128. See David H. Demo & Michael Hughes, *Socialization and Racial Identity Among Black Americans*, 53 SOC. PSYCHOL. Q. 364, 372 (1990) (concluding that the study “substantiate[d] the important role of black families in providing social support and familial bonds”); Nancy Tenney, *The Constitutional Imperative of Reality in Public Schools Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOKLYN L. REV. 1599, 1611 (1995) (“Many families that are members of racial or ethnic minorities prepare their children for the harassment they may face in the world and provide support when their children encounter oppressive treatment.”).

129. BIEGEL, *supra* note 100, at 124 (“[A]n LGBT identity often emerges quietly and secretly within a young person. It may be the case that the young person has no one to turn to—no friends to talk with about it, no family or community members to open up to.”).

130. See RAY, *supra* note 115, at 16.

131. See Rosky, *supra* note 20, at 294–97 (describing cases that have denied custody or visitation to gay and lesbian parents based partially on the stereotype that LGBT parents encourage same-sex sexual orientation in their children).

132. See MORAL PANIC, SEX PANICS: FEAR AND THE FIGHT OVER SEXUAL RIGHTS (Gilbert Herdt ed., 2009). Moral panic involves “large social events occurring in troubled times when a serious threat by evil-doers incites societal reaction.” *Id.* at 5.

custody disputes involving lesbian or gay parents,¹³³ informs education policies such as “No Promo Homo” laws,¹³⁴ and ultimately motivates parents’ mistreatment of non-heteronormative children, whether they identify as LGBT or not.¹³⁵

Although all children may be vulnerable to assimilation demands, sexual minority children are at higher risk because they are left to develop their sexual orientation or gender identity without parental support (and also often without community support).¹³⁶ Moreover, developing and asserting sexual minority identities can come at a higher cost to emotional health due to stigmatization—whether internalized or from outside sources—and pursuant isolation.¹³⁷

Sexual minority youth may find themselves required to defend their sexual identities. To the extent that same-sex sexual orientation or gender nonconforming identities are acceptable for adults, these identities should be respected as valid for youth, as well. Presumably, LGBT adults used to be LGBT youth. Assimilation demands designed to prevent or mitigate same-sex sexual orientation or gender nonconformity in youth reflect and are motivated by animus and should be considered as unacceptable as assimilation demands on adults. Still, one could argue that, though these identities are value-neutral for adults, it is important to prevent or mitigate them in children because avoiding early queer identities might reduce the discrimination or harassment children would grow to encounter as adults. This argument is unpersuasive. If LGBT identities were truly value-neutral, as they should be, these potential rights infringements (themselves assimilation demands) should not be a concern—they would no longer exist as acceptable or tolerated behavior toward sexual minorities.¹³⁸

133. See YOSHINO, *supra* note 16, at 101–03; Rosky, *supra* note 20, at 294–97.

134. “No Promo Homo” laws include policies and laws prohibiting positive discussion of homosexuality in school programs and curricula, or any such discussion at all. William Eskridge, *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1329, 1359–60 (2000).

135. See, e.g., *In re Shane T.*, 453 N.Y.S.2d 590, 593 (N.Y. Fam. Ct. 1982) (noting father’s testimony that he verbally abused his son to “cure the child of certain unspecified ‘girlie’ behavior”).

136. YOSHINO, *supra* note 16, at 184.

137. See RAY, *supra* note 115, at 2.

138. For more on this point, see Clifford Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607 (2013). Rosky shows how social anxiety around children’s non-conforming sexual identity has informed law and policy around children’s

C. ASSIMILATION DEMANDS IN COURTS: ARE ASSIMILATION DEMANDS A PARENTAL RIGHT?

Harsh assimilation demands are not a phenomenon exclusive to the public sphere. The private sphere—homes and families—imposes heterosexuality on children through tactics that are even more hostile to children’s sexual diversity, sometimes even violently so. This part of the Article provides examples from court cases to illustrate the assimilation demands parents impose on children to try to force their sexual orientation or gender identity to conform to mainstream standards. At the extreme, parents subject children to abusive and harmful practices such as conversion therapy, the practice of providing counseling with the intention to “cure” one’s homosexuality.¹³⁹

sexuality and education. He challenges the LGBT movement to tackle this fear head on, stating that so far the movement’s strategies distanced its goals from their links to children, essentially claiming LGBT rights did not foster queerness in children. To Rosky, such responses are

defensive; worse still, [they are] apologetic. [They] attack[] the factual premise that queerness *can* be contained, but [they] fail[] to challenge the normative premise that queerness *should* be contained . . . [These] response[s] amount[] to an assurance that queerness is not contagious, rather than an assertion of an individual’s equal liberty to be queer or straight. Even if only for the purpose of argument, [they] entertain[] the troubling assumption that queerness is immoral, harmful, or inferior, and thus that the state may legitimately discourage children from being or becoming queer.

Id. at 609–10.

139. Conversion therapy (also known as “reparative therapy” or “ex-gay therapy”) attempts to eliminate one’s same-sex sexual orientation through counseling, and is generally practiced by religious groups. JUST THE FACTS COAL., JUST THE FACTS ABOUT SEXUAL ORIENTATION AND YOUTH: A PRIMER FOR PRINCIPALS, EDUCATORS, AND SCHOOL PERSONNEL 2, 5 (2008), *available at* <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>. The American Psychological Association rejects conversion therapy: “[S]uch efforts have serious potential to harm young people because they present the view that the sexual orientation of lesbian, gay, and bisexual youth is a mental illness or disorder, and they often frame the inability to change one’s sexual orientation as a personal and moral failure.” *Id.* at 5. The American Psychiatric Association also condemns the practice:

In the last four decades, [conversion] therapists have not produced any rigorous scientific research to substantiate their claims of cure The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction.

Id. at 6. For more detailed discussion of conversion therapy, including the idea that conversion therapy might constitute child abuse, see John Alan Cohan,

Slightly less aggressively, parents try to control their children's sexual identity through abuse or neglect, even if the child does not identify as LGBT,¹⁴⁰ by referring to the child in derogatory terms or berating behavior in an attempt to "correct" gender presentation,¹⁴¹ or severing ties because of the child's sexual identity.¹⁴² Seemingly less abusive demands may manifest themselves in conflicts where the child is not technically a party, such as custody disputes¹⁴³ or litigation involving the child's intimate partner.¹⁴⁴ These cases have mixed results, and some protect children better than others. However, all these courts understand that the parents' behavior is harmful to children, and some go as far as explicitly positioning that behavior outside of parental rights.¹⁴⁵ Others find children's identity interests to be encompassed in the fundamental right to privacy, thus establishing that children's sexual identity is as salient in children as in adults and therefore warrants legal protection.¹⁴⁶

Parental Duties and the Right of Homosexual Minors to Refuse "Reparative" Therapy, 11 BUFF. WOMEN'S L.J. 67 (2002); David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1999); Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219 (1999); Karolyn Ann Hicks, "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505 (1999); Sonia Renee Martin, Note, *A Child's Right to Be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 174 (1996); Tyler Talbot, Comment, *Reparative Therapy for Homosexual Teens: The Choice of the Teen Should Be the Only Choice Discussed*, 27 J. JUV. L. 33 (2006); Sean Young, Note, *Does "Reparative" Therapy Really Constitute Child Abuse?: A Closer Look*, 6 YALE J. HEALTH POL'Y L. & ETHICS 163 (2006).

140. See *Shane T.*, 453 N.Y.S.2d at 593; *infra* Part II.A.

141. *C.O. v. B.C.*, No. B206425, 2008 WL 4670513, at *1 (Cal. Ct. App. Oct. 23, 2008); *Zion J. v. Lillie J.*, No. A111895, 2006 WL 2709831, at *1 (Cal. App. Sept. 22, 2006); *Shane T.*, 453 N.Y.S.2d at 592-93; *Catherine W. v. Robert F.*, 455 N.Y.S. 2d 519, 521 (N.Y. Fam. Ct. 1982).

142. *Dzierson v. Dzierson*, 661 N.Y.S.2d 779, 780 (N.Y. Fam. Ct. 1997).

143. See, e.g., *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ct. App. Mar. 23, 2007) (involving the custody of a gender non-conforming child). In custody cases, the child is not formally a party. Instead, the state assumes the representation of the child's interests. E.g., *Ford v. Ford*, 371 U.S. 187, 193 (1962). Still, the conflict at the root of these types of litigation is between the child and parent. See *Smith*, 2007 Ohio App. LEXIS 1282, at *1-2 (relating father's motion for reallocation of parental rights due to mother's support for the child's gender non-conformity).

144. See *Acevedo v. Williams*, 985 So. 2d 669 (Fla. Dist. Ct. App. 2008) (involving mother's petition for a restraining order against her daughter's girlfriend).

145. See, e.g., *Shane T.*, 453 N.Y.S.2d at 593-94.

146. See, e.g., *In re Lori M.*, 496 N.Y.S.2d 940, 941-42 (N.Y. Fam. Ct. 1985).

1. Outside of Mutability

Before discussing representative cases,¹⁴⁷ it is worth addressing the question of mutability of sexual orientation or gender identity. Many commentators and courts have opined on the mutability of sexual identity.¹⁴⁸ The innateness and stabil-

147. Despite the overwhelming rates in which LGBT youth are victimized at home, or outside of home because of family rejection, we have only a few reported cases where families have called upon courts to resolve conflicts stemming from assimilation demands on children's sexual identity. Extensive research yielded the seventeen United States cases discussed or cited throughout this Article. Only five more are discussed in the Dissertation version of this project. At least two other custody disputes over gender non-conforming children are still pending. As they have not yet been decided or reported, these cases are not discussed here. Because LGBT youth are so disempowered by parental assimilation demands and family rejection, they are unable to access the legal system. See Sara Jeruss, *Empty Promises? How State Procedural Rules Block Minors from Vindicating Their Substantive Rights*, 43 U.S.F. L. REV. 853, 854 (2009) ("[M]any minors wishing to keep their sexual orientation from their parents do not have access to the courts."); cf. Martin, *supra* note 139, at 179 ("The greatest indication that courts deny the existence of the emotional maltreatment of queer youth is the noticeable lack of reported cases that discuss the issue."). Legal services and advocacy groups do not currently offer LGBT youth the assistance they might need in order to do so. Cf. KATAYOON MAJD ET AL., *HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS* 120 (2009), available at http://www.equityproject.org/pdfs/hidden_injustice.pdf (describing LGBT youth's obstacles to gaining effective legal representation in juvenile courts); LAMBDA LEGAL, *YOUTH IN THE MARGINS* (2001), available at <http://data.lambdalegal.org/pdf/25.pdf> (discussing foster care professionals' lack of "training, resources, and institutional support" to serve LGBT youth). Additionally, privacy guarantees and reporting practices by courts create a lack of awareness among youth, families, social and legal providers, as well as courts themselves about these conflicts, which render youth and their potential advocates uninformed about their rights. See William Glaberson, *New York Family Courts Say Keep Out, Despite Order*, N.Y. TIMES, Nov. 17, 2011, <http://www.nytimes.com/2011/11/18/nyregion/at-new-york-family-courts-rule-for-public-access-isnt-heeded.html?pagewanted=all> (explaining the lack of public discourse about events and practices in Family Court due to its closure to the public). See generally Shelley Geballe & Ellen Scalettar, *Confidentiality Statutes of Children Protection Proceedings by State*, CONN. VOICES FOR CHILD. (Nov. 2004), <http://www.ctvoices.org/sites/default/files/welf04confstatute11.pdf> (summarizing each state's confidentiality rules in child protection proceedings).

148. See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (ruling that sexual orientation is mutable); *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring) (opining that sexual orientation is immutable for purposes of the equal protection doctrine); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994) (arguing that pro-LGBT litigators should focus on common ground between pro-LGBT essentialists who support immutability and pro-LGBT constructivists who do not); Susan Schmeiser, *Changing the Immutable*, 41 CONN. L. REV.

ity of sexual orientation is a position long supported in LGB rights advocacy and litigation. As the argument goes, because sexual orientation is impossible to change, it should satisfy the mutability requirement for suspect classification.¹⁴⁹ The immutability argument found new life in the Ninth Circuit opinion in *Watkins*. There, the court ruled that the immutability factor in suspect classification analysis should turn not on whether one is incapable of changing a characteristic, but on whether the characteristic is “so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change [it].”¹⁵⁰

My approach to the issue of parents’ assimilation demands on children’s sexual identity extends from the *Watkins* opinion’s “New Immutability.”¹⁵¹ Because my concern is not immutability *per se*, but parents’ right to control children’s sexual identity, this Article is positioned outside of the traditional immutability debate. Indeed, some of the cases I discuss below show that parents believe children’s sexual identity is unstable and therefore try to influence it.¹⁵² However, my claim here is that mutability is immaterial to a determination of harm. If sexual identity is immutable, parental assimilation demands harm children by imposing demands they cannot meet. If sexual identity is mutable, parental assimilation demands undermine children’s autonomous development and healthy, thoughtful identity achievement.¹⁵³

1495, 1504 (2009) (proposing that sexual orientation’s mutability is irrelevant to whether discrimination on the basis of sexual orientation should receive heightened scrutiny).

149. Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415, 468–69 (2012).

150. *Watkins*, 875 F.2d at 726.

151. Schmeiser, *supra* note 148, at 1512–19 (coining the term “New Immutability”).

152. See the discussion below regarding *Shane T.*, *infra* text accompanying notes 204–06; *C.O. v. B.C.*, *infra* text accompanying notes 222–25; and *Smith v. Smith*, *infra* text accompanying notes 175–82.

153. Healthy autonomy development is tied to positive, accepting, and secure relationships between parents and children. See Waldinger et al., *supra* note 85. Because assimilation demands undermine the parent-child relationship, they also undermine healthy autonomy development. Surely, one could argue that parents make childrearing decisions that implicate autonomy regularly. However, once these decisions are outside of parental rights, as courts found assimilation demands to be, these decisions are no longer legitimate. See, e.g., *In re Shane T.*, 453 N.Y.S.2d 590, 594 (N.Y. Fam. Ct. 1982) (“While a parent’s right to raise his or her child remains fundamental, it is equally fundamental that children have constitutional rights which must be respected by all, including their parents.” (citation omitted)).

Michael Boucai makes a similar argument about adult bisexuals in the marriage context.¹⁵⁴ He claims that if non-heterosexual identities are legitimate under *Lawrence v. Texas*,¹⁵⁵ then the state cannot influence sexual identity through legislation.¹⁵⁶ The same is true in families. If children have a right to be LGBT, then parents do not have the right to penalize or eliminate this identity development. I argue that parents should not be allowed to influence their children's sexual identity in ways that are harmful to the child, whether or not they have the ability to do so. Instead, if in fact children are "sexual waverers," perhaps parents should let them waver. This is not to say that wavering itself is preferable, though Erikson supports it as a process beneficial to the stability and health of identity in adulthood.¹⁵⁷ My claim is only that parents should see non-heterosexuality as value-neutral and, as such, abstain from behavior that conveys a message of rejection because of sexual identity, as assimilation demands do.¹⁵⁸

2. Vindicating Children's Identity Interests

The parental assimilation demands cases discussed below seem challenging for courts to resolve. As these decisions demonstrate, although courts' expressed goal is to protect children from assimilation demands, even when parents are the source of such demands, they are unable to do so effectively under current family law jurisprudence. Assimilation demands from parents do not fall within existing legal frameworks, and the existing frameworks that courts try to apply are not a good fit for protecting children. Consequently, there is no adequate mode of analysis for the problem at the root of the dispute that arises from parental heteronormative expectations. So, though courts do recognize children's interests (and sometimes rights) to develop, explore, and express their sexual identity, this recognition is not always explicit, or reliably protective. This Article offers a framework and vocabulary of assimilation demands that could help courts correctly analyze these disputes

154. Boucai, *supra* note 149.

155. *Lawrence v. Texas*, 539 U.S. 558 (2003).

156. Boucai, *supra* note 149, at 421–38.

157. ERIKSON, *supra* note 55, at 131–34.

158. See RYAN ET AL., *supra* note 106, at 8 (describing family behaviors that increase LGBT children's negative health outcomes in adulthood); Ryan et al., *supra* note 75, at 350–51 (analyzing the link between negative family reactions to adolescents' sexual identity and negative health problems in LGBT adults).

and develop a jurisprudence better suited to children's needs and identity interests.

Courts have attempted to relieve children of parental assimilation demands and protect their well-being in several cases.¹⁵⁹ Courts have also protected other types of children's rights—such as their right to informational privacy—as a way to prevent harm from parents.¹⁶⁰ This reflects courts' understanding that disclosing a sexual minority identity to parents may have grave consequences for children.

The case of *Lori M.*¹⁶¹ involved a mother's direct assimilation demand on her bisexual daughter. The New York family court explicitly ruled that a minor's fundamental right to privacy encompassed her sexual identity.¹⁶² Lori was fifteen when she came out to her mother as bisexual and told her mother she had a twenty-one-year-old girlfriend, Ellen. After her mother instructed Lori to end her relationship with Ellen, Lori left home to live with her aunt.¹⁶³ Lori's mother then petitioned the

159. *Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008) (finding that an Immigration Judge erred in denying asylum to a gay man from Jamaica, reasoning that the abuse the man suffered from his Jamaican father was indicative of the persecution he may face in his home country if deported); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 653 (8th Cir. 2007) (acknowledging that a gay man from Mexico who was driven out of his home after suffering abuse from family members because of his sexual orientation established "past persecution" even though the man was unable to report the abuse to authorities due to his young age at the time); *Petition for Appointment of Temporary Guardian, In re Lyn D.*, No. 259294 (Cal. Fam. Ct. 1992) (unpublished) (on file with author) (petition granted without court opinion); *Lyn Duff, I Was a Teenage Test Case*, CAL. LAW., May 1996, at 46 (relating her removal into foster care after she escaped a residential education facility where she was forcibly placed by her mother and compelled to participate in conversion therapy).

160. See *Sterling v. Borough of Minersville*, 232 F.3d 190, 191–92, 197 (3d Cir. 2000) (finding in a suit filed by a mother after her teenage child's suicide that a police man who threatened to disclose the teen's sexual orientation to his grandfather had violated the teen's right to privacy); *Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal. 2007). In *Nguon*, when a student was disciplined for kissing a same-sex partner at school, an administrator disclosed these facts to her mother. *Id.* at 1184. The court established distinct zones of privacy where teens may be open about their sexual identity in one context, but retain their expectation of privacy in others. *Nguon*, 517 F. Supp. 2d at 1191. Thus a child who is "out" at school still has a right to privacy at home on which the state may not infringe without a legitimate interest. *Id.* The court found that the school had a legitimate interest in outing the student, in order to give her parents information required to mount a defense against the school's disciplinary actions. *Id.* at 1194–95.

161. *In re Lori M.*, 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985).

162. *Id.* at 941–42.

163. *Id.* at 940.

family court to declare Lori a child in need of services.¹⁶⁴ The mother based her petition on the fact that Lori was in a lesbian relationship and admitted that she would not have objected to Lori's relationship with a twenty-one-year-old man.¹⁶⁵ When Lori testified, she expressed her satisfaction with her relationship with Ellen and said that the relationship was strictly consensual. She also told the court that she was not certain about her sexual orientation but that she was comfortable with her sexual identity and did not believe she required therapy to deal with it.¹⁶⁶

Relying on precedent about state regulation of teen sexuality, the court concluded it was unauthorized to intervene on behalf of Lori's mother to control Lori's sexual orientation.¹⁶⁷ As in the youth abortion¹⁶⁸ and contraception cases,¹⁶⁹ as a child of sufficient maturity, Lori had the right to make decisions regarding constitutionally protected or fundamental rights, including her sexual orientation, free of state or parental intervention.¹⁷⁰ Since the court found Lori to be mature¹⁷¹ and was impressed by her thoughtfulness regarding her sexual orientation and her relationship, the court ruled neither her mother

164. *Id.* Essentially, the result of granting such a petition would be the removal of Lori into foster care and the child welfare system. See N.Y. FAMILY LAW § 712(a) (McKinney 1962).

165. *Lori M.*, 496 N.Y.S.2d. at 940–41.

166. *Id.* at 941.

167. *Id.* at 941–42 (“[T]he mother . . . seeks to invoke the State’s intervention to force an end to the relationship . . . [so] the issue becomes whether the State may seek to regulate [Lori’s] . . . sexual orientation, as it clearly could not do for an adult, or whether her choices in this area are constitutionally protected.”).

168. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (striking down statutory requirements for parental consent to child’s abortion based on the child’s privacy rights and maturity to decide whether to procure an abortion).

169. *Carey v. Population Servs.*, 431 U.S. 678 (1977) (striking down prohibition on the sale of contraceptives to minors and extending children’s privacy rights to include their procreation decisions).

170. *Lori M.*, 496 N.Y.S.2d at 942 (“[A] mature child [has the] right to make her own decision . . . protected from parental or state interference. Where a child demonstrates sufficient maturity, her sexual orientation and choices in pursuit thereof must be . . . protected . . . [W]here a parental edict affects a substantial right of the child and is opposed by the child, resolution of the matter depends upon the nature of the right asserted by the child and the child’s maturity.”).

171. *Id.* at 941 (expressing satisfaction with her performance at school and her good behavior while living at her aunt’s home).

nor the state could intervene, rejecting the mother's petition.¹⁷² The court then urged Lorie and her mother to seek help in mending their relationship and referred them to counseling through Family Court Services.¹⁷³

Lori's mother's intervention was a clear conversion demand on Lori's sexual orientation, evidenced by her concession that Ellen's sex—not her age—motivated the petition. When Lori's mother failed to force Lori into heterosexuality, she turned to the state to do so for her through the threat of placing Lori in the child welfare system. The court refused to harness the force of the state to convert Lori because her mother's demands infringed on a constitutionally protected right that was previously extended to children.¹⁷⁴

This analysis is somewhat encouraging, though not completely helpful. The court evaluated the significance of the right asserted by the child. Arguably all assimilation demands on children's identities would implicate a constitutionally protected privacy right. Covering demands also have the potential to infringe constitutionally protected speech because they implicate conduct that expresses identity (such as a parent removing a photo of her son and his boyfriend from the son's desk, or removing a pink triangle or rainbow badge from his school bag). Therefore, despite its inability to illuminate how assimilation demands violate children's protected rights, the decision's contribution is primarily the express recognition of a child's right to assert and explore her sexual orientation. In effect, this decision levels the playing field and brings children's sexual identity rights to the level of parental rights, eliminating the default in favor of parents.

The question of parents' right to impose assimilation demands also arose in the custody dispute in *Smith v. Smith*,¹⁷⁵ where a father was granted custody to raise a gender non-conforming child according to the child's birth-assigned male

172. *Id.* at 942 (“[Lori] impressed the Court with her maturity. It is clear that she has given a great deal of thought to her decision and its possible ramifications. And, since the right being asserted by her falls within the constitutionally protected zone of privacy, her mother may not invoke the power of the state to intervene.”).

173. *Id.* at 943.

174. The court looked to Supreme Court jurisprudence to rule that children had privacy rights that included sexual rights. *See supra* notes 165–66 and accompanying text.

175. *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282, at *35 (Ct. App. Mar. 23, 2007).

sex, effectively forcing the child into gender-conformity. Despite this problematic outcome, the general policy considerations the court expresses in the decision echo the sentiment in *Lori M.* that a child's identity interests are beyond the control of parents. The child was ten years old when the lower court granted custody to the mother, and thirteen when custody was transferred to the father.¹⁷⁶ Although the child had not been diagnosed by a mental health professional, the mother believed the child had gender identity disorder (GID) and raised the child as a girl.¹⁷⁷ She called the child by a feminine name and took the child to trans support groups.¹⁷⁸ The lower court found that the child "displayed some female tendencies . . . as early as age two."¹⁷⁹ When the mother tried to enroll the child in school as a girl, the father requested a change in custody, so that he could raise the child as a boy. Both parents produced video and photographs of the child dressed in gendered clothes and engaged in stereotypical gendered behavior to support their opposing positions.¹⁸⁰ The lower court heard testimony from five different experts. Two experts diagnosed the child with GID and two did not. None of the experts recommended treatment for GID at the time. The court interpreted the conflicting expert recommendations as a result of the child's young age, suggesting a need to wait for further gender development.¹⁸¹ The court transferred

176. *Id.* at *2.

177. *Id.*

178. *Id.* at *1.

179. *Id.* at *4.

180. The father showed footage of the child "enjoying stereotypical male activities and wearing male clothing." *Id.* at *5. The mother produced video of the then ten-year-old child "talking about his gender, trying to explain the situation . . . stat[ing] numerous times . . . that he is a girl, wants to be a girl, and that he would like to live a normal life as a girl." *Id.* at *7.

181. *Id.* at *9–10, *13. The court also interviewed the child who expressed to the court a desire to wear girls' clothing and have "girls stuff" but did not specify the nature of such "stuff." *Id.* at *13. The court found that the child enjoyed stereotypically male activities, had mostly male friends, was attracted to a girl, and was unable to name female role models. *Id.* at *13–14. The court also found that the child did not exhibit any feminine mannerisms. The court concluded that the child did not have GID and was pressured by the mother into "believing that he was a transgender child." *Id.* at *26. This reasoning is not without flaws—the court's analysis is laden with the use of sex stereotypes as a method for ascertaining the child's "true" gender identity. *See, e.g.,* Williams v. Frymire, 377 S.W.3d 579, 582 (Ky. Ct. App. 2012) (discussing the female assigned at birth as a child who was "not a 'girly' girl as she did not like frills or ruffles," but preferred the girls' toy aisle on visits to a toy store). The use of sex stereotypes under the premise of sex and gender being a binary is itself an assimilation demand on the child's gender to conform to either the

custody to the father and prohibited both parents from treating the child as a girl or allowing the child to participate in trans support groups in order to “dissociate[] [the child] with that lifestyle.”¹⁸²

The appellate court upheld the decision of the lower court, finding that the change in custody benefited the child more than it caused harm.¹⁸³ The appellate court affirmed the lower court’s decision to grant sole custody to the father and prohibit the child’s exposure to gender nonconformity.¹⁸⁴ The appellate court reasoned that being raised as a boy by the father would enable the child to discover a “true” gender identity.¹⁸⁵ In the words of the court:

[The child] needed to be in an environment where he could be treated like a boy and allowed to develop as a boy, so that he could make a more informed decision about his gender at a later point in life. . . . [B]y making [the father] the residential parent, the child would be permitted to find out if he was only acting like a girl to please his mother, or if he really was a transgender child.¹⁸⁶

As a policy matter, the appellate court saw that the child should have the opportunity to form and explore a gender identity without parental pressures. In effect, the court wanted to enable the child to achieve gender identity formation later on, thus attempting to preserve the child’s “open future” opportunities for gender identity development.¹⁸⁷ The court was particularly concerned that the child’s feminine identity was a result of the mother’s assimilation demands, from which the court sought to protect the child.¹⁸⁸ However, the court ignored the effects of the father’s assimilation demands on the child’s gender

assigned sex or an opposing gender identity. On the limits of the sex/gender binary, see generally Dylan Vade, *Expanding Gender and Expanding the Law: Toward Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2005). Because this Article focuses on private—i.e. family-based—assimilation demands, a deeper analysis of courts’ sex stereotyping in gender non-conforming children’s custody cases is beyond the scope of this Article.

182. *Smith*, 2007 Ohio App. LEXIS 1282, at *5.

183. *Id.* at *33.

184. *Id.*

185. *Id.* at *4.

186. *Id.* at *31–32.

187. Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY AND STATE POWER 124, 125 (William Aiken & Hugh LaFollette eds., 1980) (defining children’s rights as anticipatory, and parental rights as a means to preserve options for children to be exercised when they reach adulthood). Therefore, parents’ role is to maximize children’s options and rights—their open future. *Id.*

188. *Smith*, 2007 Ohio App. LEXIS 1282, at *31–32.

identity. The court's order that the child should be raised as a boy, and also that the child's access to and exploration of feminine identity and conduct should be restricted, does not ensure the child's freedom from assimilation demands. Despite the opinion's rhetoric, the outcome forces identity foreclosure on the child. Had the court clearly characterized the issue as the child's identity interest and questioned how the parents could work to protect the child's identity, it may or may not have come to the same result. Perhaps such analysis would still point to granting the father custody, but the decision would have been more persuasive had the court allowed the mother to continue facilitating the child's feminine identity exploration to meaningfully preserve the child's identity interests and future development, whether the mother was the primary custodian parent or not.

Cases like *Smith*¹⁸⁹ expose the gaps between courts' purported goal to protect children's identity interests and their

189. *Id.* at *5. For other similar cases, where parents engaged in a custody dispute because of a child's gender nonconformity, see *Shrader v. Spain*, No. 05-95-01649-CV, 1998 WL 40632, at *1 (Tex. Ct. App. Feb. 4, 1998). The court found that the trial court was within its discretion to grant the father of a MTF trans child custody, as a change in custody was in the best interest of the child. *Id.* The court relied on expert testimony from the child's psychologists, claiming that the child's gender nonconformity was a result of emotional dependence on the mother and that spending more time with the father would facilitate separation from her. *Id.*; see also *Buxton v. Storm (In re Custody of D.T.J.S-B)*, 238 P.3d 30 (Or. Ct. App. 2010). Throughout the custody proceedings, the mother had accused the father of several crimes (including sexually abusing the child), but all accusations were unsubstantiated. *Buxton*, 238 P.3d at 40. Mental health experts were concerned the mother would undermine the child's bond with the father, and in fact she continuously sabotaged the child's treatment and the father's involvement. *Id.* at 37. The mother would transfer the couple's son to his father with the child wearing girl's clothes and nail polish and having pierced both his ears. *Id.* at 36. The mother claimed this was the child's own wishes and that the father was homophobic for protesting. *Id.* The father's fiancé stated the boy had told her he was gay because that's what his mother said and that sometimes the nail polish would not come off because his mother covered it with Super-Glue. *Id.* A mental health expert was concerned about the mother's behavior and the child's consequent statements, because they were in stark contrast with the child's play style and his stereotypical male behavior. *Id.* at 34. The child's psychological evaluations further found that the child suffered severe stress and development disorders due to the custody proceedings, attachment issues, and aggression towards the mother and the father's fiancée. *Id.* at 34-35. The court ultimately ruled against the mother who encouraged and presented the child in gender nonconforming ways to the father in order to elicit negative responses from him, hoping to gain an advantage in the custody dispute. *Id.* As the court put it: "[M]other's pattern of actions has undermined child's ability to have a healthy relationship with father and embroiled child in the parental conflict." *Id.* at 38.

ability to do so for gender non-conforming children. The courts' "best interest of the child" analysis was concerned more with determining the child's "true" gender identity and policing a heteronormative gender development rather than allowing children to pursue and express whichever gender identity they wish to develop.¹⁹⁰ This reveals courts' ignorance of gender identity issues. Perhaps it is a problem of judges' unfamiliarity with trans issues, or the lack of established jurisprudence about children's identity interests within families, that explains the gap between rhetoric and result, but in decisions like *Smith*, courts themselves impose assimilation demands on children. Because courts so far have not analyzed cases using the vocabulary of assimilation demands, they end up under-protecting children and facilitating parents' expectations of gender conformity. Custody decisions that do not place proper weight on children's sexual identity interests are potentially flawed because they privilege parental rights and thus perpetuate the law's view of children as parental property.¹⁹¹

To protect children's identity interests, it is important to translate the *Lori M.* and *Smith* courts' policy rationales—that children have identity interests that encompass their sexual identity and are beyond the reach of parental assimilation demands—into a broader legal construct that positions children's identities outside of parental rights in a variety of contexts. The framework suggested below in this Article, the Family in Need of Services (FINS) exception, is one that might address additional disputes that current family law does not reach. This proposal is only one of many possible solutions and will be the focus of discussion below. The primary goal of this Article is to initiate scholarly attention to family assimilation demands and to illustrate them, rather than to offer a be-all-end-all solution.

"Child's grooming and appearance during transfers for parenting time with father seem calculated to provoke conflict." *Id.*

190. *Smith*, 2007 Ohio App. LEXIS 1282, at *4.

191. Linda L. Lane, Comment, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 844 (1998); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1042–43 (1992) ("At the time of *Meyer and Pierce*, ownership of humans was a legal fact within living memory. Ironically, the Court in *Meyer and Pierce* chose to hang parental control of children on the branch of Fourteenth Amendment 'liberty' . . . [T]he right of parental control in *Meyer and Pierce*—authored and joined by the Court's most inflexible laissez-faire conservatives and grounded on economic substantive due process precedents—acquires a logical framework. Property and ownership were indeed a powerful subtext of parental rights rhetoric in the era of *Pierce and Meyer*." (footnotes omitted)).

Carving out an exception to parental rights might also be of use in the line of cases where parents try to impose assimilation demands on children through disputes with their children's intimate partners. By bringing claims against partners, parents seek to force an end to the same-sex relationship in hopes of directing children back into heterosexuality and different-sex relationships.¹⁹² Although parents of straight children might utilize the legal system against a child's partner, those instances are overwhelmingly adjudicated as statutory rape cases taken over by the state. Contrastingly, LGBT youth's parents normally bring civil claims against their children's partners for torts such as loss of consortium or seduction.¹⁹³

192. In *Acevedo v. Williams*, 985 So. 2d 669 (Fla. Dist. Ct. App. 2008), eighteen-year-old Acevedo had been dating Williams' daughter for several months before the mother petitioned a court for a restraining order against Acevedo, claiming her relationship with her daughter constituted sexual battery. The lower court granted the petition not on the basis of abuse or battery occurring in the course of the relationship, but instead by finding the seventeen-year-old daughter incapable of consenting to the relationship because of her age. *Id.* at 670. The appellate court reversed based on prior Florida courts decisions finding sixteen-year-olds capable of consent, and based on Florida statutory rape legislation setting the cut-off age for statutory rape of a sixteen-year-old at twenty-four. *Id.* at 671. Further, the appellate court found no evidence that the relationship between the two girls was in any way abusive, criminal, or injurious to Williams' daughter. *Id.* See also *Brayman v. Deloach*, 439 S.E.2d 709 (Ga. Ct. App. 1993), which is a case involving a mother's suit on behalf of her minor daughter against a community softball coach with whom the daughter had a same-sex relationship, claiming the daughter was a victim of seduction. The court rejected the claim on standing grounds and ruled that the statute created a cause of action to fathers alone, unless the father is deceased. *Id.* at 711. Since the father was alive, the mother had no standing to bring the claim. *Id.* Despite rejecting the claim on procedural grounds, the court did comment on the merits of the seduction claim as well. *Id.* at 717. The court did not find any harm to the daughter, which negated assumptions regarding the inherent inferiority of same-sex relationships and the consequent harm to partners in such relationships, particularly children and youth. *Id.* at 712.

193. Searches through several treatises yielded no results for cases where parents filed civil claims (such as loss of consortium) against the different sex partners of their children. The sources reviewed were: 59 AM. JUR. 2D *Parent and Child* § 122–23 (2d ed. 2012); 14 C.J.S. *Civil Rights* § 37 (2006); 67A C.J.S. *Parent and Child* § 331 (2002); 5 B. E. WITKIN, WITKIN LEGAL INST., SUMMARY OF CALIFORNIA LAW § 1684 (10th ed. 2005); 4 CALIFORNIA TORTS § 56.04 (Neil M. Levy, Michael M. Golden, & Leonard Sacks eds., 2013). One case involving a statutory rape offense between two boys is *Kansas v. Limon*, 122 P.3d 22 (Kan. 2005). In that case, it is unclear as to whether the prosecution was a result of complaints by parents. I therefore do not consider this a case of parental assimilation demands. For another statutory rape case between two boys, see *Commonwealth v. Washington W.*, 928 N.E.2d 908 (Mass. 2010). As of summer 2013, a felony child abuse case is pending in Florida: there, the par-

These instances, in which parents initiate a legal battle against children's same-sex partners, may not be obvious examples of assimilation demands. However, these cases do illustrate assimilation demands and the resultant intra-family disputes, and therefore also show how these disputes take shape in courts.

In *Landreneau v. Fruge*,¹⁹⁴ a mother sued her daughter's teacher and coach, alleging that the two women committed various acts intended to entice her daughter into homosexual activity, which allegedly resulted in the loss of her daughter's consortium.¹⁹⁵ The mother and daughter had a tumultuous relationship even before the onset of the daughter's relationships with the two women. The daughter had a history of abusive relationships (mostly, but not all of which, were same-sex), substance abuse, and suicidality.¹⁹⁶ After disclosing the details of her same-sex sexual relationships to her mother, the daughter escaped from her mother's home and was consequently admitted to a hospital for substance abuse treatment.¹⁹⁷ The court rejected the loss of consortium claim because the abusive nature of the mother-daughter relationship preceded the mother's discovery of her daughter's same-sex relationships.¹⁹⁸ The fact that the relationships were same-sex seemed immaterial throughout the opinion, as the court emphasized the abusive nature of the relationships as well as the daughter's troubled behavior more generally. However, the mother, who seemed unconcerned by her daughter's different-sex relationships, filed suit only against her daughter's same-sex partners, though these relationships were not the only abusive relationships her daughter had experienced.¹⁹⁹ Indeed, the court portrays the other relationships as far more harmful. The court did not describe the relationship in question as overtly violent.²⁰⁰

ents of a minor girl initiated charges against the daughter's eighteen-year-old girlfriend. Sunnive Brydum, *Kaitlyn Hunt Is Not the First to Complicate 'Justice'*, ADVOCATE (Jan. 30, 2014, 7:19 PM), <http://www.advocate.com/youth/2013/06/13/kaitlyn-hunt-not-first-complicate-justice?page=0,1>.

194. *Landreneau v. Fruge*, 94-553, p.13 (La. App. 3 Cir. 6/12/96); 676 So. 2d 701.

195. *Id.* at 704.

196. *Id.* at 705-06.

197. *Id.* at 706.

198. *Id.* at 709.

199. *Id.* at 705.

200. *Id.*

Regardless of whether the relationship between the mother and her daughter deteriorated as a result of the daughter's coming out, the fact that the court entertained the loss of consortium by rejecting it on its merits illustrates that the court did not object to the mother's basic animus toward her daughter's sexual orientation. Rather than treating this case as an opportunity to signal to parents that they cannot mistreat their children because of their sexual identity, the court's decision could have an adverse effect. The decision could perversely incentivize parents to reject children who come out and turn to courts to recover damages from their children's partners.

Causes of action such as loss of consortium and seduction cement problematic views that parents are within their rights to control their children's sexual identity and recover financially when they fail to do so. These causes of action reflect notions of children as parental property at the expense of family cohesion or the parent-child relationship. Many states have repealed the tort of seduction²⁰¹ as well as other laws such as child abuse prohibitions or child labor laws. These repeals signify a legal trend moving away from theories and regulations of children as parental property. Perhaps the time has come to do away with the loss of consortium tort as well. As we become less comfortable with disparities in power dynamics and victimization created by the law, such torts that intensify already existing power imbalances between parents and children should be reconsidered.

The insufficient protection that the three cases above offer children *de facto* signals to LGBT youth that their sexual identity and relationships are inferior and illegitimate and are, quite literally, harmful to themselves and their parents. Negative messages from parents and the legal system raise concerns that LGBT children and youth will be particularly vulnerable to emotional injuries from heteronormative assimilation de-

201. While California Civil Code § 49 prohibits "the abduction or enticement of a child from a parent, or from a guardian entitled to its custody," part (b), which prohibited "the seduction of a person under the age of legal consent," has been repealed. CAL. CIV. CODE § 49 (West 2013); *see also* B. E. WITKIN, *supra* note 193, § 723 ("Although C.C. 49(b) still forbids the seduction of a person under the age of legal consent, the repeal of former C.C.P. 374 and 375 in 1967 abolished the action. The only sanction is the felony-misdemeanor of 'unlawful sexual intercourse' with a person under 18 years of age."); CAL. PENAL CODE § 261.5 (2008) (providing both criminal punishment and civil penalties). For more on seduction, *see generally* Douglas E. Cressler, *An Old Tort with a Unique Hoosier History Finds New Life*, 47 RES GESTAE 26 (June 2004).

mands. Assimilation demands burden children's healthy identity development, positive and stable sense-of-self, and even their relationships with partners and other family members. That no case²⁰² endorses the tactics parents use to enforce heteronormativity on their children illustrates courts' intentions to protect children from parental mistreatment. Courts have rejected parental claims and included explicit language affirming children's identity interests. Read together, these decisions reflect a trend of limiting parental authority to control children's identity through assimilation demands in favor of children's interests. However, courts' willingness to protect children is not entirely helpful to children when that protection is inconsistent, unclearly articulated, or poorly rationalized.

II. INADEQUACY OF CURRENT FAMILY LAW

Establishing that parental rights do not extend to a right to impose assimilation demands that foreclose a child's development or control her identity interests to her detriment begs the question of whether carving a new framework to deal with family assimilation demands is necessary. Put differently, are existing frameworks, namely abuse and neglect law or the child in need of supervision (CHINS) doctrine, sufficient legal tools to resolve these disputes, and if not, why? In this Part, I demonstrate why existing frameworks are unhelpful in protecting children's identity interests. In attending to abuse and neglect (primarily emotional abuse), I argue that these exceptions to parental rights are inadequate because most assimilation demands are too subtle to constitute abuse or neglect. This leads courts to sanction harmful parental heteronormativity that does not reach the level of abuse/neglect. Additionally, the immediate and default remedy for abuse/neglect is removal, and removal is contrary to this Article's goal of fostering family cohesion. Similarly, CHINS, which is the procedure through which truant or "incorrigible" children are removed from the home and placed in foster care, also triggers family separation. This proceeding places blame for family discord on the child. Suggesting that a child's behavior is reprehensible when she asserts her identity rights does not get to the core of the problem of how parents respond to the child's identity. As a final concern regarding both abuse/neglect and CHINS, courts are

202. Of the cases discussed or cited here or throughout the dissertation version.

overly limited in their authority to offer services to the family as a unit, or to mandate services when they find the parent's behavior did not constitute abuse/neglect or when the child is not declared a CHINS. The FINS framework I suggest below is a hybrid of abuse/neglect law and CHINS jurisprudence. In that sense, it authorizes courts to mandate family services designed to resolve family conflict, but unlike abuse/neglect and CHINS, it prevents courts' findings that imply either parent or child is responsible for the dispute. Because under FINS courts are not required as a first step to find there was abuse/neglect or an "incurable" child, courts can offer reparative family services without removing the child. Thus, FINS expands the range of cases in which courts can intervene by mandating social services, but limits the intrusion to less restrictive alternatives like mediation.

A. ASSIMILATION DEMANDS IN ABUSE AND NEGLECT LAW

The predominant exception to parental rights that family law has created is the abuse/neglect model, where the state intervenes to remove a child from the home when she is severely harmed or when her needs are not met. The abuse/neglect model has limited efficacy in assimilation demands cases. This is partly because of the high bar of egregiousness required for abuse/neglect law to restrict parental behavior, and partly because the interventions crafted for abuse/neglect are generally not a good fit in assimilation demands cases. As I will describe below, this is not to say that abuse/neglect law is never an appropriate tool to address family assimilation demands—indeed, some cases of parents' assimilation demands have been well litigated as abuse or neglect cases. However, abuse/neglect law does not cover the full range of parents' assimilation demands. A complementary framework that might be more useful and more appropriate in addressing the more subtle cases of assimilation demands is therefore in order.

1. Violent Demands: Sexuality as a Site of Abuse and Neglect

The case law discussed in this Part suggests that parents harshly punish what they interpret as signs of same-sex sexual orientation or gender nonconformity in their children, and rely on their parental rights to excuse the abuse. Parents knowingly and admittedly abuse their children in order to assimilate them into mainstream, straight society. Regardless of whether the abuse is motivated solely by a desire to control a child's sexual

identity or to control the child more generally,²⁰³ courts are troubled by these abusive patterns and do not see this abuse as protected conduct under parental rights.

Shane T. is the first case where a court used abuse law to exclude assimilation demands from parental rights.²⁰⁴ Fourteen-year-old Shane was verbally abused by his father, who continually referred to Shane using derogatory slurs such as “fag,” “faggot,” and “queer” and told Shane, both at home and in public, that he should have been a girl.²⁰⁵ To defend his conduct, the father relied on his parental rights and claimed he was trying to “cure [Shane] of certain girlie behavior.”²⁰⁶ The court found the father’s conduct abusive because verbal mistreatment constitutes abuse when it creates a serious impairment to the child’s health, including emotional health.²⁰⁷ The court stated that although Shane maintained that he was heterosexual, he was clearly distraught by his father’s attacks on his sexual orientation.²⁰⁸ Next, the court rejected the father’s parental rights argument. The court reasoned that children have the same fundamental rights as adults and that even parents must respect children’s fundamental rights.²⁰⁹ Parental rights, according to the court, do not bar state intervention when that intervention is necessary to protect children’s health and welfare. The court went on to deem the father’s reliance on parental rights “ludicrous” because of the severe effect the threat of abuse had on Shane’s future emotional development.²¹⁰

This case is seemingly a mild case of assimilation demands. Because Shane identified as straight, his father’s

203. Some of the families in these cases experience abuse in light of substance abuse or mental disabilities, for instance. Animus to sexual identity is present and mingled with the other causes of abuse, but is not always the sole cause of mistreatment. Still, parents’ abuse in this context targets sexual identity and is an attempt to alter it or its expression and inflicts unique and exacerbated harms in ways typical abuse does not, and therefore merits the special attention of this Article.

204. *In re Shane T.*, 453 N.Y.S.2d 590, 591 (N.Y. Fam. Ct. 1982). The Commissioner of Social Services petitioned the court to declare Shane and his two sisters abused and neglected children. *Id.* The court did so and remanded Shane for psychological and physical evaluation before a disposition hearing, a decision which was not reported. *Id.*

205. *Id.* at 591–92.

206. *Id.* at 593.

207. *Id.* at 592–93.

208. *Id.* at 593.

209. *Id.*

210. *Id.* at 593–94.

treatment was merely a reverse-covering demand, rather than a conversion demand on a gay son.²¹¹ Shane's father's attempts to "cure" his son's "girlie" behavior were designed not to coerce Shane to abandon his identity, but rather to influence him to mute any gender non-confirming behavior and flaunt his masculinity.²¹² Shane's father used derogatory name-calling to pressure Shane to reverse-cover and comply with male sex-stereotypes.²¹³ But however subtle and non-violent these assimilation demands seem, they were in fact highly coercive and oppressive to Shane.²¹⁴ The inherent power imbalance between parent and child made Shane vulnerable to any mistreatment by his father, but these particular abusive assimilation demands increased Shane's preexisting powerlessness. Indeed, even Shane's mother's intervention on his behalf proved futile and caused the father to increase the emotional abuse.²¹⁵ These assimilation demands had such a detrimental impact on Shane that the court was concerned for his emotional development.²¹⁶ The effect of his father's assimilation demands was internalized homophobia that caused Shane to question his sexual orientation²¹⁷ and devalue his sense-of-self.²¹⁸

The court's sympathy to Shane's emotional distress over his father's abuse motivated it to protect Shane from conduct that another court could have found permissible.²¹⁹ The assimilation demands in this case were limited to verbal expressions toward a child who was not actually gay.²²⁰ A different court may have reasoned that directing children into heterosexuality

211. For the definition of "reverse-covering," see YOSHINO, *supra* note 16, at 23 and accompanying text.

212. *Shane T.*, 453 N.Y.S.2d at 593.

213. *Id.* at 592.

214. *Id.* at 593.

215. *Id.* at 592.

216. *Id.* at 594.

217. Questioning one's sexual orientation is not inherently troubling or harmful, but being driven to question one's sexual orientation as a result of abuse is. Just as we condemn conversion therapy that might influence one to question her same-sex sexual orientation, so too should a parent's abusive behavior targeted at a straight child that causes her to question her orientation be equally criticized. Perhaps even more so, when what underlies that questioning is internalized homophobia that upsets the child's sense-of-self by the mere experience of questioning, regardless of the outcome of such process.

218. *Shane T.*, 453 N.Y.S.2d at 593.

219. *Id.* at 594. Because there are so few published opinions on point, I know of no case where a parent's homophobic remarks were found to be permissible or non-abusive.

220. *Id.* at 592.

is within parental rights, and even aligns with the public interest in a sexual order that enables social continuity through marriage and procreation. Yet that court would have entirely missed the point that the *Shane* court saw: when assimilation demands are so harmful to the child as to risk his psychological well-being and future development, they should be impermissible.²²¹ However, relying solely on abuse law as an effective avenue to limit parents' assimilation demands is a flimsy proposition.

C.O. v. B.C. is another case of child abuse through parental assimilation demands that targeted the child's sexual identity.²²² Here, the court considered the consequences of a history of abuse on the mother's parental rights and the potential for family reunification.²²³ A mother physically assaulted her daughter, C.O., when C.O. came out to her as a bisexual, leaving visible scratches on C.O.'s face.²²⁴ On a different occasion, the mother threatened to have a man rape C.O. in order to "cure" her of her bisexuality.²²⁵ The mother, who later received counseling and participated in parenting classes, apologized for the violence and stated that it would not happen again.²²⁶ As C.O. insisted upon returning to her mother's care, the court reunited the two.²²⁷ Yet, despite parenting and domestic violence counseling, violence ensued upon reunification.²²⁸ C.O. exhibited rebellious and violent behavior toward her mother and her mother retaliated.²²⁹ The court ultimately decided to stop reuni-

221. *Id.* at 593–94. The court relied on Shane's testimony to evaluate the extent and severity of the harm he suffered. *Id.* The court was concerned with Shane's distress over his father's attacks on his sexual identity and masculinity. *Id.* The courts also remanded Shane to a psychological evaluation to examine the emotional harm he experienced. *Id.*

222. *C.O. v. B.C.*, No. B206425, 2008 WL 4670513 (Cal. App. Oct. 23, 2008).

223. *Id.* at *1. These are services the state, through social services professionals, provides families and parents in order to prevent further abuse and allow for families to reunite safely in an attempt to avoid termination of parental rights. For more on such services, see generally Orly Rachmilovitz, *Achieving Due Process Through Comprehensive Care for Mentally Disabled Parents: A Less Restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785 (2010).

224. *C.O.*, 2008 WL 4670513, at *1.

225. *Id.* at *3.

226. *Id.*

227. *Id.* at *8.

228. *Id.*

229. *Id.*

fication services and to place C.O. and her siblings in foster care.²³⁰

Though the court expressed satisfaction that the violence around C.O.'s sexual orientation had been resolved,²³¹ it still found it necessary to protect C.O. and her siblings from the broader patterns of abuse they experienced.²³² But the court did not give sufficient weight to the abuse related to C.O.'s sexual identity and obscured the severity of the abuse by overlooking its homophobic motivation. The assault that followed C.O.'s coming out was not a typical act of child abuse, but a highly violent assimilation demand. By violently punishing C.O.'s sexual orientation, her mother imposed two demands at once. First, the assault can be seen as a covering demand because it had the power to teach C.O. that her sexual identity was an illegitimate part of the family conversation. Second, the mother's assault on C.O. demanded conversion by signaling to C.O. that bisexuality was unacceptable and deserved violent punishment. The conversion demand employed rape threats, which the mother admitted were designed to "cure"²³³ C.O.—to convert her from bisexual to heterosexual in a most aggressive and heinous manner.

Shane T. and *C.O.* are examples of assimilation demands from parents that constitute abusive attacks on children's identity. The parents in these cases harassed and threatened violence in order to force their children to conform to mainstream sexuality or punish their transgressions. Such demands can be detrimental to the child's emotional health and lead to grave outcomes for her. Although courts do not use an "identity rights" or "assimilation demands" vocabulary, they understand that these children have suffered greatly and need the state to intervene on their behalf to stop parents' abusive assimilation demands.

Children are also in danger of neglect by parents because of the children's sexual identity. Many parents respond to children coming out by forcing them out of the home and cutting off

230. *Id.* at *12.

231. *Id.* at *1 ("[C.O.] stated she and Mother had conversations regarding the threat to have a man rape C.O. and C.O. now understood that Mother was very angry when she made the threat and was not serious about it, and Mother apologized profusely for making the threat."); *id.* at *3 ("[P]arents are able to accept C.O.'s sexual identity and choices.").

232. *Id.* at *12.

233. *Id.* at *2.

financial support.²³⁴ A stark example of rejection and neglect as forms of assimilation demands can be found in the case of *Dzierson v. Dzierson*.²³⁵ In this case, as a term of divorce, a father agreed to shoulder the full expenses of his son's college tuition.²³⁶ When the son came out to his father as gay, the father told his son that he was uncertain about his future participation in the son's life.²³⁷ When the son reacted by refusing to see or speak to his father, the father claimed he was abandoned by the son and therefore was no longer obligated to finance his son's education.²³⁸ The court rejected the father's argument, finding that the father was the one who abandoned his son, not the other way around.²³⁹ The father, the court ruled, caused the breakdown between the two when he reacted adversely to his son's coming out.²⁴⁰ As such, the father could not claim that the son abandoned him or effectively released him of his obligations under the divorce agreement.²⁴¹

Arguably, these cases are not about assimilation demands but are about abuse or neglect. After all, none employ the assimilation demands vocabulary, and only a few speak of identity. However, the fact that the maltreatment targeted the children's sexual identity, both as the reason for the abuse and as impacting the shape the abuse took, demonstrates that animus for the children's actual or perceived sexuality motivated the abuse. These courts see how detrimental the effects of this animus can be to the well-being and emotional health of the chil-

234. As of 2006, 20% to 40% of American homeless youth identify as LGBT. RAY, *supra* note 115, at 1. The number changes across locations. Bigger cities like New York and Los Angeles have larger numbers of homeless youth who identify as LGBT, estimated at almost 40% of all homeless youth. *Id.* at 2. Twenty-six percent of homeless LGBT youth point to family rejection as reason for their homelessness. *Id.* at 14.

235. *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (N.Y. Fam. Ct. 1997). For another neglect case, see *Catherine W. v. Robert F.*, 455 N.Y.S.2d 519 (N.Y. Fam. Ct. 1982). There, a son responded to his father's mistreatment (calling the son a "faggot" and telling him he acted "like a queer," among others) by ending the relationship. *Id.* at 522. The father relied on the son's rejection as reason to escape support obligations. *Id.* at 520. The court ruled that because the father's remarks made him a threat to his son's emotional well-being and caused the son's refusal of contact, the father could not rely on the son's conduct to release him from his obligations toward the son. *Id.* at 522.

236. *Dzierson*, 661 N.Y.S.2d at 780.

237. *Id.*

238. *Id.*

239. *Id.* at 782.

240. *Id.*

241. *Id.* at 780.

dren involved. These cases support the argument that assimilation demands on children's identity are abusive, and thus parents cannot seek refuge in parental rights when imposing such demands on their children.

In addition to concerns about the harms to children, another concern underlies these cases: the concern for family cohesion. The cases above illustrate how assimilation demands can split families, whether by court action or independently. In the neglect cases, both fathers requested to end their parental obligations, which would also terminate any rights they had within the relationship. C.O. and her mother were engaged in such pervasive and severe mutual violence that the court placed C.O. and her siblings in foster care. The assimilation demands those parents imposed on their children hindered their families' ability to accept the children's sexual identities in a pluralistic manner, and the inevitable result was disengagement between parents and children. Perhaps the danger of disengagement is not exclusive to situations involving abusive assimilation demands. Abuse and neglect cases generally lead to disengagement, as they often involve temporary or permanent removal of children and limits on parental rights. However, even when they do not clearly rise to the level of abuse or neglect, the adverse impact parents' assimilation demands have on their children's identity development and on attachments between parents and children carry a significant risk of leading to family disengagement.

2. Rejecting Emotional Abuse as a Mechanism for Litigating Family-Based Assimilation Demands

The previous Part demonstrated how assimilation demands have already been integrated into abuse/neglect law. *Shane T.*, in particular, can be viewed as a case to support the notion that assimilation demands are essentially a form of emotional abuse.²⁴² Though I do not claim emotional abuse is never a good fit for assimilation demands litigation, I believe it is not always the best fit. The law should develop a more expansive framework to encompass the instances where it currently leaves children underserved and under-protected. As discussed above, my discomfort with emotional abuse law as the ultimate construct to protect children's identity interests lies in the prevalence of removal and family separation, and the inade-

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

quacy of services provided to parents. I am also skeptical of how helpful a framework as tenuous as emotional abuse can be in advancing strong protections for vulnerable children, when the great challenges in proving this particular type of abuse leads courts to err on the side of overly protecting parents' positions.

Not all states recognize emotional abuse as a form of child abuse.²⁴³ States that do tend to employ vague definitions that generally include elements such as repetitive behavior from a parent hindering the child's emotional development, acts which lead to emotional disturbances, or acts which cause emotional pain.²⁴⁴ More specific statutes enumerate particular mental health outcomes, including anxiety or depression.²⁴⁵ Both actual emotional injury and prospective emotional injury may lead to a finding of emotional abuse.²⁴⁶ A parent's harmful behavior could be physical or sexual abuse, or neglect that inflicts psychological wounds,²⁴⁷ but also could be strictly emotional: constant screaming, derogatory or foul name-calling, belittling, or ignoring the child.²⁴⁸ The outcomes of emotional abuse cases range from family counseling to child removal.²⁴⁹

Like all abuse/neglect cases, emotional abuse cases reflect a tension between limiting interventions to preserve parental rights and broadening the law and policy to protect more injured children. Perhaps the greatest challenge for courts deciding these cases is to draw the line between reasonable discipline and abuse.²⁵⁰ For example, in *People v. D.A.K.*²⁵¹ the

243. GUGGENHEIM ET AL., *supra* note 5, at 106.

244. Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children*, 26 J. LEGAL MED. 311, 314 (2005). *See generally* ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* (3d ed. 2012) (emphasizing the causal connection between the parent's conduct and the child's emotional harm).

245. HARALAMBIE, *supra* note 244.

246. Rebecca E. Hatch, *Cause of Action for Termination of Parental Rights Based on Abuse or Neglect*, 53 CAUSES OF ACTION § 6, at 523 (2d ed. 2012).

247. *Id.* ("Courts will generally recognize that where there is physical abuse, it will have a long-lasting impact on not only the child's physical health but [her] emotional health as well.")

248. DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 16:8 (2012).

249. HARALAMBIE, *supra* note 244.

250. *State ex rel. J.R.*, 257 P.3d 1043, 1044 (Col. 2011) ("The issue of whether discipline was reasonable is a fact-dependent analysis . . . [S]lapping J.R., calling her . . . vile names, accusing J.R. of sexual activity, and threatening J.R. with an exam to prove or disprove her virginity . . . was not reasonable discipline . . . [T]he father's pattern . . . was not a 'good faith effort to maintain discipline.'").

251. *People v. D.A.K.*, 2011 WL 1043 (Col. 2011).

Colorado Supreme Court expanded the statutory definition of “abuse” to include emotional harm to the child.²⁵² The court ruled that the general term “abuse” must be “liberally construed” to encompass emotional injuries to the child.²⁵³ Limiting the definition to physical harm alone would hinder the legislative goal of securing the well-being of children.²⁵⁴ In contrast, the Missouri Supreme Court was careful to explain that not every kind of inappropriate parental conduct (in this case, placing children in multiple consecutive adoptions, probably for financial benefit) will sufficiently harm children to meet the high standards of abuse or neglect.²⁵⁵ These high bars are in place to protect the fundamental liberty interest parents have in raising their children.²⁵⁶ Bad parenting, therefore, does not extinguish parental rights.²⁵⁷

Arguably, the line-drawing problem between parental rights and children’s interests plagues general abuse law and is not specific to emotional abuse cases.²⁵⁸ The unique characteristics of emotional abuse make this problem more acute, and it often results in under-protection of children or protection only in cases where the emotional harm is linked to physical or sexual mistreatment. First, emotional harm is intensely difficult to prove, even when a child may have developed a diagnosable mental disorder.²⁵⁹ Second, and related, because of the expan-

251. *People v. D.A.K.*, 596 P.2d 747 (1979). The mother had refused to bathe or feed her child and told a nurse and social worker that she was afraid of the child and wanted to release him for adoption. *Id.*

252. *Id.* at 750.

253. *Id.*

254. *Id.* (“The welfare of the child cannot be protected if courts must ignore the very real emotional abuses that a child may suffer. Emotional abuse may leave scars more permanent and damaging to a child’s personality than bodily bruises from a physical beating We decline to conclude that an enlightened legislature . . . would be concerned only with the safety of the child’s body, but not of the integrity of [her] mind, personality and spirit.”).

255. *In re K.A.W.*, 133 S.W.3d 1 (Mo. 2004); *In re P.C.*, 62 S.W.3d 600, 604 (Mo. Ct. App. 2001) (ruling that threatening to spank children, throwing toys in the trash to end children’s fighting over them, failing to spend Christmas with them, etc., are “inappropriate” and “bad judgment” but not emotionally abusive).

256. *P.C.*, 62 S.W.3d at 603.

257. *K.A.W.*, 133 S.W.3d at 12.

258. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 104–05 (2002).

259. GUGGENHEIM ET AL., *supra* note 5, at 107. One of the difficulties in proving emotional abuse is the causation between parental conduct and the child’s psychological state, rather than the child’s predisposition to poor mental health.

sive liberties afforded parents, social services and law enforcement hesitate to intervene in pure emotional abuse cases.²⁶⁰ It is also possible that the delicate balance between discipline and abuse is even more elusive when no physical or sexual violence had taken place, leading to under-reporting or trivializing by victims or witnesses and reducing the likelihood of legal or social intervention. Because of these challenges to litigating emotional abuse, the vast majority of cases carry some component of more tangible forms of abuse.²⁶¹

Ultimately, then, emotional abuse is an ineffective mechanism to handle assimilation demands from parents. As discussed in previous sections, many assimilation demands cases involve threats of violence or derogatory name-calling intended to “cure” the child’s behavior.²⁶² Assimilation demands that find their way into litigation as emotional abuse cases that do not involve physical abuse or neglect (e.g., failing to financially support a child because of her sexual identity) would likely not result in intervention protecting the child. Even where independent emotional abuse claims do stand on more solid ground, because of the aggressive nature of abuse-based interventions into the family and infringement on parental rights, the standard for behavior that constitutes abuse is high, leaving much of parental maltreatment beyond state reach. While it is prudent to leave most instances of bad parenting, bad judgment, or inappropriate behavior out of the courtroom, the standard of severity in conduct and harm that abuse and neglect require to permit state intervention will leave many LGBT children who experience mild rejection or emotional abuse because of their heightened vulnerability unprotected. As much as this is a pragmatic concern for the welfare of these children, it is also a political-institutional critique on perpetuating heteronormativity. Using abuse/neglect law and its high standards for intervention sends a message that the legal system condones parents’ homophobia and transphobia, as long as it is not egregious enough to constitute abuse or neglect. Instead, a legal system in a pluralistic society that is moving toward better ac-

260. Loue, *supra* note 244, at 323.

261. *Id.* at 322–23; HARALAMBIE, *supra* note 244. Indeed, a Westlaw search of emotional abuse cases conducted for the purpose of this project produced thirty-four cases, of which at least twenty-five included some component of physical or sexual abuse. At least one other case did not find that any abuse had occurred.

262. *See, e.g.,* C.O. v. B.C., No. B206425, 2008 WL 4670513, at *2 (Cal. App. Oct. 23, 2008).

ceptance and stronger rights protections for sexual minorities should consider harmful parental homophobia and transphobia unacceptable, even when they do not rise to the high level of severity that is abusive or neglectful.

This is not to negate any instance of assimilation demands as emotional abuse. Emotional abuse is an appropriate framework in those truly egregious cases.²⁶³ However, in recognition of the limits of abuse law (and primarily those of emotional abuse law), family law should develop a supplemental and intermediate framework as well. This intermediate framework—the Family in Need of Services (FINS) framework—is a refinement of current legal tools, such as abuse/neglect law and CHINS framework, that allows additional protection for victimized children, but reduces the danger of state overreaching into the family.

B. ASSIMILATION DEMANDS AND THE CHILD IN NEED OF SUPERVISION

Originally encompassed in juvenile criminal proceedings, the child in need of supervision (CHINS) framework eventually developed separately to invite state intervention into families needing assistance controlling an unruly child.²⁶⁴ CHINS proceedings essentially rely on status offenses—behaviors that are subject to state intervention based solely on the status of being a minor. To declare a child in need of supervision, a court must find that the child has either been truant from school, or has been “incurable.”²⁶⁵ An incurable child is usually defined as a child who is habitually defiant toward her parents’ reasona-

263. Perhaps one way to view the relationship between assimilation demands and abuse law is analogous to discrimination and harassment law, respectively. In this analogy, assimilation demands, like discrimination, manifest in a variety of troubling behaviors that reject a child because of her divergent identity, as perhaps a woman might be in a male-dominant workplace. Like harassment, abusive assimilation demands would be those most aggressive and violent behaviors. For an example of a case that abuse could also be viewed as intra-family sexual harassment, see *In re Kelley D.*, 590 N.W.2d 392 (Neb. 1999), where the parents only abused the girls—including snapping one girl’s bra in the company of others and encouraging the boy to physically assault the girls.

264. NATURE AND HISTORY OF SUPERVISION PROCEEDINGS, CALLAGHAN’S FAMILY COURT LAW & PRACTICE NEW YORK (2013); 32 JOSEPH R. NOLAN & LAURIE J. SARTORIO, MASSACHUSETTS PRACTICE: CRIMINAL LAW § 704 (3d ed. 2001).

265. NOLAN & SARTORIO, *supra* note 264, § 704.

ble and lawful authority.²⁶⁶ Parents and some state agencies can file CHINS petitions with juvenile or family courts to remove the child from parental custody and into state supervision.²⁶⁷ Courts generally review CHINS dispositions as early as six months after the initial decision to subject the child to services and render a final decision as early as a year after the proceedings began.²⁶⁸ The court can then either reunite the child with her parents or terminate parental rights. However, when a court declines to declare a child as a child in need of services, it generally abdicates authority to offer the family any state assistance toward repairing their struggling relationships. Therefore, the crisis that triggered the CHINS proceedings, which the proceedings were meant to resolve,²⁶⁹ remains.

In *L.A.M. v. State*, a fifteen-year-old girl appealed a lower court's declaration that she was a child in need of supervision based on her truancy.²⁷⁰ The Alaska Supreme Court rejected her appeal, finding that she violated the lower courts' decisions by continuing to miss school and claiming that, were she an adult, such actions would be criminalized under contempt of court proceedings.²⁷¹ The opinion characterized CHINS as a custody dispute between parent and child, where the parent moves to enforce her fundamental rights to custody, discouraging the child to "resort to self-help and . . . violence" against the parent.²⁷² CHINS is a framework that is concerned primarily with the parental rights paradigm.²⁷³ It is decisively not designed to consider the child's best interest, particularly her identity, self-determination, or autonomy interests. Nowhere in

266. *Id.* Additional requirements may be that the child has repeatedly run away from home. *See, e.g.*, FLA. STAT. § 984.03 (2013).

267. JAMES DWYER, FAMILY LAW: THEORETICAL, COMPARATIVE, AND SOCIAL SCIENCE PERSPECTIVES 444 (2012).

268. 15A J. ERIC SMITHBURN & ANN CAROL NASH, INDIANA PRACTICE SERIES, FAMILY LAW: CHILDREN IN NEED OF SERVICES § 20:4 (2012–2013 ed. 2012).

269. Anne R. Mahoney, *PINS and Parents*, in CHILDREN, PARENTS, AND THE LAW: PUBLIC AND PRIVATE AUTHORITY IN THE HOME, SCHOOLS, AND JUVENILE COURTS 337 (Harris et al. eds., 3d ed. 2012).

270. *L.A.M. v. State*, 547 P.2d 827, 829 (Alaska 1976), in DOMESTIC RELATIONS: CASES AND MATERIALS 876 (Walter Wadlington & Raymond C. O'Brien eds., 6th ed. 2007).

271. *Id.* at 878.

272. *Id.* at 879.

273. The L.A.M court is so preoccupied with the parents' perspective that it twice makes the point that "[i]t is impossible to discuss severing this relationship without considering the *heartache and anguish of the parents.*" *Id.* at 880 (emphasis added).

the opinion does the court consider the child's emotional well-being, or her reasons for truancy. Further, the goal of CHINS proceedings, per the *L.A.M.* court, is not to provide assistance, care, or recovery for a troubled child, but only to make efforts to reunite the child with her parents.²⁷⁴ This line of reasoning reveals the court's real priority in rehabilitating children—preserving parental rights.

CHINS proceedings then place blame on the child and her behavior and assume (because of the parental rights paradigm) that the parents' behavior is reasonable and lawful and that the family's problems lie with the child. Courts should instead be asking whether the parents' behavior contributed to the child's conduct. Were the parents' attempts to control the child indeed lawful? Was "incurability" the only way a child, considering power imbalances within families and the general disempowerment of children, could protest parents' unlawful control? *Andrew R.*, a case where a child resisted his parents' efforts to involuntarily return him to foster care,²⁷⁵ helps illuminate these questions. Andrew's parents placed him in residential care,²⁷⁶ where he remained for seven months without review.²⁷⁷ The court was highly troubled by the effects of involuntary placements of children. Confinement deprives children of their liberty interests—a potential violation of constitutional rights—as well as the "daily consortium of family and friends, schoolmates, and participation in community affairs and activities."²⁷⁸ Because the confinement without hearing violated Andrew's fundamental procedural and substantive due process rights, Andrew was essentially protesting unlawful behavior from his parents and could not be declared a child in need of supervision solely because he refused to return to confinement. Denied resources or an opportunity to hold a hearing, Andrew's troubled behavior was the only meaningful avenue he had to fight his placement.²⁷⁹

274. *Id.* at 881.

275. *In re Andrew R.*, 454 N.Y.S.2d 820 (N.Y. Fam. Ct., 1982), *in* DOMESTIC RELATIONS, *supra* note 270, at 883.

276. Residential care is another term for group homes. Essentially—a foster care arrangement that does not place the child in a foster family home, but in a facility run by the state. Generally, children reside in the facility, but occasionally may be educated there as well, particularly if they have special educational needs or disabilities.

277. *Andrew R.*, 454 N.Y.S.2d at 886.

278. *Id.* at 885.

279. *Id.* at 886–87.

Andrew R. and *Lori M.* are both examples of the incongruity of CHINS proceedings. If a child asserts a protected right or protests parents' unlawful control, she either becomes subject to the juvenile or welfare systems, or she has her position vindicated and returns to the custody of a parent who rejected her in an extreme manner.²⁸⁰

LGBT youth are particularly vulnerable to CHINS proceedings for two primary reasons. First, because of the high incidence of both disputes with parents and truancy among LGBT youth, they are more prone to these proceedings.²⁸¹ Second, they may be more likely to be declared in need of supervision because of the misconception that parents' assimilation demands may be lawful or reasonable. Other contributing factors might include stereotypes associating sexual minorities with illegal, immoral, or otherwise socially undesirable conduct.²⁸² These circumstances underscore the greatest flaw in the CHINS framework—that it places blame for a family breakdown on the child, the weakest member of the family.

Because CHINS and the abuse/neglect frameworks focus only on one “side” of the family—child or parent—and not the family as a whole, any new framework should address the family as a unit to effectively account for family disputes around children's identities and parents' assimilation demands without placing blame on either “side.” Establishing the FINS jurisprudence first requires a coherent formula for distinguishing permissible parental conduct from assimilation demands that are an exception to parental rights.

280. *Id.* at 889 (“This is a sad commentary on the degree of our society's [loose] commitment to treating children with the respect they deserve as citizens. This case demonstrates in graphic terms the need to avoid granting . . . unfettered discretion over the liberties of children . . .”).

281. Though CHINS proceedings could be initiated based on truancy, *Andrew R.* could be a helpful precedent against such petitions. The *Andrew R.* court rejected the truancy petition because it understood the truancy as “another manifestation of [Andrew's] deep-seated desire not to be [in confinement].” 454 N.Y.S.2d at 945. Similarly, truancy by LGBT youth is generally a result of the discrimination and abuse LGBT students experience in schools. See GAY, LESBIAN AND STRAIGHT EDUC. NETWORK, THE 2009 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 47 (2010), available at <http://glsen.org/download/file/NDIyMw==%E2%80%8E>.

282. See Rosky, *supra* note 20.

III. THE PROPOSED FRAMEWORK: THE FAMILY IN NEED OF SERVICES

The previous Parts illustrated the need for a new legal framework for understanding and analyzing family disputes around parents' assimilation demands and children's identity rights. Because children have identity interests in both the public and private spheres that may trump the rights of their parents, it is helpful to start thinking of assimilation demands cases as additional categorical exceptions where children's interests may outweigh parental rights. This Article as a whole advocates for a vocabulary that better explains why parental assimilation demands are a violation of LGBT youth's rights and are harmful to their interests. The "identity/assimilation demands" vocabulary used here could allow courts to reach better decisions for these youth that go beyond the rhetoric of protection and effectively guarantee that children are not subject to unacceptable assimilation demands because of their sexual identity. Further, the assimilation demands framework might help courts understand other identity-based reasons for family conflict, such as children who practice their religion differently than parents (or not at all), children of different racial or ethnic background than their parents, and so on. Implementing this vocabulary in courts' analyses will help courts develop a workable, reliable jurisprudence that emphasizes family cohesion and support for youth. This jurisprudence might ultimately include several suitable frameworks to address the problem. This Article proposes one potential solution by suggesting new ways to resolve these family conflicts according to the "assimilation demands/identity" vocabulary, and accurately position assimilation demands outside the contours of parental rights.

A. DISTINGUISHING ASSIMILATION DEMANDS FROM PARENTS' RIGHTS

Courts generally understand that parental assimilation demands foreclose children's identity achievement and violate children's anticipatory rights.²⁸³ However, courts have yet to articulate a coherent doctrinal method to flesh out when parents' conduct indeed constitutes assimilation demands that violate

283. Feinberg, *supra* note 187, at 125–26 (defining "anticipatory rights," or "rights in trust," as those rights which adults hold but whose exercise is contingent on a child's capacity and development. Rights in trust should be "saved" for children until they are able to enjoy them. Violation of rights in trust is conduct that denies the child of future options).

children's identity rights. Some courts focus on harm to children, but do not elaborate on what comprises the harm. The test I propose here—the identity/assimilation test—returns to the theoretical root of assimilation demands literature, identity scholarship, and case law to flesh out those assimilation demands that target children's sexual identity and inflict harms at levels that warrant state intervention on behalf of children.

The test assumes that children hold identity interests but requires them, their representatives, or parties challenging parents' conduct to show that the conduct infringes children's identity interests in harmful ways. The test consists of two prongs: (a) that the parent's conduct is a heteronormative assimilation demand on a child's identity interest, and (b) that the assimilation demand caused the child a significant level of harm. To satisfy prong (a), a party challenging the parent's conduct would have to show that a child's identity interest²⁸⁴ was a target for the parent's heteronormative coercive requirement to change, conceal, mute, or flaunt that identity, rather than merely an effort to expose the child to other identity options. Once a party has demonstrated that the parent's action was indeed an assimilation demand, to satisfy prong (b), that party would have to demonstrate a sufficient level of harm and that the harm resulted from the assimilation demand.

1. Coercion Versus Exposure

This first prong relies on Yoshino's definition of assimilation demands and Erikson's work on identity to determine which parental actions constitute assimilation demands. The distinction between innocuous childrearing practices and assimilation demands is that the latter target a child's unfavorable sexual identity and attempt to control or manipulate it in coercive ways. Perpetuating heterosexuality or gender and sex binaries is the impetus for such assimilation demands.²⁸⁵ The

284. Following Erikson's theory, identity interests would be those imperative to identity exploration or achievement: developing, pursuing, or expressing a sexual identity.

285. Generally speaking, Yoshino and others are concerned with assimilation demands that perpetuate mainstream dominance over minority identity. See YOSHINO, *supra* note 16. Though assimilation demands may be objectionable regardless of the identities, they promote by virtue of the identity foreclosure they impose on children, I—like Yoshino, Lau, and others—am most concerned about heteronormative assimilation demands because of their demonstrated links to harmful outcomes to youth. See RYAN ET AL., *supra* note 106; RAY, *supra* note 115; Himmelstein & Brückner, *supra* note 126; Ryan et al., *supra* note 75.

elements of this prong require that the parental action be coercive and go beyond mere exposure to identity alternatives.

Exposure increases pluralism, while coercion is inconsistent with the pluralistic goals of American society because it standardizes children, according to the Supreme Court.²⁸⁶ These concerns regarding the standardization of children are not fully alleviated unless children are free from the assimilation demands at home that standardize them to their parents. The proposed test sets out to increase pluralism within families because pluralism ensures that children have the freedom they need to reach identity achievement without the psychological harms that assimilation demands cause.²⁸⁷ Restricting parents' coercive assimilation demands protects children's identity interests that diverge from their parents' identity and acknowledges that a multitude of valid identities can exist within one family.

Court decisions resolving conflicts between school curricula and parents' religion-based challenges demonstrate how courts draw the line between permissible exposure and coercion. Coercion exists when assimilationist conduct requires children to endorse a position as their own or disavow it,²⁸⁸ or participate in activities associated with that position.²⁸⁹ Coercion is also exclusionary, as it does not make space for different positions and considers only one as truthful or correct.²⁹⁰ On the other hand, exposure engages children with critical thinking and diverse views without coercing them into adopting or endorsing them.²⁹¹ In the family cases, some demands were coercive because of their violent and abusive nature, which harshly penal-

286. *E.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Soc'y of the Sisters of the Holy Names*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

287. *Lau*, *supra* note 11, at 337.

288. *Parker v. Hurley*, 514 F.3d 87, 104–05 (1st Cir. 2008) (rejecting parents' challenge to school curriculum teaching tolerance for sexual diversity because the program did not require children to adopt such views or reject their religion in any way, nor did it require students to actively participate in the discussion of tolerance for homosexuality).

289. *Parents United for Better Schs., Inc. v. Sch. Dist. of Pa. Bd. of Educ.*, 148 F.3d 260 (3d Cir. 1998) (finding that a school's condom distribution program did not require students to receive or use condoms, but rather provided voluntary access to condoms at the nurse's office).

290. *See Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1068–69 (6th Cir. 1987); *Davis v. Page*, 385 F. Supp. 395, 405–06 (D.N.H. 1974).

291. *See Mozert*, 827 F.2d at 1065–70.

ized children for their sexual orientation or gender identity.²⁹² Other parents imposed coercive demands by threatening the child with family separation.²⁹³ Some coerced the children into particular gender presentations that they could not resist by opting to present differently.²⁹⁴

Arguably, coercion is not a useful test in the family context because every parental action might be coercive to some degree, given the power structure of the family and the dependence of children on their parents.²⁹⁵ It might be helpful to think of most parental actions that exert pressure on children as not meaningfully coercive. That is, the cost of non-compliance is manageable, unlike disengagement or disownment. These actions merely expose children to alternative decisions or identities. However, when parents' demands provide children with a choice only between compliance and extreme consequences, that demand is effectively coercive. Thus, the gay son in *Dzierson*,²⁹⁶ for example, suffered a coercive demand. On its face, he had the choice to abandon his sexual orientation to maintain his relationship with his father and benefit from his father financing his college education, or sever the relationship

292. See *Ixtlilco-Morales v. Keisler*, 507 F.3d 651, 652 (8th Cir. 2007); C.O. v. B.C., No. B206425, 2008 WL 4670513, at *1-7 (Cal. Ct. App. Oct. 23, 2008); *Zion J. v. Lillie J.*, No. A111895, 2006 WL 2709831, at *1 (Cal. Ct. App. Sept. 22, 2006); *Landreneau v. Fruge*, 94-553, p.13 (La. App. 3 Cir. 6/12/96); 676 So. 2d 701, 709; *In re Shane T.*, 453 N.Y.S.2d 590, 591-93 (N.Y. Fam. Ct. 1982); *Catherine W. v. Robert F.*, 455 N.Y.S.2d 519, 521 (N.Y. Fam. Ct. 1982); Petition for Appointment of Temporary Guardian, *In re Lyn D.*, No. 259294 (Cal. Fam. Ct. 1992) (unpublished) (on file with author); Duff, *supra* note 159.

293. See *Bromfield v. Mukasey*, 543 F.3d 1071, 1078 (9th Cir. 2008); *Ixtlilco-Morales*, 507 F.3d at 651; *Dzierson v. Dzierson*, 661 N.Y.S.2d 779, 780 (N.Y. Fam. Ct. 1997); *In re Lori M.*, 496 N.Y.S.2d 940, 940 (N.Y. Fam. Ct. 1985); Petition for Appointment of Temporary Guardian, *In re Lyn D.*, No. 259294 (Cal. Fam. Ct. 1992) (unpublished) (on file with author); Duff, *supra* note 159, at 47.

294. In *Buxton*, the mother painted the son's nails and covered them with super glue, thus preventing the removal of the nail polish. *Buxton v. Storm (In re Custody of D.T.J.S-B)*, 238 P.3d 30, 36 (Or. Ct. App. 2010). In *Smith*, both parents treated the child according to a different gender, without consideration of the child's preference. *Smith v. Smith*, No. 05 JE 42, 2007 Ohio 1282, at *1-18 (Ct. App. Mar. 23, 2007); see also *Shrader v. Spain*, No. 05-95-01649-CV, 1998 WL 40632, at *2 (Tex. App. Feb. 4, 1998) (noting a recommendation from the child's therapist that he spend more time with the father in order to "cure" the child's gender identity disorder).

295. Daniel S. Shaw & Richard Q. Bell, *Developmental Theories of Parental Contributions to Antisocial Behavior*, 21 J. ABNORMAL CHILD PSYCHOL. 493, 506-07 (1993).

296. *Dzierson*, 661 N.Y.S.2d at 779.

and try to somehow finance his education on his own.²⁹⁷ Because both ending the relationship with his father and potentially not completing his education are harsh consequences for resisting the assimilation demand, this is not a meaningful choice, and the demand was coercive. A parent's action is coercive when it leaves the child with no meaningful opportunity to resist it without suffering grave costs.

2. The Assimilation Demand Is Harmful to the Child

Once a party has demonstrated that parents' actions were indeed assimilation demands, the party would then have to demonstrate a sufficient level of harm and that the harm is a result of the assimilation demand. Findings of harm ensure that children's claims are not frivolous, but that they have suffered the type and level of harm that justifies state intervention into the family. These would be the cases where parental conduct cannot be justified under parental rights. If the child is unharmed by the assimilation demands, perhaps state intervention is unwarranted. The typical best-interest test provides helpful factors for determining harm.²⁹⁸ These factors may include the demand's impact on the child's short- and long-term emotional and physical health, the child's performance at school and relationships with peers, and any substance abuse or other risky behavior.²⁹⁹ These factors are not all necessary for a showing of harm. Instead, as with the "best interest of the child" test, courts may weigh each factor, separately or in combination with the other factors, to determine whether the required standard of harm is met.

Several decisions highlight harms that children experience. In *Shane T.*,³⁰⁰ for example, the court is quite concerned with the emotional hardship and confusion Shane's father caused him.³⁰¹ Shane's father abused him verbally, yet Shane's psychological well-being became the focal point of the decision and the

297. *Id.* at 780–82.

298. For a broad overview of such tests, see, e.g., Jerry A. Behnke, Note, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 701–04 (1995).

299. See *supra* Part I.A–B.

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

301. *Id.* at 593; see also *Petition for Appointment of Temporary Guardian, In re Lyn D.*, No. 259294 (Cal. Fam. Ct. 1992) (unpublished) (on file with author). Lyn Duff's petition for guardianship also emphasized the harms she suffered because of her mother's decision to send her to a residential school setting to receive conversion therapy. *Id.*

material set of facts that led the court to intervene on his behalf.³⁰² Coercive demands cause identity foreclosure harms.³⁰³ Parents' heteronormative infringements on identity interests are a form of rejection that weaken attachments and create the risk for family disengagement.³⁰⁴ Because issues of sexual identity can cause a decrease in attachment security, and because children respond to separation, loss, and parental rejection with anger and insecurity, children are at risk to manifest this anger in antisocial and self-injurious ways.³⁰⁵ It is important that any framework that guides dispute resolution attempts to preserve or rehabilitate these attachments.

a. *Identity Foreclosure Harms*

Coercion is inconsistent with children's identity interests because it leads to identity foreclosure.³⁰⁶ Conversely, exposure is a way to increase the number of identity possibilities children have and thus preserve future identity developments, pursuits, or expressions.³⁰⁷ The second prong looks into the harmful effects that coercion is likely to cause. The parent should be barred from continuing to impose assimilation demands on the child when those harmful effects occur.

The decisions discussed above try to achieve the idea of an open future for children, at least in principle, if not in practice. According to the open future concept developed by Joel Feinberg, parents hold children's rights in trust, and should be obligated to "save" them until their children are able to fully enjoy those rights as adults.³⁰⁸ Because assimilation demands burden children's identity interests by coercing children to convert, pass, or cover their sexual identities, such parental conduct limits children's opportunities for independent identity pursuit. Identity foreclosure violates the child's rights in trust and de-

302. *Shane T.*, 453 N.Y.S.2d at 592–93.

303. See, e.g., Al Petipas, *Identity Foreclosure: A Unique Challenge*, 56 PERS. & GUIDANCE J. 558, 558–59 (1978) (discussing events and conditions thought to lead to identity foreclosure).

304. See, e.g., Gregory A. Wilson et al., *An Examination of Parental Attachments, Parental Detachments and Self-Esteem Across Hetero-, Bi-, and Homosexual Individuals*, 11 J. BISEXUALITY 83, 93 (2011).

305. Allen et al., *supra* note 85, at 1233–36.

306. See, e.g., ERIKSON, *supra* note 59, at 238–41.

307. See, e.g., Cris Mayo, *Pushing the Limits of Liberalism: Queerness, Children, and the Future*, 56 EDUC. THEORY 469, 472–77 (2006) (demonstrating the necessity of public education efforts to ensure that LGBT students are not closed off from identity possibilities).

308. Feinberg, *supra* note 187, at 127.

nies her future options regarding her sexual identity.³⁰⁹ According to Feinberg, in conflicts regarding children's rights, the options that privilege the child's open future by keeping as many choices as possible available to her when she is able to make her own decisions should prevail.³¹⁰

When a child's options are limited, her identity interests are foreclosed and her emotional well-being is at risk. The inability to experiment with different identities and social roles causes cognitive difficulties, hampers social ties, and prevents identity stability.³¹¹ Erikson provides several examples of the harms children experience as a result of identity foreclosure: "bewildered by the incapacity to assume a role forced on [them, youth] run[] away in one form or another, dropping out of school, leaving jobs, staying out all night, or withdrawing into bizarre and inaccessible moods."³¹²

Based on Erikson and Feinberg's work, as well as the case law,³¹³ identity foreclosure harms should constrain parental assimilationist actions. Courts should view assimilation demands that limit children's opportunities to exercise their identity interest as suspect and should prohibit parents from imposing them when they cause such harm as inability to perform at school or work, rebellious behavior, social maladjustment, or depression.

309. *See id.* at 125–26 (“[The child’s] right while he is still a child is to have these future options kept open until he is a fully formed self-determining adult capable of deciding among them.”).

310. *Id.* at 148–51.

311. ERIKSON, *supra* note 55, at 131–32; PATTERSON, *supra* note 11, at 544.

312. ERIKSON, *supra* note 55, at 132. Erikson touches on what, in effect, are assimilation demands on youths' identity. While they struggle to forge a coherent identity that is natural to them, outside pressures to assimilate into an expected, more pervasive identity (i.e. by conversion, passing, or covering) may result in a range of harms for that teen. *Id.*

313. For instance, after the initial change in custody, the father in *Smith* required his child to fully conform to a masculine gender identity and expected the child to constantly present as a boy. *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282, at *3–4 (Ct. App. Mar. 23, 2007). This was an extreme burden because it was constant and all-encompassing. *See id.* Even during visitations with the mother, the child could not escape the father's demand that the child convert a feminine gender identity into a masculine one. *See id.* at *6. These assimilation demands meant that the child's feminine identity would be entirely foreclosed. The child could not use feminine names or pronouns, express a feminine gender identity through clothing or other conduct, or consider pursuing medical intervention to transition physically. *Id.* at *3–4. The child was depressed and confused about gender and potentially suicidal. *Id.* at *16–17.

b. Weakened Attachments and Disengagement Harms

Distinguishing between assimilation demands that cause family disengagement and weakened attachments between children and parents and innocuous childrearing actions that do not threaten family cohesion is a helpful line-drawing principle. This distinction is founded on what is arguably the greatest concern of family law—family unity and preservation. When assimilation demands undermine the child’s attachment with family members or the family’s engagement as a healthy, constructive social unit, and when they might result in family separation or in disengagement between parents and children, then the assimilation demands are sufficiently harmful.

Arguably, family disengagement might allow parents and children to conduct their lives separately without the children having to conform to the parents’ assimilation demands. Conduct that is likely to cause family disengagement is a harmful assimilation demand because it exposes powerless family members (i.e. children) to the risks of weakened attachments. To children and youth who have been rejected by their families, the threat of disengagement increases pressure to sustain relationships by succumbing to their parents’ assimilation demands. Thus, in the unique context of the family, disengagement pluralism³¹⁴ is not meaningful pluralism. Since the identity/assimilation test examines the family’s likelihood of disengaging because of assimilation demands, it facilitates pluralism and continued engagement of different identity-holders within families.

Because children respond to separation, loss, and parental rejection with anger and insecurity, they are at risk of manifesting this anger in antisocial ways.³¹⁵ Social scientists have linked family rejection and weakened attachments to negative outcomes for LGBT youth. The Family Acceptance Project found that youth who have experienced family rejection because of their sexual identity are far more likely than youth

314. See Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 348, 359–81 (2009). Based on NeJaime’s accommodation model, disengagement pluralism is a form of pluralism that protects distinct groups from competing beliefs by allowing these groups to separate from civic life and public education that values diversity, tolerance, and critical thinking. See *id.* for a discussion of NeJaime’s model in the context of public education. In families, this would be similar to family separation intended to allow family members to retreat without imposing assimilation on each other.

315. See Allen et al., *Adolescent Problem Behavior*, *supra* note 91, at 458.

who have not experienced such rejection to exhibit higher rates of suicidality, depression, substance abuse, and unprotected sexual practices.³¹⁶ Similarly, Allen and his colleagues found that weakened attachments lead to teenage delinquency, drug use, depression, anxiety, unsafe sexual practices, and poor academic achievement.³¹⁷ Studies also found that insecure family relationships undermine one's ability to achieve either intimacy or autonomy within relationships.³¹⁸ Considering these findings, it is not surprising that family rejection and broken attachment bonds lead to such destructive outcomes for LGBT youth.³¹⁹

Many of the cases included in this Article illustrate that parents' assimilation demands cause family disengagement. In cases where a parent's conduct was abusive, as in *Shane T.*³²⁰ or *C.O.*,³²¹ the assimilation demands were so overtly egregious that they brought on family separation as a matter of law.³²² The children in these cases were removed from their homes, and their parents' rights were limited or terminated. In other cases, the assimilation demand came in the form of disengagement. In *Dzierson*³²³ the father discontinued his relationship with his gay son and used the litigation as a way to end financial obligations toward his child, citing the son's sexual orienta-

316. Ryan et al., *supra* note 75, at 350 tbl.4.

317. See Allen et al., *Adolescent Problem Behavior*, *supra* note 91, at 456; Allen et al., *Conflicts in Families*, *supra* note 91, at 425–26.

318. See, e.g., Allen et al., *Conflicts in Families*, *supra* note 91, at 426.

319. See generally Ryan et al., *supra* note 75 and accompanying text.

320. *In re Shane T.*, 453 N.Y.S.2d 590, 593–94 (N.Y. Fam. Ct. 1982) (holding that father's verbal maltreatment intended to "cure . . . 'girlie' behavior" was not within parental rights and constituted abuse).

321. *C.O. v. B.C.*, No. B206425, 2008 WL 4670513, at *1 (Cal. Ct. App. Oct. 23, 2008) (mother threatened to have a man rape her daughter to "cure" her same-sex orientation).

322. Another example is *Zion J. v. Lillie J.*, No. A111895, 2006 WL 2709831, at *7 (Cal. Ct. App. Sept. 22, 2006), where the court decided to remove children from grandparents' custody. Among a variety of abusive acts on grandparents' part, grandmother taunted one sibling by telling him he was gay and should be wearing dresses and high-heeled shoes. *Id.* at *1.

323. *Dzierson v. Dzierson*, 661 N.Y.S.2d 779, 780 (N.Y. Fam. Ct. 1997). For another case where a father shirked his parental obligations and claimed his rights to do so based on the son's sexual orientation, see *Catherine W. v. Robert F.*, 455 N.Y.S.2d 519 (N.Y. Fam. Ct. 1982). The court rejected this argument, finding that the father's rejection of his gay son spurred his son to discontinue the relationship with the father. *Id.* Thus, the father's claim that the son "abandoned" him could not stand as a justification for neglect. *Id.*

tion as the cause of the relationships' dissolution. In *Lori M.*³²⁴ and in Lyn Duff's case,³²⁵ in which Lyn's mother subjected her to conversion therapy, both mothers drove their daughters out of their homes because of their sexual orientation. Lori resided with her aunt, and her mother petitioned the court to remove her into foster care.³²⁶ Lyn's mother placed her in a residential education setting, which Lyn escaped.³²⁷ Lyn eventually petitioned to be placed in the guardianship of a lesbian couple in order to terminate her mother's custody rights.³²⁸ In *Smith* and other custody disputes,³²⁹ parents tried to convert their child's gender nonconformity by restricting the child's interaction with the opposite-sex parent. Because the parents imposed assimilation demands on their child, it is highly likely that the child's attachment with both parents was weakened, and possibly severed with the losing parent.

Family disengagement violates children's rights and interests.³³⁰ It also strongly contributes to potential harms to children's emotional well-being, physical health, and social function.³³¹ Assimilation demands that cause family separation, then, should be considered harmful to children and should not be permitted as within parental rights.

324. *In re Lori M.*, 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985) (mother petitions to declare bisexual daughter a child in need of supervision, which would have resulted in the daughter's removal into foster care).

325. Petition for Appointment of Temporary Guardian, *In re Lyn D.*, No. 259294 (Cal. Fam. Ct. 1992) (unpublished) (on file with author) (after escaping a residential education facility that performed conversion therapy to which her mother sent her, Lyn Duff petitioned to remove her from her mother's custody into the care of a lesbian couple); Duff, *supra* note 159, at 47–48.

326. *Lori M.*, 496 N.Y.S.2d at 940.

327. Duff, *supra* note 159, at 48.

328. *Id.* at 48, 84.

329. *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ct. App. Mar. 23, 2007) (reviewing father's petition for change in custody in an attempt to raise gender nonconforming child according to the sex assigned at birth and limit mother's ability to engage the child in gender nonconforming identity exploration). See also *Shrader v. Spain*, No. 05-95-01649-CV, 1998 WL 40632 (Tex. App. Feb. 4, 1998), in which a father followed a therapist's recommendation to limit the child's contact with the mother as a way to address the MTF child's gender identity and counteract the child's identification with the mother. The court assigned custody to the father based on the therapist's recommendation. *Id.* at *2–3.

330. Rachmilovitz, *Achieving Due Process*, *supra* note 223, at 824–27.

331. See, e.g., Ryan et al., *supra* note 75, at 350 tbl.4.

c. *Harms to Child's General Well-Being*

The third type of harms that courts might consider in assessing the detrimental effects of assimilation demands are the general negative outcomes children suffer. These general harms may or may not be a result of identity foreclosure or family disengagement. General harms might include short- or long-term emotional or physical harm; the deterioration of the child's relationships with siblings, extended family, or other social ties; or unmet educational or material needs.

Courts have considered harms in assimilation demands cases. In *Buxton v. Storm*³³² a court modified custody to the father based in part on the therapist's conclusion that the child had developmental disorders, experienced severe stress, and was behaving aggressively toward his father and the father's fiancée. The therapist concluded that these outcomes were a result of the mother's attempt to manipulate the child's gender presentation and sexual orientation in order to gain leverage in the custody dispute between the parents.³³³ The therapist further cautioned that the child might experience gender confusion or that his relationship with the father might continue to suffer.³³⁴ The derogatory name-calling by the fathers in *Shane T.*³³⁵ and another case, *Catherine W.*,³³⁶ affected the two boys' emotional health, as it weakened their sense-of-self and lowered their self-esteem.

Another example of harmful assimilation demands are those that carry severe financial consequences to the child. These consequences could be a result of children being driven away from their parents' homes, such as in the cases of *Lyn Duff*³³⁷ and *Lori M.*,³³⁸ but also can occur when a parent decides

332. *Buxton v. Storm* (*In re* Custody of D.T.J.S-B), 238 P.3d 30 (Or. Ct. App. 2010).

333. *Id.* at 36.

334. *Id.*

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

336. *Catherine W. v. Robert F.*, 455 N.Y.S.2d 519, 521 (N.Y. Fam. Ct. 1982).

337. Petition for Appointment of Temporary Guardian, *In re* Lyn D., No. 259294 (Cal. Fam. Ct.1992) (unpublished) (on file with author) (describing how after escaping a residential education facility that performed conversion therapy to which her mother sent her, Lyn Duff petitioned to remove her from her mother's custody into the care of a lesbian couple); Duff, *supra* note 159.

338. *In re* Lori M., 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985) (mother petitioned court to declare bisexual daughter a child in need of supervision, which would have resulted in the daughter's removal into foster care); *see also* Bromfield v. Mukasey, 543 F.3d 1071 (9th Cir. 2008) (reviewing a deportation pro-

to cut financial ties with the child, as was the situation in *Dzierson*,³³⁹ where—despite agreeing to fund his son’s college education in a divorce settlement—the father stopped doing so after the son came out. Although the court decision does not detail the son’s other financial resources, such as eligibility for loans or employment and income prospects, it is safe to assume that refusing to financially support a son’s higher education after promising to do so adversely impacts the likelihood of the son completing his studies.

d. Standard of Harm Across Different Contexts

Courts have not articulated *why* children are vulnerable to harm despite the fact that they have discussed harms to children in various cases. The courts have yet to develop a standard for the level of harm required to establish the parent’s conduct as an impermissible assimilation demand. A single standard regarding harm may be unsuitable, because disputes over assimilation demands are litigated across several contexts. The standard should instead be appropriate to the type of litigation. Abuse and neglect cases may involve temporary or permanent removal of children from the home. Because removal is an extreme intervention that carries grave consequences for children, as well as potential implications for parents’ and children’s rights,³⁴⁰ the standard of harm should be quite high. Indeed, to warrant removal, abuse and neglect statutes prescribe that the level of harm to children must be, or have the potential to be, life-threatening or cause physical disfigurement or im-

ceeding against a gay son who came to the United States undocumented after his father disowned him because of his sexual orientation and ultimately remanding for further factual development); *Ixtilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) (the immigration court decided not to deport a man who, as a child, escaped abuse at home and came to the United States undocumented, finding family abuse because of sexual orientation constitutes persecution under immigration law).

339. *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (N.Y. Fam. Ct. 1997). The court enforced a divorce agreement in which the father agreed to finance the son’s college education. *Id.* at 783–83. The father’s claim that the son’s abandonment of the father released the father from his obligation to support the child was rejected by the court. *Id.* at 780. The court found that the son’s abandonment was a consequence of the father’s rejection of his son because of the son’s sexual orientation. *Id.*

340. See generally Rachmilovitz, *Achieving Due Process*, *supra* note 223 (discussing removal of children and termination of parental rights in abuse and neglect cases, the potential harm to children from removal and foster care placement, and the risk of violation of parents’ and children’s substantive due process rights).

pairment, or a substantial impairment to intellectual or psychological functions.³⁴¹

In custody cases the standard of harm to the child is generally lower, and a showing of “reasonable and substantial likelihood of immediate or future impairment” is sufficient.³⁴² Thus, harm is established when parents’ acts jeopardize the child’s mental or physical well-being.³⁴³ In custody disputes involving third parties’ challenges to parental rights, the standard is intermediate—again, as a way to protect parents’ fundamental rights.³⁴⁴ This standard tends to require clear and convincing evidence that the parent is not acting in the child’s best interest.³⁴⁵

This lower standard for harm is, in my opinion, best suited for cases between children and parents brought under the FINS framework. To fend off frivolous claims by children turning to courts in an attempt to have mundane parental decisions overruled, not just any showing of harm would be sufficient. However, because of LGBT children’s heightened vulnerability and their rampant victimization, they should not be required to meet a high standard that additionally burdens their position in the litigation process. A standard of reasonable harm or substantial likelihood of harm balances the child’s strong interest in limiting parents’ assimilation demands and protecting her identity interests but also accounts for the fact that mildly assimilationist parental conduct might not create significant harm and that parents’ fundamental rights should be protected, as well.

B. PROMOTING FAMILY COHESION

The FINS framework prioritizes neither parents nor children and provides an avenue for children to solicit help when their parents impose assimilation demands on their identities.

341. See, e.g., Andrew Ford, Note, *State Child Abuse Laws: Their Failure to Protect Children with Gender Identity Disorder*, 49 FAM. CT. REV. 642, 645–47 (2011) (critiquing shortcomings of current child abuse statutes specifically because of their inefficacy in addressing the types of harm gender non-conforming children face).

342. *In re Marriage of Hadeen*, 619 P.2d 374, 382 (Wash. Ct. App. 1980).

343. *In re Marriage of Jensen-Branch*, 899 P.2d 803, 807–08 (Wash. Ct. App. 1995).

344. See Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 885 (2003).

345. See *id.*

Under the test proposed here, children bringing such petitions would have a chance to voice their preferences, defend their identity interests, and receive assistance to ensure family cohesion. Below, I discuss the obstacles the legal system currently faces in providing practical tools for families and present mediation as one such tool that could be incorporated to facilitate family cohesion.

1. Current Limitations on Remedies

Courts' incoherence around children's identity rights and the limits of parents' assimilation demands, when coupled with inadequate remedies, leaves LGBT youth unprotected. The legal system and its companion social services are currently ill-equipped to meet the needs of families and their LGBT children.³⁴⁶ These systems are unable to repair family relationships or prevent family separation or negative outcomes for youth because of parents' rejection and assimilation demands. In abuse and neglect cases, courts have more authority in ordering social services that can foster better relationships between the parent and the child.³⁴⁷ However, the default course of action in abuse and neglect litigation is removing a child into the welfare system during provision of services to parents, or once the services fail.³⁴⁸ Abuse and neglect cases effectively expose families to higher risk of disengagement. Because LGBT youth are exceedingly vulnerable to harms of homelessness, the juvenile system, and foster care, disengagement holds grim prospects.

Outside of the abuse/neglect framework, courts are severely restricted in their authority to mandate any sort of social services support for families.³⁴⁹ Many of the cases involving LGBT youth and their parents are therefore unlikely to lead to state intervention that could mend these relationships. The general services currently available are typically limited to abuse and neglect cases.³⁵⁰ As such, they are unhelpful to LGBT

346. See, e.g., Matthew J. Hulstein, *Recognizing and Respecting the Rights of LGBT Youth in Child Custody Proceedings*, 27 BERKELEY J. GENDER L. & JUST. 171, 179–85 (2012) (discussing deficiencies of the current legal framework in safeguarding LGBT youth's rights).

347. See, e.g., Steve Baron, *The Scope of Family Court Intervention*, 4 J. CTR. FOR FAM. CHILD & CTS. 115, 117 (2003).

348. See Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 842–44 (2010).

349. See *id.* at 872–85 (discussing standards for removal and remedial steps short of removal).

350. See Ford, *supra* note 341, at 645–47.

youth and their families because they do not confront and resolve parental homophobia or transphobia. When assimilation demands do not rise to the level of abuse or neglect and are adjudicated under other frameworks, courts cannot mandate these services even when they believe families would benefit from them.

An example for this is *Lori M.*, where the court encouraged Lori and her mother to reconcile and referred them to counseling, indicating that they should resolve their conflict in the spirit of the decision.³⁵¹ It appears that the court would want Lori's mother to learn to accept Lori's sexual identity to restore their relationship. However, the court seemed frustrated with its inability to order participation in counseling, stating that though counseling was voluntary, "the Court urges both parties to work toward a rehabilitation of the parent-child relationship."³⁵² Although Lori's identity rights were vindicated in court, without counseling Lori would remain vulnerable to her mother's mistreatment. The recognition of Lori's rights does not ensure a better, more accepting relationship between her and her mother.³⁵³ Lori, therefore, is free to be bisexual, but is left to her own devices as far as negotiating her future relationship with her mother. A FINS framework would help resolve this double bind. Once a child alerts the legal system or social services that there is an assimilation demand conflict in the family, and a court finds the parent's behavior constitutes an assimilation demand, the court should then be authorized to mandate services for the family. Upon further review and the conclusion that services had failed, the FINS proceedings could transform into an abuse/neglect case. Only then should courts consider removal—as a last resort.

To clarify, I do not suggest that courts must always mandate services, or that services are always appropriate. In some cases families might be able to conduct their post-litigation relationships without social services, or the relationships may be beyond repair, and services would be futile. The purpose of FINS is to provide the option of services when appropriate in light of the merits and circumstances of the case, rather than

351. *In re Lori M.*, 496 N.Y.S.2d 940, 943 (N.Y. Fam. Ct. 1985) ("It would be in the interest of both Lori and her mother to reconcile their differences within the framework of this decision. Accordingly a referral is made for both of them to Family Court Services for counseling to assist them in implementing this decision.").

352. *Id.*

353. *See id.*

the type of litigation (i.e. abuse or neglect cases). Therefore, the contribution of extending intervention is the opportunity to explore compromise and assistance at parents' or children's request, at social services professionals' recommendation, or by court mandate and discretion.

There are obstacles inherent to the legal system that currently hinder dispute resolution and require the rethinking of extra-litigation strategies. Professor Clare Huntington³⁵⁴ observes that because of its adversarial nature, both substantively and procedurally, family law generally achieves dispute resolutions in ways that exacerbate, rather than alleviate, family conflict.³⁵⁵ Similarly, the noninterventionist position that the state normally takes toward family law hinders policies that might contribute to family repair.³⁵⁶ Huntington suggests employing positive psychology research and practice to reform family law to promote human and family flourishing: "to provide the best possible environments for their [family] members in light of individual needs while still allowing for the tremendous pluralism that marks family life in a diverse society."³⁵⁷ To do so, Huntington proposes that family law become less adversarial and incorporate alternative dispute resolution methods such as mediation, collaborative law, and family group conferencing.³⁵⁸ Building on Huntington's basic proposal, courts resolving family disputes regarding children's identity and parents' assimilation demands should be able to help parties take positive steps toward family cohesion and support for their LGBT children. Courts might consider mandating either individual or group therapy for parents and children, submitting a parenting plan, requiring parenting training that focuses on sexual diversity and LGBT identities, or ordering participation in community support groups such as Parents, Families, Friends, and Allies of Lesbians and Gays (PFLAG).³⁵⁹

354. Clare Huntington, *Happy Families? Translating Positive Psychology Into Family Law*, 16 VA. J. SOC. POL'Y & L. 385, 393–94 (2009).

355. *Id.* at 393.

356. *Id.* at 393–94 ("Repair is not necessarily stitching back together the family, but rather attending to the emotional aspects of family relationships—repairing relationships, even as legal relationships may change.")

357. *Id.* at 395.

358. *Id.* at 406.

359. *Get Support*, PFLAG.ORG, <http://community.pflag.org/getsupport> (last visited Mar. 11, 2014).

2. Mediation

LGBT youth and their parents could benefit from a system of litigation alternatives. There is a variety of professionals that children and families could come across who can help mitigate crises in families.³⁶⁰ But perhaps Huntington's suggestions would best come to life through establishing court-ordered mediation. In mediation, parties resolve their conflicts with the help of a neutral third party who facilitates better understanding of the parties' positions, identifying mutual perspectives and discovering potential solutions.³⁶¹ Because the mediation process is motivated in part by the parties' emotional needs, it may address a variety of concerns with which the parties struggle—beyond the narrow legal issues.³⁶² In many states, mediation has now become par for the course in divorce, custody, and CHINS disputes, and mediators offer their services both privately and through courts.³⁶³ The increased use of mediation in these areas is designed to motivate parents towards better decision-making for children,³⁶⁴ and to better account for children's needs, interests, and perspectives in family dispute resolution.³⁶⁵

In a prominent longitudinal study, researchers randomly assigned families to mediation and compared their outcomes to

360. My goal here is to make only initial suggestions about this. I am aware of class-based critiques that not all families have access to supportive doctors, mental health professionals and so on, or the class and race-based critiques that these professionals' involvement increases state policing of minority parents that serves to criminalize and victimize them or remove their children. As this is merely an attempt to stimulate conversation, in depth discussion of these critiques is out of the scope of this Article.

361. DOUGLAS ABRAMS ET AL., CONTEMPORARY FAMILY LAW 914 (3d ed. 2012).

362. *Id.*

363. See CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 98 (2006).

364. Katherine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 6 (2002).

365. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 137 (2002) ("Mandatory mediation conveys a clear policy and social message to parents and lawyers that discussion of children's needs and efforts to settle disputes in more collaborative forums are preferred over more adversarial processes.").

families who continued to litigate custody disputes.³⁶⁶ In a twelve-year follow-up, co-parenting conflict decreased for mediation families and increased in litigation families.³⁶⁷ The study concluded that mediation improves relationships in families and protects them from the harmful effects of litigation, because mediation is non-adversarial,³⁶⁸ and because it is cost- and time-efficient.³⁶⁹ The decreased cost of mediation compared to litigation should make it an appealing form of state intervention.³⁷⁰ Because the process includes children and their perspectives, mediation is an important mechanism to potentially prevent the negative outcomes associated with family conflicts. Indeed, perceived control over decisions can help improve mental health,³⁷¹ and perhaps facilitate better autonomy development in children.³⁷²

Though including children in mediation between parents is controversial, the benefits of children's participation increases when the child herself is party to the conflict, as would be the case under FINS and other assimilation demands disputes. One common goal is guaranteeing the child is not burdened with adult decision-making, for instance, by being expected to favor one parent's custody over the other's.³⁷³ But excessive caution over turning the child into the decision-maker has led to the exclusion of children from entire mediation processes that have long-term and life-altering impact on them.³⁷⁴ Instead, mediators could solicit children's opinions and help them express their feelings about the conflict, while leaving them out of

366. David A. Sbarra & Robert E. Emery, *Deeper into Divorce: Using Actor-Partner Analyses to Explore Systemic Differences in Coparenting Conflict Following Custody Dispute Resolution*, 22 J. FAM. PSYCHOL. 144 (2008).

367. *Id.* at 150.

368. *Id.*

369. Kelly, *supra* note 365, at 138.

370. For information on developing alternatives that rely on social services, but are cost-effective compared to litigation, see Rachmilovitz, *Achieving Due Process*, *supra* note 223, at 847. Dorothy Roberts makes a similar argument about state funding of social services as a more cost-effective expenditure than foster care to resolve domestic violence. ROBERTS, *supra* note 258, at 134–35.

371. Kelly, *supra* note 365, at 149.

372. See ERIKSON, *supra* note 59, at 249–53.

373. Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation Comments on Kelly's "Resolving Child Custody Disputes"*, 10 VA. J. SOC. POL'Y & L. 164, 168–69 (2002).

374. Kelly, *supra* note 365, at 148.

the negotiating meetings.³⁷⁵ Though excluding a child from the negotiation stage is problematic when the mediation is meant to resolve a conflict between the parents and the child herself, there are ways to mitigate this concern by including legal counsel for the child. Another concern for mediation in FINS or assimilation demands cases mirrors the objection to mediation in domestic violence cases—that the power imbalance negates the weaker party’s autonomy and her ability to stand up for her interests.³⁷⁶ But, as in domestic violence cases, safeguards can counter these concerns.³⁷⁷ One such safeguard would be selecting a mediator trained to understand the imbalanced dynamics between parents and children, who is familiar with the development of autonomy and agency in children and youth and (perhaps most importantly) sensitive to the particular challenges of assimilation demands on children’s identities, especially those on LGBT youth.

Possibly the greatest benefit of mediation in resolving conflicts between parents and children is that the process allows parents to listen to children’s perspectives with respect, which validates children’s thinking, needs, and feelings.³⁷⁸ The process softens the conflict and fosters productive communication.³⁷⁹ Indeed, mediation has been found to be particularly advantageous when parents and children’s views are polarized,³⁸⁰ thus preventing disengagement even in the most extreme of family conflicts. Mediation brings Douglas’s *Yoder* dissent to life because it gives children a voice and signals that their identities and interests are valued.³⁸¹

C. POTENTIAL CHALLENGES TO FINS

Despite the recognition of children’s identity interests and the potential risk assimilation demands pose to children’s well-being, advocating increased protections for children’s identities might elicit concerns. Here, I contend with three possible counterarguments to the interventions I propose in this Article.

375. Solangel Maldonado, *Taking Account of Children’s Emotions: Anger and Forgiveness in “Renegotiated Families,”* 16 VA. J. SOC. POL’Y & L. 443, 457 (2009).

376. Bartlett, *supra* note 364, at 13.

377. *Id.* at 14.

378. Kelly, *supra* note 365, at 151.

379. *See id.* at 159.

380. *Id.* at 160.

381. *See generally* Wisconsin v. Yoder, 406 U.S. 1526 (1972) (Douglas, J., dissenting).

1. Which Identity to Protect?

As a natural progression of this Article's focus on children's sexual identity, the FINS framework is designed with family conflicts around children's sexual orientation and gender identity in mind. That being said, it may very well be applicable to other circumstances where children's identities diverge from their parents—for example children in interracial or interfaith families, children who practice religious faiths that differ from their parents', children with disabilities (or able-bodied children of parents with disabilities),³⁸² or children who are adopted into families of a different racial or ethnic background.³⁸³ Yet expanding the potential scope of identity-based FINS claims raises concerns over the limits of identity protections. Should any identity be protected from parental assimilation demands under FINS?³⁸⁴ Would a child whose parents are pressuring her to play sports over music have a claim?³⁸⁵ Should she?

In order to craft a limiting principle, it may be helpful to rely on both the legal and psychological conceptions of identity. On both the constitutional and state levels, the law has recognized several identity categories that warrant protection. These are primarily race, religion, ethnicity, sex and gender, and, depending on the jurisdiction, sexual orientation or gender identity.³⁸⁶ This is a good point of departure, but it is limited because

382. See, e.g., Jenny L. Singleton & Matthew D. Tittle, *Deaf Parents and Their Hearing Children*, 5 J. DEAF STUD. DEAF EDUC. 221 (2000).

383. See, e.g., Kim H. Pearson, *Legal Solutions for API Transracial Adoptees*, 3 UC IRVINE L. REV. (forthcoming Dec. 2013).

384. The original test articulated above seeks to identify "heteronormative" demands. Generally, expanding this test to additional identity groups would now search for demands that create preferences for other mainstream identities and devalue nonmainstream identities. Still, the mainstream-minority identity dichotomy is not completely helpful in identifying troubling demands. As I discuss below, perhaps salience is a better marker for identities that warrant protections.

385. Of course, these pressures might have a particular contextual meaning when explained through gendered, cultural, or other lenses. These circumstances notwithstanding, parents may reasonably elect to promote certain activities over others. To distinguish when this constitutes an assimilation demand, it is helpful to stick with my suggestions regarding the constitutional framework of identity protection, or the socio-psychological theories on identity formation and identity salience. See *supra* notes 373–75 and accompanying text.

386. See, e.g., *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf (last visited Mar. 11, 2014); *Statewide School Anti-Bullying Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/school_anti-bullying_laws_062013.pdf (last visited Mar. 11, 2014); *Statewide*

of the diversity of jurisdictions, and because the law might be slow to reflect social change; some identities (like LGBT identities) might remain unprotected in some jurisdictions, or for some purposes.³⁸⁷ Psychology's identity theories fill in that gap and suggest flexibility in identity protection. Utilizing identity theory, Holning Lau recommends two limits on the identities that the law should protect from assimilation demands.³⁸⁸ First, he advocates for protecting identities that are a result of the development process Erikson envisioned: exploration and ultimately commitment to ideas, values, and goals associated with a social category.³⁸⁹ The other limit is that the identity must be salient to that person's sense-of-self, as society constructs certain identities or traits as more vulnerable yet more significant to one's sense-of-self.³⁹⁰

Establishing the scope of children's identity interests in the face of parents' assimilation demands might leave one to wonder, why the preoccupation with sexuality? Is this a project about children's identities or about children's sexuality? It is both. Sexuality is both typical and unique among children's identities. It is typical because it is only one of several examples where parents might impose assimilation demands on children. But sexuality is also unique because of the vulnerability it creates in children. The vulnerability of LGBT children to harmful assimilation demands is evident in the case law and the empirical data discussed throughout this Article. That LGBT children are subject to parental rejection in such rampant and excruciating ways is telling.

School Non-Discrimination Laws & Policies, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/school_non-discrimination_laws_062013.pdf (last visited Mar. 11, 2014).

387. For instance, in education, federal law protects against sex discrimination through Title IX, which some courts have understood to protect trans students' rights to dress in clothes associated with their gender identity rather than their birth-assigned sex. *Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000). However, trans identity is not protected from marriage inequality. *See Littleton v. Prange*, 9 S.W.3d 223, 232 (Tex. Ct. App. 1999).

388. Lau, *supra* note 11, at 331.

389. *Id.* at 331–32.

390. *See id.* Of course, for some people a particular type of identity category might be more salient than it might be to someone else. This analysis is perhaps more muddled in the case of intersectional identities. However, since this is a project that aims to begin a conversation specifically on children's sexual identity, it cannot do justice to the hugely important matter of intersectionality, which warrants its own scholarly attention. I leave the questions raised by intersectional identities to future projects.

2. Reporting

Opponents of the FINS proposal may point out that perhaps it does not sufficiently address problems of access to courts, or does not clarify how FINS claims would be initiated. Further, it might be improper to burden already disadvantaged children with filing claims against their own parents. This is an extremely difficult matter, but it is probably no more difficult to contend with than if it were raised in the context of existing abuse or neglect frameworks. As in cases of abuse and neglect, interventions to protect children from assimilation demands require a comprehensive, multi-leveled solution. For instance, school administrators who become aware of family conflicts can serve as a resource for children and parents in learning how to resolve conflicts in a reparative way. Of course, many school environments are not supportive of LGBT youth, but if they were to improve they could be very useful sources of support for families as well. It is also important to ensure that reporting follows consultation with the child. Even well-meaning school staff or faculty can worsen a child's situation by "outing"³⁹¹ her to her parents without her knowledge or consent. Further, courts have ruled that "outing" by school and other state officials violates children's informational privacy rights and that state actors must have a compelling state interest warranting the disclosure.³⁹²

It is important to note that a big first step is shedding light on the harms of assimilation demands from parents. Starting a conversation about children's identity interests and the importance of protecting them is pivotal for children, educators, lawyers, and others to begin the work toward eliminating assimilation demands and supporting families of LGBT youth. This Article aims to inspire this conversation.

391. "Outing" is a third party's disclosure of one's sexual orientation or gender identity. See STUART BIEGEL, *THE RIGHT TO BE OUT: SEXUAL ORIENTATION AND GENDER IDENTITY IN AMERICA'S PUBLIC SCHOOLS*, at xiii–xv (2010).

392. See *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (finding that a policeman, who threatened to tell a minor's grandfather that the minor was gay if the minor did not tell his grandfather himself, acted upon no legitimate state interest; the minor committed suicide because of the threat); *Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal. 2007) (finding that students have an expectation of privacy that school officials do not disclose their sexual orientation to parents, even if the students are out at school. School officials can defend their decision to disclose when they have a compelling state interest in outing a student. In this case, the interest of allowing parents to mount a defense against the school's disciplinary actions justified the disclosure).

3. “Bad Parenting” Claims

Advocates of the parental rights paradigm may also be concerned that this Article lays a path to judicial oversight of reasonable, or even “bad,” parenting. But this Article attempts to weed out the cases where real and significant harm is done to children because parents reject them on the basis of their most salient sense of who they are. However, even if children would attempt to second-guess their parents and bring frivolous suits, at least one opinion, *Miner v. Garrity*,³⁹³ reassures us that courts are not amenable to them. There, two adult children brought tort claims against their mother for intentional infliction of emotional distress and negligent infliction of emotional distress.³⁹⁴ After their divorce, the mother and father shared custody of their daughter, while the father had sole custody of their son.³⁹⁵ The children claimed that at times their mother favored one child over the other, refused to purchase gifts for them, failed to send the son care packages at college and purchase prom dresses for the daughter, refused to pay their medical expenses without seeing receipts, demanded the daughter return home at midnight after a party, and threatened to take the son to the police station when he refused to put on a seatbelt in the car.³⁹⁶ The trial court dismissed the case for failure to show a cause of action, in that the children did not demonstrate they were in danger or feared for their safety, or that the mother’s conduct was extreme and outrageous.³⁹⁷ The appellate court affirmed, ruling that outside of abuse and neglect, generally parents hold significant discretion in raising their children. This discretion protects even “bad parenting” unless it is extreme or outrageous. Prohibited parental conduct is that which is “so shocking as to form a basis for a claim for intentional infliction of emotional distress.”³⁹⁸

This Article demonstrates that assimilation demands are examples of “shocking” mistreatment that goes beyond “bad parenting.” They constitute mistreatment that targets chil-

393. *Miner v. Garrity*, No 1-10-3023, 2011 Ill. App. Unpub. LEXIS 2017, at *1 (July 29, 2011).

394. *Id.*

395. *Id.*

396. *Id.* at *2–8.

397. *Id.* at *14.

398. *Id.* at *34–35 (finding the mother’s “alleged actions are unpleasant and perhaps insensitive, and some would arguably fall outside the realm of ‘good mothering,’ but they are not so shocking as to form a basis for a claim for intentional infliction of emotional distress”).

dren's core sense-of-self and devalues it. While many of the cases included in this Article were unable to explain why the parental conduct detailed was unacceptable, none of these cases found the disputes around assimilation demands and children's identity to be frivolous or that parents who imposed assimilation demands were merely being "bad parents."

CONCLUSION

Since *Covering*,³⁹⁹ legal scholars have paid considerable attention to assimilation demands in the public sphere. Commentators have written about assimilation demands on sexual-minority identities in politics,⁴⁰⁰ the workplace,⁴⁰¹ schools,⁴⁰² and in communities of color.⁴⁰³ This Article fills the gap in the scholarship and begins a conversation about assimilation demands in the private sphere, namely, within families. By focusing on the impact of parents' assimilation demands on their children's identities, this Article flows from the premise that as harmful as assimilation demands may be in the public sphere, they are even more harmful to children in the home, and can no longer remain neglected by the law.

This Article's purpose is twofold. First it articulates a mode of analysis based on assimilation demands. Framing children's claims as identity interests would help courts reach outcomes that actually protect children's identity interests, not just purport to do so. Better crafted decisions and their outcomes would lead in turn to more coherence in the principles and legal tools that the opinions create. Second, this Article introduces ways in which the legal and welfare systems can help families overcome these conflicts. I propose a new exception to parental rights—

399. YOSHINO, *supra* note 16, at 57. Yoshino criticizes pressures to assimilate into the mainstream, which he terms "assimilation demands," as costly to one's authentic self because they devalue a person's sense-of-self and deny her the freedom to develop her identity independently of such pressures. Yoshino opposes these pressures when they are coercive and motivated by animus. For similar work on identity negotiation and performance, see generally Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

400. See, e.g., Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897 (2010).

401. See, e.g., Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379 (2009); Zachary A. Kramer, *After Work*, 95 CALIF. L. REV. 627 (2007).

402. See, e.g., Lau, *supra* note 11.

403. See, e.g., Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809 (2007).

FINS—and a test for courts to apply in order to identify impermissible assimilation demands.

Though this Article provides one potential legal solution, additional efforts may be needed. As the discussion here reveals, LGBT youth can benefit greatly from systemic and widespread social change in the way sexual diversity in children is perceived. Another important implication of this work is its application to other identity categories where children's identities might diverge from their parents'. Even with its focus on children's sexual identity, this Article advocates a shift in the parental rights paradigm and challenges the assumption that parents do what is best for their children. This Article aspires to show how the law can encourage parents to support and love their children, regardless of their sexual orientation or gender identity, so that children may flourish and become masters of their own destinies.