

**MASTERS OF THEIR OWN DESTINY:
CHILDREN'S IDENTITIES, PARENTS'
ASSIMILATION DEMANDS AND STATE
INTERVENTION**

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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. Indeed, parents' rights to the care, custody and control of their children are fundamental rights in American constitutional law,¹ 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.

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.² The most notable situations 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.³ Parents who compromise their children's best interest may find their parental rights limited in custody disputes as well.⁴ Additional exceptions to the parental rights paradigm are not only

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¹ Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Troxel v. Granville, 530 U.S. 57 (2000).

² MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 36 (2005).

³ MARTIN GUGGENHEIM ET AL., THE RIGHTS OF FAMILIES 94-95 (1994).

⁴ 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 18, 28 and accompanying text.

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concerned with preventing harm to children, but also recognize that in some instances parents are not the best decision-makers for their children. Justice Douglas's dissent in *Wisconsin v. Yoder* first expressed the idea that children should be able to voice their interests, and receive legal protection for those wishes even when their wishes diverge from those of their parents. Douglas writes:

“It is the future of the [child], not the future of the parent, that is imperiled by today's decision... It is the [child's] judgment, not his parent's that is essential if we are to give full meaning to what we have said about the Bill of Rights and the right of [children] to be masters of their own destiny. If he is harnessed to [his parents'] way of life by those in authority over him... his entire life may be stunted and deformed.”⁵

Justice Douglas opens our eyes to the possibility that children's interests may not align with parents' and that the parental rights paradigm might give rise to abuses. He seeks to give children the opportunity to assert their independent interests so that courts can give them adequate consideration. Douglas does not tip the scale in favor of children, but rather wishes to allow for exceptions when parents' and children's interests conflict. 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 also that following the parental rights paradigm may be detrimental to the child. The law has recognized then, that in some cases children have the capacity, and thus the right, to autonomic decision-making. Legislators and courts granted decision-making rights to children seeking care for pregnancy prevention and termination, for HIV/AIDS and other sexually transmitted infections, for substance abuse and for mental health.⁶ Allowing children to make their own decisions in

⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 245-46 (1972) (Douglas, J., dissenting).

⁶ 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). *Newmark v. Williams/DCPS*, 588 A.2d 1108 (Del. 1990) (In a dispute between Christian Scientist parents and the child welfare system over the treatment of a 3-year-old with cancer, the Delaware Supreme Court ruled 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.); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (extending abortion rights to minor girls without requiring them to consult, or even notify parents); *Bellotti v. Baird*, 443 U.S. 622 (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.).

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these instances encourages children to seek and receive medical attention when approaching parents is a highly sensitive matter and could jeopardize the child's welfare or her relationship with her parents.⁷

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 other instances where parental conduct overly burdens children's self-determination and compromises children's safety and wellbeing. This Article thus aims to illustrate one such example where the law should carve out an additional exception. This is the case of family conflicts around children's identity interests – their freedom to develop, express and pursue their identities.⁸ 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 that tension between children's identity interests and parental rights particularly in the area of children's sexual orientation⁹ and gender identity,¹⁰ because of the rampant victimization of lesbian, gay, bisexual or trans (LGBT) youth in the home, in society, and in the law.¹¹

⁷ SAMUEL A. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 158 (2004).

⁸ Psychology defines identity as a sense of who we are, what we value and where we are headed. CHARLOTTE J. PATTERSON, CHILD DEVELOPMENT 543 (2007). Our identity is related to those biological traits or social background that “involves learning about, relating to, and committing to socially constructed meaning associated with those biological [or social] status[es].” Holning Lau, *Pluralism: A Principle of Children's Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 331(2007).

⁹ 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).

¹⁰ 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 NYC based nonprofit organization that 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 LAW PROJECT, <http://srlp.org/trans-101> (last visited Oct. 9, 2011). 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 2010) (unpublished Ph.D. dissertation, University of Michigan) (on file with author).

¹¹ These areas of victimization are discussed further in depth below.

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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 the vulnerability by creating a new exception to the parental rights paradigm – the “Family in Need of Services” framework.¹² My analysis relies heavily on a vocabulary of assimilation demands as introduced by law Professor Kenji Yoshino.¹³ 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. Though Yoshino focuses on adults, he does address assimilation demands on children by parents. Adults presume children to be “sexual waverers” who must be protected from developing an unfavorable sexual minority identity.¹⁴ Many parents, therefore, try to direct the outcome of their children’s sexuality, sometimes by such aggressive means as abuse or neglect.¹⁵ Yet the only legal context in which Yoshino analyzes assimilation demands on children is where the law imposes these demands on LGBT parents (and thus vicariously on children.) When gay or lesbian parents are involved in disputes with former different-sex partners with whom they had children, these lesbian or gay parents tend to prevail only when they downplay their sexual orientation to the court and conceal it from their children.¹⁶ When parents do so, courts’ concerns about the outcome of children’s sexual orientation is mitigated. By requiring or incentivizing parents to keep their sexual orientation from their children, courts affectively attempt to steer children into heterosexuality. Anxiety that children will develop sexual minority identities motivates restrictions on LGBT parents’ custody rights as an attempt to curb children’s undesirable non-heterosexual identities. This fear of potential non-heteronormative

¹² 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 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. 5 Arkansas Family Law and Practice § 17:1.

¹³ KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006).

¹⁴ *Id.* at 44.

¹⁵ See *infra* part II.A. citing cases of parents beating their LGBT children, referring to them in sexualized derogatory terms, cutting off financial ties, etc.

¹⁶ YOSHINO, *supra* note 13 at 101, 103.

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children insidiously affects LGBT youth themselves because it condones adults' assimilation demands. In Yoshino's example of family assimilation demands on children's sexuality,¹⁷ these assimilation demands are super-imposed by courts.¹⁸ Parents cooperate – presumably reluctantly and at high costs – in order to retain parental rights.

So far, legal scholars have not commented on the assimilation demands children suffer at home independent of courts' pressures on LGBT parents. This fills this gap in the literature by exploring assimilation demands that are rooted in parents' own desire for children's heterosexuality and gender conformity, and their animus toward sexual minorities. Examples of assimilation demands include verbal harassment and name-calling,¹⁹ threatening a child with rape in order to "cure" her same-sex attractions,²⁰ blocking access to LGBT friends, partners,²¹ or support groups,²² or subjecting the child to conversion therapy.²³ These

¹⁷ To maximize inclusion of identities and their expressive conduct, I use the term "sexuality" to refer to either or both sexual orientation and gender identity throughout this Article.

¹⁸ 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. 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 they are infectors/carriers of sexually transmitted infections, and that both gay fathers and lesbian mothers are "recruiters" or "role-models." According to the last set of stereotypes, LGBT parents encourage their children to reject homosexuality and 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). 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. Clifford Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 *YALE J. L. & FEMINISM* 257 (2009).

¹⁹ *In re Matter of Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982).

²⁰ *In re C.O.*, No B206425, 2008 WL 4670513 (Cal. App. Oct. 23, 2008).

²¹ *Landreneau v. Fruge*, 676 So. 2d 701 (La. Ct. App. 1996).

²² *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ohio Ct. App. Mar. 23, 2007).

²³ 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. 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." 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

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assimilation demands range in their severity, with physical beatings and conversion therapy closer to the extremely egregious end of the assimilations demands spectrum.²⁴ However, children experience assimilation demands as a form of family rejection and milder assimilation demands may often harm children as well. This Article will focus on the more subtle assimilation demands because the law has yet to effectively address them. 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 sexuality. I argue that such conduct harms children, infringes upon their identity interests, and should be considered an exception to parental rights. Assimilation demands should join the existing exception for when parents' behavior harms children or limits children's self-determination, because assimilation demands do both. I critically examine the courts' reasoning in the few cases in which courts have considered assimilation demands made on children, and conclude that children's identity interests are currently under-protected in the law. I then propose a framework that courts could use to analyze cases involving children's identity interests and parental assimilation demands.

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. This Part concludes that while courts attempt to protect children's identity interests – some even ruling such interests are

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." <http://www.apa.org/pi/lgbt/resources/just-the-facts.pdf>

²⁴ For examples of more detailed discussion of conversion therapy, including the idea that conversion therapy might constitute child abuse, see John Alan Cohan, *Parental Duties and the Right of Homosexual Minors to Refuse "Reparative" Therapy*, 11 BUFF. WOMEN'S L.J. 67 (2002-03); 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 Mistreatment of Queer Youth*, 48 HASTINGS L.J. 167 (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).

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fundamental rights – the *de facto* results of these cases under-protect, and even harm, children. Part II addresses current family law: abuse and neglect, and “child in need of services” jurisprudence and finds both inadequate to protect children’s identity interests from parental assimilation demands. Finally, Part III details how courts are to distinguish acceptable parental behavior from assimilation demands, proposing courts restrict parental behavior that is strictly coercive and sufficiently harmful to the child. This test is designed to allow state intervention only in very extreme, high-conflict cases. Next, Part III proposes the “family in need of services” framework as an alternative that preserves family cohesion and suggests mediation as one practical tool for constructive, less adversarial dispute resolution. Part III concludes by contending possible concerns.

I wish to briefly address one primary objection readers might raise, and that is the potential classification of parents’ religious inculcation as an assimilation demand.²⁵ Would adopting the assimilation demands framework I advocate 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. I believe that the test I offer in Part III – the distinction between assimilation demands and acceptable parenting is 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 rights that parents would hold as non-parents are limited due to children’s interests: parents’ property rights take a back seat to their obligation to financially support their children,²⁶ or their exercise of the right to engage in non-marital relationships may cost them custody rights.²⁷ 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 wellbeing.²⁸ The parallel argument may be made here: that with the wealth of empirical evidence on the victimization of LGBT youth,²⁹ perhaps in

²⁵ This concern might very well merit its own independent piece of scholarship and thus is out of the scope of this paper, which merely aims to start a conversation in the literature about assimilation demands in families.

²⁶ *E.g.* *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (1997).

²⁷ See Rosky, *supra* note 18.

²⁸ See *Siegel v. Siegel*, 472 N.Y.S.2d 272 (N.Y. Spec. Term 1984); *Munoz. v. Munoz*, 489 P.2d 1133 (Wash. 1971); *Sagar v. Sagar*, 781 N.E.2d 54 (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).

²⁹ See *infra* Part I.B.

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instances of extreme family conflict, parents' religious rights should not take precedence over the child's identity interests and wellbeing. In short, when a family is bitterly conflicted over the parents' religion and the child's sexuality, they would be a Family in Need of Services, 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.³⁰ But the result of this doctrine is the assimilation of children into their family and community identities, thereby restricting their independent identity interests. 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 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. According to this metaphor, minorities are encouraged to assimilate into a neutral, American identity, which incorporates traits from different identity groups.³¹ Yoshino criticizes assimilation as costly to one's authentic self – denying one's freedom to develop an identity independent of pressures to conform. 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.³²

Yoshino articulates three types of coerced assimilation – or assimilation demands – conversion, passing, and covering.³³ Conversion is

³⁰ 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).

³¹ YOSHINO, *supra* note 13, at 140, 179.

³² *Id.* at 26-27. Yoshino gives examples of racial minorities required to "act white" due to white supremacy; women instructed to downplay their family responsibilities at work because of patriarchy and LGBT persons asked not to "flaunt" because of homophobia. *Id.* at xi.

³³ 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* 2 (1963).

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the demand on one to assimilate by changing an unfavorable identity or identity traits into a more acceptable one.³⁴ Passing is defined as the demand to assimilate by concealing one's unfavorable identity and misleading others to believe that the individual identifies with the mainstream.³⁵ Lastly, covering is the demand to assimilate by muting or downplaying the unfavorable identity that one has *made known* to others.³⁶ 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.³⁷ Another aspect of covering, reverse-covering, is the demand that the individual performs according to stereotypes associated with her identity group.³⁸ It equally compromises one's authentic identity and conduct. All assimilation demands are harmful to identity and to the authentic self. Assimilation demands and their pressures conflict 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. Therefore assimilation demands create psychological burdens, such as feeling of inferiority or self-hatred.³⁹

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.⁴⁰ When assimilation demands deny an

³⁴ YOSHINO, *supra* note 13, at 46.

³⁵ *Id.* at 17-18.

³⁶ *Id.* at 18.

³⁷ *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.”)

³⁸ *Id.* at 23. Yoshino elaborates on reverse-covering with the example of women in the workplace. *Id.* at 143-52.

³⁹ Lau, *Pluralism*, *supra* note 8, at 324-25.

⁴⁰ YOSHINO, *supra* note 13, at 184-85 (presenting D.W. Winnicott's theory regarding true and false selves and the relationship among them as measures of psychological health.) Both Winnicott's work and Yoshino's use of it have been criticized by legal scholars. Paul Horwitz suggested that: “There is reason to be skeptical of Winnicott's simple schema of the true and false selves. [These vague terms are] not much help in identifying precisely what, if anything, the True Self means”. Paul Horwitz, *Covering: The Hidden Assault on Our Civil Rights*. By Kenji Yoshino, 105 MICH. L. REV. 1283, 1289-90 (2007) (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.

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authentic identity one cannot achieve full emotional health by appreciating and expressing her identity. Thus the process of identity development in the psychological sense, the development of understanding who we are, what we value and where we are headed, is compromised by assimilation demands because these demands undermine the achievement of a coherent sense-of-self.⁴¹

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. Children are then more dependent on protection from outside sources 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 for which I advocate.

Though Yoshino couches his arguments about assimilation's harms to identity in the idea of the authentic self, 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 for a healthy identity. Exploring different talents and skills facilitates industry in place of inferiority. Beyond belonging to a social group, one's identity is also a result of her interests and capabilities.⁴² If one is unable to develop her identity through exploration she is at risk of identity confusion and foreclosure, the harms of which Erikson explained: "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, roping out of school, leaving jobs, staying out all night, or withdrawing into bizarre and inaccessible moods."⁴³ Thus achieving a coherent and stable identity is necessary for adults to enjoy higher levels of mental health than adults who have committed to identity without exploration or who have yet to achieve identity commitment. Healthy identity achievement is further crucial for

⁴¹ PATTERSON, *supra* note 8, at 543.

⁴² ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 124-25 (1968).

⁴³ *Id.* at 132.

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accomplishing what Erikson viewed as true intimacy – the merging of identities.⁴⁴

Erikson touches on what, in effect, are assimilation demands on youth's identities. 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 to that teen. Put differently, assimilation demands threaten identity achievement because they discourage the exploration and experimentation necessary before committing to an authentic identity and thus may lead to the harms of identity confusion of which Erikson warns.⁴⁵ Without exploration of the authentic self, identity foreclosure occurs, and with it the inability to accomplish intimacy as well as an overall weakened emotional health.

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, children are exceptionally vulnerable to assimilation demands because of their incomplete development. When adults who have completed their identity development are vulnerable to identity harms, certainly children who are still forming their identity are increasingly vulnerable to those harms. A legal framework that would aspire 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, the case for children's protection might be more challenging to make. That there are harms to children that are different and worse than harms to adults may not be an argument persuasive enough to overcome the parental rights paradigm or family privacy policies. However, parental rights should 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. I illustrate below two reasons for legal intervention to protect children from assimilation demands despite the parental rights paradigm: ensuring children's optimal development, and compensating for imbalanced family dynamics. As this Article progresses I will pay more in depth attention to 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.

⁴⁴ *Id.* at 135. Erikson focuses on “a true and mutual psychological intimacy with another person,” rather than sexual intimacy. *See also*, PATTERSON, *supra* note 8, at 544.

⁴⁵ ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 131-132 (1964).

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.⁴⁶ The law should take it upon itself to compensate for children's inability to deflect harmful assimilation demands since children have yet to fully develop coping skills and lack the resources that allow them to handle assimilation demands and their harms. More importantly, this leaves children particularly prone to assimilation demands that impose an identity that may not ring true.⁴⁷ Yoshino is primarily concerned with the individual's opportunity to develop her authentic self,⁴⁸ not with how she actually would go about accomplishing it. Nowhere is the denial of exploration process in identity development more critical than to children in a developmental stage that centers round this task. Yoshino's concern about assimilation demands restricting opportunities for exploration and experimentation with identity and authenticity is perhaps most relevant to children.

Because their identity has not yet formed, adults consider children waverers who must be protected from developing an unfavorable identity and converted to comply with expectation of what their identity should be.⁴⁹ 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 nonconformity "back" to heterosexuality or gender conformity.⁵⁰ That children are most vulnerable to assimilation demands in their most severe form (conversion) and from the most coercive and harm inflicting source (the family) establishes the need for better protection of children from conversion, as well as other forms of assimilation demands.

Conformity to assimilation demands causes 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.⁵¹ As

⁴⁶ Lau, *Pluralism*, *supra* note 8, at 327. *See also*, Mary Jane Rogheram-Borus & Kris A. Langabeer, *Developmental Trajectories of Gay, Lesbian and Bisexual Youth*, in *LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH* 97, 105 (D'augelli and Patterson eds., 2001).

⁴⁷ Lau, *Id.*

⁴⁸ Yoshino terms this "self-elaboration," which is "the most important work we can do." YOSHINO, *supra* note 13, at 184.

⁴⁹ *Id.* at 44.

⁵⁰ 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 received vast attention from scholars, including Yoshino. *See supra* note 24 and accompanying text.

⁵¹ Lau, *supra* note 8, at 332.

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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.⁵² Other unfortunate consequences of victimization,⁵³ are high rates of suicidality,⁵⁴ substance abuse⁵⁵ and homelessness due to either running away from home or being cast out by parents.⁵⁶ Faced with assimilation demands, children realize they cannot depend on parents, friends or other close contacts for support in their identity explorations.⁵⁷

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.⁵⁸ According to attachment theory, the close interactions between a child and parent help them to form emotional bonds that are essential to the child's survival. Attachments ensure that parents care for their children and keep them safe.⁵⁹ Indeed, the parental rights paradigm reflects the laws assumption and support for parents building healthy attachment bonds (termed "secure attachment") with their children. Yet, not all attachment patterns are alike. The four types of attachment vary in degree of protection and comfort parents provide, as well as in the child's resulting happiness and confidence. Secure attachment is the most common

⁵² *Id.* at 329-30.

⁵³ I use "victimization" as an umbrella term for abuse, neglect, harassment, discrimination or other forms of mistreatment youth experience, whether at school or at home or other spaces.

⁵⁴ Rotheram-Borus & Langabeer, *supra* note 46, 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, 229 (2009), available at <http://pediatrics.aappublications.org/content/123/1/346.full?ijkey=NrncY0H897IAU&keytype=ref&siteid=aapjournals> [hereinafter *Family Rejection Study*] (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.

⁵⁵ Rotheram-Borus & Langabeer, *supra* note 46, at 113-15.

⁵⁶ PATTERSON, *supra* note 8, at 491-92. *See also* Rotheram-Borus & Langabeer, *supra* note 46, 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).

⁵⁷ Rotheram-Borus & Langabeer, *supra* note 46, at 105.

⁵⁸ ERIKSON, CHILDHOOD AND SOCIETY *supra* note 45, 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.)

⁵⁹ PATTERSON, CHILD DEVELOPMENT *supra* note 8, at 228.

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and healthy type of attachment. It is characterized by the child's sense of security⁶⁰ and the ability to create well-balanced relationships with others in ways that foster both autonomy and closeness.⁶¹ 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.⁶² 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.⁶³ One might also struggle with negative expectations regarding others, distorted communication patterns,⁶⁴ or otherwise hostile interactions.⁶⁵

While attachment styles are usually stable throughout life, stressful events such as conflicts around a child's independent identity may impact security.⁶⁶ 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 decrease in attachments that coincide would eventually lead children to engage in at-risk behavior.⁶⁷ An indirect result is that

⁶⁰ *Id.* at 230.

⁶¹ Joseph P. Allen et al., *The Relation of Attachment Security to Adolescents' Parental and Peer Relationships, Depression, and Externalizing Behavior*, 78(4) CHILD DEV. 1222, 1235 (2007) [hereinafter *Peer Influences*]; 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(1) PSYCHOTHERAPY RES. 77, 79 (2003).

⁶² PATTERSON, CHILD DEVELOPMENT, *supra* note 8, at 232.

⁶³ Joseph P. Allen et al., *Attachment and Autonomy as Predictors of the Development of Social Skills and Delinquency During Midadolescence* 70(1) J. CONSULTING & CLINICAL PSYCHOL. 56, 63 (2002).

⁶⁴ Allen et al., *Peer Influences*, *supra* note 61, at 1223.

⁶⁵ Joseph P. Allen et al., *Prediction of Peer-Rated Adult Hostility from Autonomy Struggles in Adolescent-Family Interactions*, 14 DEV. & PSYCHOL. 123, 133 (2002).

⁶⁶ 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. Allen et al., *Peer Influences*, *supra* note 61, at 1223; PATTERSON, CHILD DEVELOPMENT, *supra* note 8, at 232-33, 336; Allen et al., *Stability and Change in Attachment Security Across Adolescence*, 75(6) CHILD DEV. 1793-94, 1802 (2004).

⁶⁷ 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 Conflicts to Adolescents' Developing Autonomy and Relatedness with Parents*, 8 DEV. & PSYCHOL. 425, 425-426 (1996) [hereinafter *Conflicts in Families*] (explaining that in extreme situations

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children become less capable to cope well with assimilation demands. Attachments that become insecure exacerbate families' imbalanced power structures.⁶⁸ This leaves children more isolated within the family, suffering 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. Further disadvantaging children in families is a minority identity that parents may not share (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 ability to challenge assimilation demands. Yoshino's support for social solutions in the form of reason-forcing conversations,⁶⁹ therefore, is unhelpful to children. Yet, social change that is dependent exclusively on conversations initiated by the subject of the demand puts additional burdens on disadvantaged parties. Requiring minorities, let alone children, to do their own work, without the assistance of legal or social institutions, further cements the imbalance between children and parents. Put differently, because such solutions burden the less-powerful party they may prove impossible for children confronting parents' assimilation demands.

A healthy identity depends on supportive social networks.⁷⁰ Indeed, warm and close relationships with parents help mitigate other stressors that

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(3) PSYCHIATRIC CLINICS N. AM. 455, 456 (1990) [hereinafter *Adolescent Problem Behavior*].

⁶⁸ 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).

⁶⁹ Yoshino warns that the law cannot be the ultimate solution for assimilation demands. Where the law's work ends, he argues, society must step in. Personal connections and reason-forcing conversations in which people confront each other and their demands of assimilation will further compassion and understanding about the harm of assimilation demands. This in turn will lead to the abandonment of such demands. YOSHINO, *supra* note 13, at 24. Such reason-forcing conversations would allow the subject of the demands to challenge the motivation behind the demand and its legitimacy. *Id.* at 463 Yoshino foresees the result of these conversations to be a middle ground between assimilation and authenticity that he doubts the law can reach alone. YOSHINO, *supra* note 13 at, 193-95.

⁷⁰ Lau, *supra* note 8, at 328-29.

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teens may experience while growing up.⁷¹ These positive relationships may begin to suffer when children exhibit identities that are objectionable to parents.⁷² Parents who impose assimilation demands create a stressful, unsupportive environment increasing the likelihood of adolescents' unhealthy conduct.⁷³ 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 achievement and 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. The law, both in academia and in practice, has so far been concerned with the struggles LGBT youth face mainly in the public sphere – in public education and foster care, or the juvenile system.⁷⁴ LGBT youth

⁷¹ PATTERSON, *supra* note 8, at 566. *See also*, Ryan, et al., *Family Rejection Study* *supra* note 54, at 228 (citing studies that found that youth experiencing stressors unrelated to their sexuality are exacerbated when they also face stressors from family on the basis of their sexuality).

⁷² 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* 3, 11 (D'Augelli and Patterson eds., 2001) (“Given the Polarization of the reality of the adolescent’s world and parental beliefs and expectations [regarding the adolescent’s sexuality], parent- adolescent relationship may involve significant change.”).

⁷³ *Id.* at 13. *See also* Ryan et al., *Family Rejection Study*, *supra* note 54, at 235 (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).

⁷⁴ 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 & GENDER IDENTITY IN AMERICAN PUBLIC EDUCATION* (2010); Lau, *Pluralism*, *supra* note 8. 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

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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 such as 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. The data also suggests that LGBT youth have less access to legal recourse.

A parent's response to a child's disclosure of an LGBT identity impacts the child-parent relationship, as well as the child's healthy development.⁷⁵ Social science research identified a variety of increased negative outcomes and risks for LGBT youth, and tied 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.⁷⁶ FAP defines rejecting behaviors by families as behavior designed to change a child's sexuality, conveying messages that gender non-conformity or same-sex orientation is shameful, sinful, or otherwise devalued, or isolating a child from LGBT associations or resources.⁷⁷ 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 sexuality. Lastly, high rejection families are those who exhibit extreme negative

(focusing both on schools and out-of-home care).

⁷⁵ 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.

⁷⁶ See Ryan et al., *Family Rejection Study*, *supra* note 54, at 349-50

⁷⁷ CAITLIN RYAN ET AL., SUPPORTIVE FAMILIES, HEALTHY CHILDREN: HELPING FAMILIES WITH LESBIAN, GAY, BISEXUAL AND TRANSGENDER CHILDREN (2009), *available at* <http://family.project.sfsu.edu/publications>. This publication provides additional examples of rejecting behaviors and recommends parents avoid them: 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 sexuality, telling a child she is a source of shame to the family. *Id.* at 8.

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behaviors and express their disappointment or shame, including, but not limited to, attempts to change a child's identity.⁷⁸

The Family Rejection Study's results show significant disparities for health outcomes between LGBT youth from low, moderate or high rejection families.⁷⁹ 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. Depression rates are similarly increased by experiencing rejection within the family: 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. While only a marginal difference exists in rates of substance abuse⁸⁰ between LGBT youth from low rejection families 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%. 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. Therefore, the quantity and quality of family rejection that youth experience significantly compromises their emotional health and endangers their physical wellbeing.

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.⁸¹ Between 20-40% of American homeless youth identified as LGBT.⁸² 26% of these teens were forced to leave home upon disclosure of their sexuality to their families.⁸³ Others chose to leave home after experiencing other forms of rejection. 50% of gay male youth experienced some form of negative reaction from their families, and as much as a third of all LGBT homeless youth suffered physical violence,

⁷⁸ See *id.* at 6.

⁷⁹ Ryan et al., *Family Rejection Study*, *supra* note 54, at 350 tbl.4, available at <http://pediatrics.aappublications.org/content/123/1/346/T4.expansion.html>.

⁸⁰ Defined by FAP as the abuse of any substance at any point in time throughout life.

⁸¹ NICHOLAS RAY, NATIONAL GAY AND LESBIAN TASK FORCE, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS (2006), available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>.

⁸² *Id.* at 13.

⁸³ *Id.* at 16.

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including sexual assaults from family members.⁸⁴ 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. The experience of homophobia inspires romanticized ideas of living in more tolerant communities, usually urban environments. For this reason, LGBT youth tend to leave their hometowns for cities like New York, Los Angeles and San Francisco, where affordable housing is scarce.⁸⁵ The difficulty in securing employment that pays a livable wage often prohibits LGBT youth from escaping homelessness.⁸⁶ 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.⁸⁷ These studies on the state of LGBT youth⁸⁸ 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 identity of family members. 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, LGBT youth usually have no such inherent support system.⁸⁹ LGBT youth are faced with exploring, forming, disclosing and performing their sexuality without assistance, and often with hostility, from parents. 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.

⁸⁴ *Id.* at 16, 18.

⁸⁵ Luke A. Boso, *Urban Bias, Rural Sexual Minorities and the Courts*, 60 *UCLA L. REV.* 562 (2013).

⁸⁶ RAY, *supra* note 81, at 21-22.

⁸⁷ *Id.* at 59, 71.

⁸⁸ For a study on the vulnerability of LGBT youth for over-involvement in and higher penalties from the juvenile system, see Kathryn Himmelstein & Hannah Bruckner, *Criminal Justice and School Sanctions Against Non- Heterosexual Adolescents: A National Longitudinal Study*, 127 *PEDIATRICS* 49, 52 (2011), available at <http://pediatrics.aappublications.org/content/127/1/49.full.pdf+html>.

⁸⁹ BIEGEL, *supra* note 74, 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.”).

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Heteronormative culture translates into LGBT youth often suffering the most extreme type of assimilation demands, which in turn, renders them prone to the most severe harms as a result of such demands. 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. This “moral panic”⁹⁰ guides courts deciding custody disputes involving lesbian or gay parents, informs education policies such as “No Promo Homo” laws⁹¹ and ultimately motivates parents’ mistreatment of non-heteronormative children, whether they identify as LGBT or not.

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).⁹² Moreover, developing and asserting sexual minority identities comes at a higher cost to emotional health due to stigmatization – whether internalized or from outside sources – and pursuant isolation.

Sexual minority youth may find themselves required to defend their sexuality. 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 non-conformity should be considered equally as unacceptable because they too reflect homophobia and are motivated by it. Still, one could argue that though possessing these identities as adults is value-neutral, 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) would not be a concern – they would no longer exist as acceptable or tolerated behavior toward sexual minorities.

⁹⁰ See MORAL PANIC, SEX PANICS: FEAR AND THE FIGHT OVER SEXUAL RIGHTS (Gilbert Herdt ed., 2009). Moral panic involves “[l]arge social events occurring in troubled times when a serious threat by evil-doers incites societal reaction.” *Id.* at 5.

⁹¹ 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 (2000).

⁹² YOSHINO, *supra* note 13, at 184.

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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 sexual 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.⁹³ Slightly less aggressively, parents try to control their children’s sexuality through abuse or neglect, even if the child does not identify as LGBT.⁹⁴ Parents may do so by referring to the child in derogatory terms or berating behavior in an attempt to “correct” gender presentation,⁹⁵ or sever ties because of their sexuality.⁹⁶ Seemingly less abusive demands may manifest themselves in conflicts where the child is not technically a party, such as custody disputes,⁹⁷ or litigation involving the child’s intimate partner. These cases have mixed results and some protect children better than others. However, all these courts understand that the parent’s behavior is harmful to the child, and some go as far as explicitly positioning that behavior outside of parental rights.⁹⁸ Others find children’s identity interest to be encompassed in the fundamental right to privacy, thus establishing that children’s sexuality is as salient in children as in adults and therefore warrants legal protection from parents.⁹⁹

⁹³ See *supra* notes 23, 24.

⁹⁴ See *infra* part II.A.

⁹⁵ *In re Matter of Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982); *In re Zion*, No A111895, 2006 WL 2709831 (Cal. App. Sept. 22, 2006); *In re C.O.*, No B206425, 2008 WL 4670513 (Cal. App. Oct. 23, 2008); *Catherine W. v. Robert F.*, 455 N.Y.S. 2d 519 (N.Y. Fam. Ct. 1982).

⁹⁶ *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (1997).

⁹⁷ In these cases, the child is not formally a party either. Instead, the state assumes the representation of the child’s interests. Still, the conflict at the root of these types of litigation is between the child and parent.

⁹⁸ See, e.g., *In re Matter of Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982).

⁹⁹ See, e.g., *In re Lori M.*, 496 N.Y.S.2d 940 (1985).

1. Outside of Mutability

Before discussing representative cases,¹⁰⁰ it is worth addressing the question of mutability of sexual orientation or gender identity. Many commentators and courts have opined on the mutability of sexuality.¹⁰¹ The innateness and stability 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 be a suspect classification.¹⁰² The immutability argument found new life in the 9th circuit opinion in *Watkins*. There, the court ruled that the immutability factor in suspect classification analysis should turn not on whether one is incapable to change 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].”¹⁰³

My approach to the issue of parents’ assimilation demands on children’s sexuality extends from the *Watkins* opinion’s “New Immutability.”¹⁰⁴ Because my concern is not immutability *per se*, but parents’ right to control children’s sexuality, this Article is positioned outside of the traditional immutability debate. Perhaps examining parental assimilation demands on children assumes that parents have the ability to impact the outcome of children’s sexuality before it becomes stable, an argument from mutability. Indeed, some of the cases I discuss below show

¹⁰⁰ Despite the overwhelming rates in which LGBT youth are victimized at home, or outside of home because of family rejection, we have only few reported cases where families have called upon courts to resolve conflicts stemming from assimilation demands on children’s sexuality. Extensive research yielded the 17 United States cases discussed or cited throughout this Article. Only 5 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. Legal services and advocacy groups do not currently offer LGBT youth the assistance they might need in order to do so. 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.

¹⁰¹ 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 (9th Cir. 1989); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994); Susan Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495 (2009); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (ruling that sexual orientation is mutable).

¹⁰² Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012).

¹⁰³ *Watkins*, 875 F.2d at 726.

¹⁰⁴ A term coined in Schmeiser, *supra* note 101.

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that parents believe children's sexuality is unstable and therefore try to influence it.¹⁰⁵ On the other hand, courts that protect children from assimilation demands are persuaded by arguments about immutability and imply that parental assimilation demands are harmful because sexuality is fixed. My claim here is that mutability is immaterial to a determination of harm. If sexuality is immutable, certainly parental assimilation demands harm children by imposing demands they cannot meet. If sexuality is mutable, parental assimilation demands undermine children's autonomous development and healthy, thoughtful identity achievement.¹⁰⁶

Michael Boucai makes a similar argument about adult bisexuals in the marriage context.¹⁰⁷ He claims that if non-heterosexual identities are legitimate under *Lawrence v. Texas*,¹⁰⁸ then the state cannot influence sexuality through legislation. 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 sexuality 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.¹⁰⁹ 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 sexuality, as assimilation demands do.¹¹⁰

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 under current family law jurisprudence. Assimilation demands from parents

¹⁰⁵ See the discussion below re *In re Shane T.*, *In re C.O.*, and *Smith v. Smith*.

¹⁰⁶ Healthy autonomy development is tied to positive, accepting and secure relationships between parents and children. 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.

¹⁰⁷ Boucai, *supra* note 102.

¹⁰⁸ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁹ ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 42, at 131-35.

¹¹⁰ RYAN ET AL., SUPPORTIVE FAMILIES, HEALTHY CHILDREN, *supra* note 77; Ryan et al., *Family Rejection Study*, *supra* note 54.

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do not fall within existing legal frameworks. Alternatively, 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 is parental heteronormative expectations. So though courts do recognize children's interest (and sometimes rights) to develop, explore and express their sexuality, this recognition is not always explicit, or reliably protective. Consequently, courts are incapable of sufficient and proper protection because they do not correctly identify the subject of the necessary protection. This Article offers a vocabulary of assimilation demands that could help courts correctly analyze these disputes and help develop a jurisprudence better suited to children's needs and identity interests.

Courts have attempted to relieve children from parental assimilation demands and protect their wellbeing in several cases.¹¹¹ 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. This reflects courts' understanding that disclosure of sexuality to parents may bring grave consequences to children.¹¹² The case of *Lori M.*¹¹³ involved a

¹¹¹ Lyn Duff's Petition for Appointment of Temporary Guardian (S.F. Fam. Ct. filed Sep. 11, 1992) (No. 259294) (petition granted without court opinion) (unpublished, on file with author); Lyn Duff, *I Was A Teenage Test Case*, CAL. LAW. 46 (1996) (removing a teen into foster care after the teen escaped a residential education placement where she was forcibly placed by her mother and compelled to participate in conversion therapy. Before and during her time in this education placement, the teen was physically abused by her mother because of the teen's sexual orientation.); *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008) (an immigration court granting asylum to a gay man from Jamaica, reasoning that the abuse the man suffered from his father before leaving for the United States indicative of the persecution he may face in his home country if deported); *Ixtlilco-Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007) (an immigration court granting asylum to a gay man from Mexico who was driven out of his home after suffering abuse from family member based on his sexual orientation. The court found that because of the man's young age at the time, he was unable to report the abuse to authorities. Therefore abuse by family constituted persecution for the purpose of asylum.)

¹¹² *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (finding that a police man who threatened to disclose a teen's sexual orientation to his grandfather had violated the teens right to privacy. The suit was filed by the mother after the teen's suicide); *In Nguon v. Wolf*, 517 F. Supp. 2d 1177 (C.D. Cal. 2007) (when a student was disciplined for kissing a same-sex partner at school, administrators disclosed these facts to her parents. The court established distinct "zones of privacy" where teens may be open about their sexuality on one context, but retain their expectation of privacy in others. 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. 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.)

¹¹³ *In re Lori M.*, 496 N.Y.S.2d 940 (1985).

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mother's direct assimilation demand on her bisexual daughter. The New York family court explicitly ruled in the case that a minor's fundamental right to privacy encompassed her sexuality. Lori was 15 when she came out to her mother as bisexual and told her mother she had a 21-year-old girlfriend, Ellen. After her mother instructed Lori to end her relationship with Ellen, Lori left home to live with her aunt.¹¹⁴ Lori's mother then petitioned the family court to declare Lori a child in need of services.¹¹⁵ 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 21-year-old man.¹¹⁶ When Lori testified, she expressed her satisfaction with her relationship with Ellen, and 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 sexuality and did not believe she required therapy to deal with it.¹¹⁷

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.¹¹⁸ Like the youth abortion¹¹⁹ and contraception cases,¹²⁰ a child of sufficient maturity had the right to make decisions regarding constitutionally protected or fundamental rights, including her sexual orientation, free of state or parental intervention.¹²¹ Since the court found Lori to be mature,¹²² and was impressed by her thoughtfulness regarding her sexual orientation and her relationship, the

¹¹⁴ *Id.* at 940.

¹¹⁵ *Id.* at 940. 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 Court Act § 712(a).

¹¹⁶ *Lori M.*, 496 N.Y.S.2d. at 940-41.

¹¹⁷ *Id.* at 941.

¹¹⁸ *Id.* at 941-42 ("The mother . . . seeks to invoke the State's intervention to force an end to the relationship . . . 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.").

¹¹⁹ *Planned Parenthood v. Danforth*, 428 US 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).

¹²⁰ *Carrey v. Population Servs.*, 431 U.S. 678 (1977) (striking down prohibition on the sale of contraceptives to minors, and extended children's privacy rights to include their procreation decisions).

¹²¹ *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.").

¹²² *Id.* (expressing satisfaction with her performance at school and her good behavior while living at her aunt's home.)

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court ruled neither her mother, nor the state could intervene and rejected the mother's petition.¹²³ The court then urged the two to seek help in mending their relationship and referred them to counseling through Family Court Services.¹²⁴

Lori's mother's original response to learning about the relationship between Lori and Ellen, instructing Lori to end the relationship, may not seem so extreme because it was not physically or verbally violent. After all, Lori left home willingly, and only then did her mother petition the court. However, Lori's mother's instruction was nothing short of a 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 with the threat of placing Lori in the child welfare system. The court refused to harness the force of the state to convert Lori for two main reasons: first, because her mother's demands infringed on a constitutionally protected right that was previously extended to children;¹²⁵ and second, because Lori demonstrated sufficient maturity to make such decisions regarding that right.

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 when assimilation demands would not violate children's protected rights, the decision's contribution is primarily the expressed 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 sexuality rights to the level of parental rights, eliminating the default in favor of parents.

¹²³ *Id.* (“[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.”).

¹²⁴ *Id.* at 943.

¹²⁵ The court looked to the Supreme Court cases, *supra* notes 119-120, to rule that children had privacy rights that included sexual rights.

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The question of parents' right to impose assimilation demands arose in the custody dispute in *Smith v. Smith*,¹²⁶ where a father was granted custody to raise a gender non-conforming child according to the child's birth-assigned male 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 10-years-old when the lower court granted custody to the mother, and 13 when custody was transferred to the father. 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. She called the child by a feminine name and took the child to trans support groups.¹²⁷ The lower court found that the child displayed "female tendencies . . . as early as age two."¹²⁸ 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.¹²⁹ 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 expert recommendation as a result of the child's young age and a need to wait for further gender development.¹³⁰

The lower court interviewed the 10-year-old child. The child expressed to the court a desire to wear girls' clothing and have "girls' stuff," but did not specify the nature of such "stuff." 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.¹³¹ 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

¹²⁶ *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ohio Ct. App. Mar. 23, 2007).

¹²⁷ *Id.* at *1.

¹²⁸ *Id.* at *4.

¹²⁹ The father showed footage of the child "enjoying stereotypical male activities and wearing male clothing," (*Id.* at *5) while the mother produced video of the then 10-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.

¹³⁰ *Id.* at *9-10, 13.

¹³¹ *Id.* at *13-14.

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the mother into “believing that he was a transgender child.”¹³² The court transferred 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.”¹³³

The appeals court upheld the decision of the lower court, finding that the change in custody benefited the child more than it caused harm. The appeals court affirmed the lower court’s decision to grant sole custody to the father, who would continue to raise the child as a boy. The appeals court reasoned that being raised as a boy by the father would enable the child to discover a “true” gender identity. 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. . . . by 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.¹³⁴

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 protect the child’s open future.¹³⁵ The court was particularly concerned that the child’s feminine identity was a result of the mother’s assimilation demands, from which the

¹³² *Id.* at *26-27. 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. William v. Frymier*, 377 S.W.3d 579, 582 (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’ toys isle on visits to a toy store). The use of sex stereotypes in a way 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 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 A Sexual 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 piece.

¹³³ *Id.* at *15.

¹³⁴ *Id.* at *31-32.

¹³⁵ Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY AND STATE POWER 125, 125 (William Aken & 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.

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court sought to protect the child. However, the court ignored the effects of the father's assimilation demands on the child's gender 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 would not likely have come to the same result. Perhaps such analysis would still point to granting the father custody, but to really preserve the child's identity interests and future development, the decision would have been more persuasive if the court had allowed the mother to continue facilitating the child's feminine identity exploration.

Cases like *Smith*¹³⁶ expose the gaps between courts' purported goals to protect children's identity interests and their 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 concerned with

¹³⁶ 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. App. Feb. 4, 1998) (finding 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. The court relied on expert testimony from the child's psychologists, claiming that the child's gender non-conformity was a result of emotional dependence on the mother and that spending more time with the father would facilitate separation from her.); *Buxton v. Storm*, (*In re 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. Mental health experts were concerned the mother would undermine the child's bond with father and in fact she continuously sabotaged the child's treatment and father's involvement. 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. The mother claimed this was the child's own wishes and that the father was homophobic for protesting. 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. 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. 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 father's fiancé. 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. As the court put it: "Mother'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 "Child's grooming and appearance during transfers for parenting time with father seem calculated to provoke conflict." *Id.*)

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allowing children to pursue and express whichever gender identity they come to develop. 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 these decisions 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 duly weigh children's sexuality are potentially flawed because they privilege parental rights and thus perpetuate views of children as parental property in the law.¹³⁷

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 sexuality and that 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 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 purporting to offer a be-all-end-all solution.

Another example of where carving out an exception for parental rights might be of use is 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.¹³⁸ Although parents of

¹³⁷ Linda Lane, Comment, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 844 (1998), 838; 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*.").

¹³⁸ In *Acevedo v. Williams*, 985 So. 2d 669 (Fla. Dist. Ct. App. 2008), 18-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

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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.¹³⁹ These instances, in which a parent initiates a legal battle against a child's same-sex partner may not be an obvious instance of assimilation demands. However, these cases do cause assimilation demands, and possible intra-family disputes because of them, to surface and therefore are also illustrative of how these disputes take shape in courts.

In *Landreneau v. Fruge*,¹⁴⁰ 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 resulted in the loss of her daughter's consortium.¹⁴¹ The mother and daughter had a tumultuous relationship even before the onset of daughter's relationships with the two women. The daughter had a history of abusive relationships (mostly, but

battery occurring in the course of the relationship, but instead by finding the 17-year-old daughter incapable of consenting to the relationship because of her age. The appeals court reversed based on prior Florida courts decisions finding 16-year-olds capable of consent, and based on Florida statutory rape legislation setting the cut-off age for statutory rape of a 16-year-old at 24. Further, the appeals court found no evidence that the relationship between the two girls was in any way abusive, criminal, or injurious to Williams' daughter. *See also* *Brayman v. Deloach*, 439 S.E.2d 709 (Ga. Ct. App. 1993), 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. Since the father was alive, the mother had no standing to bring the claim. Despite rejecting the claim on procedural grounds, the court did comment on the merits of the seduction claim as well. 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.

¹³⁹ 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: AMJUR Parent §122-23, CJS Civil Rights §37, CJS Parent §331, 6 WITSUM Ch IX §1684, CAL Torts §56.04. One case involving a statutory rape offense between two boys is *Limon v. Kansas*, 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.*, 457. Mass. 140. As of summer 2013, a felony child abuse case is pending in Florida. There, the parents of a minor girl initiated charges against the daughter's 18 year-old girlfriend. <http://www.advocate.com/youth/2013/06/13/kaitlyn-hunt-not-first-complicate-justice?page=0,0>

¹⁴⁰ *Landreneau v. Fruge*, 676 So. 2d 701 (La. Ct. App. 1996).

¹⁴¹ *Id.* at 704.

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not all of which were same-sex), substance abuse and suicidality.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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 same-sex nature of the relationships was probably material for the mother. The mother, who seemed unconcerned by her daughter's different-sex relationships, filed suit against her daughter's same-sex partners though these relationships were not the only abusive relationships her daughter had experienced. Indeed, the court portrays the other relationships as far more harmful. The court did not describe the relationship in question as overtly violent.¹⁴⁵

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 does 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 orientation, the court's decision could have an adverse effect. The decision could incentivize parents to reject children who come out and turn to courts to recover damages from their children's partners. Instead of establishing that parents cannot mistreat their children because of the child's sexuality, this decision therefore could facilitate and reward disengagement between parents and their LGBT children.

Causes of action such as loss of consortium and seduction cement problematic views that parents are within their rights to control their children's sexuality and recover financially when they fail to do so. These causes of action embody notions of children as parental property at the expense of family cohesion or the child-parent relationship. Many states have repealed the tort of seduction¹⁴⁶ as well as other laws such as child

¹⁴² *Id.* at 705-706.

¹⁴³ *Id.* at 706.

¹⁴⁴ *Id.* at 709.

¹⁴⁵ *Id.* at 705.

¹⁴⁶ I checked Witkin, Summary of CA Law (Torts), and found that while Cal. Civil Code § 49 prohibits "the abduction or enticement of a child from a parent, or from a guardian entitled to its custody," part (b), that prohibited "the seduction of a person under the age of legal consent" has been repealed. See 5 Witkin, Summary, Torts, § 723, Abolished Actions >

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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 *de-facto* offer children, signals to LGBT youth that their sexuality and relationships are inferior and illegitimate and are, quite literally, a harm 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 demands. 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 case¹⁴⁷ endorses a parents' action toward her child or condones the tactics parents use to enforce heteronormativity on their children illustrates courts' intentions to protect children from parental mistreatment. These courts 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 the right to foreclose a child's development or control her identity interests to her detriment through imposing assimilation demands, 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

Types of Actions, at 1047 (“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.”); see CAL. PENAL CODE § 261.5 (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 [Tort of Seduction; Indiana]*, 47 RES GESTAE 26 (June 2004).

¹⁴⁷ Of the cases discussed or cited here or throughout the dissertation version.

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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 may be too subtle to be considered by courts as abusive or neglectful. The courts therefore 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 also triggers a child’s removal from the home. Each proceeding focuses on the child’s “incorrigible” behavior, therefore placing 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 overly limited in their authority to offer services to the family as a unit, or to mandate services when it finds the parent’s behavior did not constitute abuse/neglect or when the child is not declared a CHINS.

A. Assimilation Demands in Abuse and Neglect Law

The predominant exception that family law has created for parental rights 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 intervention abuse/neglect law involves is 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. The full range of assimilation demands by parents is far wider than abuse/neglect law. 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

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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 sexuality or control the child more generally,¹⁴⁸ courts are troubled by these abusive patterns and do not see this abuse as protected conduct under parental rights.

In the Matter of Shane T. is the first case where a court used abuse law to exclude assimilation demands from parental rights.¹⁴⁹ 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.¹⁵⁰ To defend his conduct, the father relied on his parental rights and claimed he was trying to "cure [Shane] of certain girlie behavior."¹⁵¹ 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.¹⁵² The court stated that although Shane maintained that he was heterosexual, he was clearly distraught by his father's attacks on his sexual orientation. 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.¹⁵³ 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 term the father's reliance on parental rights "ludicrous" because of the severe effect the threat of abuse had on Shane's future emotional development.¹⁵⁴

This case is seemingly a mild case of assimilation demands. Because Shane identified as straight his father's treatment was merely a reverse-covering demand, rather than a conversion demand on a gay son.¹⁵⁵ Shane's

¹⁴⁸ Some of the families in these cases experience abuse in light of substance abuse or mental disabilities, for instance. Animus to sexuality 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.

¹⁴⁹ *In re Matter of Shane T.*, 453 N.Y.S.2d 590 (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 in which was not reported.

¹⁵⁰ *Id.* at 591-92.

¹⁵¹ *Id.* at 593.

¹⁵² *Id.* at 592-93.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 593-94.

¹⁵⁵ For the definition of "reverse-covering" see YOSHINO, *supra* note 13 and accompanying text.

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father's attempts to "cure" his son's "girlie" behavior were designed not to coerce Shane to abandon his identity but rather influence him to mute any gender non-confirming behavior and flaunt his masculinity. Shane's father used derogatory name-calling to pressure Shane to reverse-cover and comply with male sex-stereotypes. But however subtle and non-violent these assimilation demands seem, they were in fact highly coercive and oppressive to Shane. 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.¹⁵⁶ These assimilation demands had such a detrimental impact on Shane that the court was concerned for his emotional development. The effect of his father's assimilation demands was internalized homophobia that caused Shane to question his sexual orientation¹⁵⁷ and devalue his sense-of-self.

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 perhaps found permissible.¹⁵⁸ The assimilation demands in this case were limited to verbal expressions toward a child who was not actually gay. A different court may have reasoned that directing children into heterosexuality 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 her psychological wellbeing and future development, they should be impermissible.¹⁵⁹ Relying solely on abuse law as an effective avenue to limit parents' assimilation demands is a flimsy proposition.

¹⁵⁶ *Id.* at 592.

¹⁵⁷ 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.

¹⁵⁸ 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.

¹⁵⁹ The court relied on Shane's testimony to evaluate the extent and severity of the harm he suffered. The court was concerned with Shane's distress over his father's attacks on his sexuality and masculinity. The courts also remanded Shane to a psychological evaluation to examine the emotional harm he experienced.

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In re C.O. is another case of child abuse through parental assimilation demands that targeted the child's sexuality.¹⁶⁰ Here, the court considered the consequences of a history of abuse to the mother's parental rights and the potential for family reunification.¹⁶¹ A mother physically assaulted her daughter, C.O., when C.O. came out to her as a bisexual. The assault left visible scratches on C.O.'s face. On a different occasion, the mother threatened to have a man rape C.O. in order to "cure" her of her bisexuality.¹⁶² The mother, who later received counseling and participated in parenting classes, apologized for the violence and stated that it would not happen again. As C.O. insisted upon returning to her mother's care, the court reunited the two. Yet, despite parenting and domestic violence counseling, violence ensued upon reunification. C.O. exhibited rebellious and violent behavior toward her mother and her mother retaliated. The court ultimately decided to stop reunification services and to place C.O. and her siblings in foster care.

Though the court expressed satisfaction that the violence around C.O.'s sexual orientation had been resolved¹⁶³ it still found it necessary to protect C.O. and her siblings from the broader patterns of abuse they experienced. But the court did not give sufficient weight to the abuse related to C.O.'s sexuality 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 sexuality 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" C.O.; to convert her from bisexual to heterosexual in a most aggressive and heinous manner.

¹⁶⁰ *In re C.O.*, No. B206425, 2008 WL 4670513 (Cal. App. Oct. 23, 2008).

¹⁶¹ These are services the state, through social welfare service 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).

¹⁶² *In re C.O.*, 2008 WL 4670513 at *3.

¹⁶³ *Id.* ("[C.O.] stated she and Mother had conversations regarding the threat to have a man rape C.O. and C.O. now understands 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 *7 ("parents are able to accept C.O.'s sexual identity and choices.").

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Shane T. and *C.O.* are examples of assimilation demands from parents that are 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 by their parents 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 sexuality. Many parents respond to a child coming out by forcing her out of the home and cutting off financial support.¹⁶⁴ A stark example of rejection and neglect as forms of assimilation demands can be found in the case of *Dzierson v. Dzierson*.¹⁶⁵ In this case, as a term of divorce a father agreed to shoulder the full expenses of his son's college tuition. 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. 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. The court rejected the father's argument, finding that the father was the one who abandoned his son, not the other way around. The father, the court ruled, caused the breakdown between the two when he reacted to his son's coming out as he did. As such, the father could not claim that the son abandoned him or effectively released him of his obligations under the divorce agreement.¹⁶⁶

Arguably, these cases are not about assimilation demands but are about abuse. After all, none employ the assimilation demand vocabulary and only few speak of identity. However, the fact that the abuse targeted the children's sexuality both as the reason for the abuse and as the shape the abuse took demonstrates that the abuse was motivated by animus for the

¹⁶⁴ As of 2006, 20-40% of American homeless youth identify as LGBT. *Statistics*, YOUTH PRIDE INC., <http://www.youthprideri.org/Resources/Statistics/tabid/227/Default.aspx> (last visited Nov. 21, 2011). The number changes across locations. Bigger cities like New York and Los Angeles have larger numbers of homeless youth, estimated at almost 40%. *Id.* 26% of homeless LGBT youth point out to family rejection as reason for their homelessness. *Id.*

¹⁶⁵ *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (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. The father relied on the son's rejection as reason to escape support obligations. The court ruled that because the father's remarks made him a threat to his son's emotional wellbeing 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.

¹⁶⁶ *Dzierson*, *Id.* at 780.

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children's actual or perceived sexuality. These courts see how detrimental the effects of this animus can be to the wellbeing and emotional health of the children 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 that would 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 family's ability to accept the child's sexuality 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 assimilation demands from parents 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 as a form of emotional abuse. 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 in the instances where it 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 inadequacy of services provided to parents. I am also skeptical of how helpful a tenuous framework as emotional abuse can be in advancing strong protections for vulnerable children.

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Not all states recognize emotional abuse as a form of child abuse.¹⁶⁷ States that do, 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.¹⁶⁸ More specific statutes enumerate particular mental health outcomes, including anxiety or depression.¹⁶⁹ Both actual emotional injury and prospective emotional injury may lead to a finding of emotional abuse.¹⁷⁰ A parent's harmful behavior could be physical or sexual abuse, or neglect that inflicts psychological wounds,¹⁷¹ but also could be strictly emotional: constant screaming, derogatory or foul name-calling, belittling, or ignoring the child.¹⁷² The outcomes of emotional abuse cases range from family counseling to child removal.¹⁷³

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.¹⁷⁴ For example, in *People v. D.A.K.*¹⁷⁵ the Colorado Supreme Court expanded the statutory definition of "abuse" to include emotional harm to the child. The mother had refused to bathe or feed her child, told a nurse and social worker that she was afraid of the child and wanted to release him for adoption.¹⁷⁶ Though this case could have been adjudicated as a neglect case, the court found it to be one of emotional abuse, ruling that the general term "abuse" must be "liberally construed" to encompass emotional injuries to the child. Limiting the

¹⁶⁷ MARTIN GUGGENHEIM ET AL., *THE RIGHTS OF FAMILIES* 106 (1996).

¹⁶⁸ Sana Loue, *Redefining The Emotional And Psychological Abuse And Maltreatment of Children*, 27 J. LEGAL MED. 311, 314 (2005); ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* (2012) (emphasizing the causal connection between the parent's conduct and the child's emotional harm.)

¹⁶⁹ HARALAMBIE, *supra* note 168.

¹⁷⁰ Rebecca E. Hatch, *Cause of Action for Termination of Parental Rights Based on Abuse or Neglect*, 53 CAUSES OF ACTION 2D 523 at § 6 (2012).

¹⁷¹ *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.")

¹⁷² DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* (2012).

¹⁷³ HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES supra* note 168.

¹⁷⁴ State ex rel. J.R., 257 P.3d 1043, 1044 (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.'")

¹⁷⁵ *People v. D.A.K.*, 596 P.2d 747 (1979).

¹⁷⁶ *D.A.K.*, 748.

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definition to physical harm alone would hinder the legislative's goal in securing the wellbeing of children.¹⁷⁷ In contrast, the Missouri Supreme Court was careful to explain that not every inappropriate parental conduct (in this case, placing children in multiple consecutive adoptions, probably for financial benefit)¹⁷⁸ will sufficiently harm children to meet the high standards of abuse or neglect. These high bars are in place to protect the fundamental liberty interest parents have in raising their children. Bad parenting, therefore, does not extinguish parental rights.¹⁷⁹

Arguably, the line-drawing problem between parental rights and children's interest plagues general abuse law¹⁸⁰ and is not specific to emotional abuse cases. 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.¹⁸¹ Second, and related, because of the expansive liberties afforded parents, social services and law enforcement hesitate to intervene in pure emotional abuse cases.¹⁸² 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, 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.¹⁸³

¹⁷⁷ D.A.K., 750 (“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 a child’s body, but not of the integrity of [her] mind, personality, and spirit.”).

¹⁷⁸ *In re K.A.W.*, 133 S.W.3d 1 (2004); *In re P.C.*, 62 S.W.3d 600 (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.)

¹⁷⁹ *K.A.W.*, at 12.

¹⁸⁰ DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 105 (2002).

¹⁸¹ GUGGENHEIM ET AL., *RIGHTS OF FAMILIES* *supra* note 167, at 107 (1996). 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, Kramer,

¹⁸² Loue *supra* note 168, at 323.

¹⁸³ *Id.* at 322-23; Haralambie *supra* note 168. Indeed, a Westlaw search of emotional abuse cases conducted for the purpose of this project produced 34 cases, of which at least 25 included some component of physical or sexual abuse. At least 1 other case did not find that any abuse had occurred.

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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. Assimilation demands that find their way into litigation as emotional abuse cases that do not involve physical abuse or neglect (failing to financially support a child because of her sexuality) would likely not resolve in intervention protecting the child. Even were independent emotional abuse claims 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 out a message that the legal system condones parents’ homophobia and transphobia, so 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 acceptance and stronger rights protections for sexual minorities, should consider harmful parental homophobia and transphobia unacceptable, even when it does 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.¹⁸⁴ However, in recognition of the limits of abuse law (and primarily those of emotional abuse law) it is advisable to develop a supplemental and intermediate framework as well. This intermediate framework – the Family in Need of Services (FINS) framework is the

¹⁸⁴ 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 (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.

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refinement of current legal tools, such as abuse/neglect law and CHINS, 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.¹⁸⁵ CHINS proceedings essentially rely on status offenses – behaviors that are subject to state intervention solely on the basis of 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 “incorrigible.” An incorrigible child is usually defined as a child who is habitually defiant toward her parents’ reasonable and lawful authority.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ 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, that the proceedings were meant to resolve,¹⁸⁹ remains.

In *L.A.M. v. State*, a 15 year-old girl appealed a lower court’s declaration that she was a child in need of supervision based on her truancy.¹⁹⁰ The Alaska Supreme Court rejected her appeal finding that she violated the lower courts’ decisions by continuing to miss school, claiming that were she an adult, such actions would be criminalized under contempt

¹⁸⁵ Nature and history of supervision proceedings, Callaghan's Family Court Law & Practice NY; 32 Mass. Prac., Criminal Law § 704 (3d ed.).

¹⁸⁶ *Id.*; additional requirements may be that the child has repeatedly run away from home, e.g. F.S.A. § 984.03.

¹⁸⁷ JAMES DWYER, FAMILY LAW: THEORETICAL, COMPARATIVE, AND SOCIAL SCIENCE PERSPECTIVES 444 (2012).

¹⁸⁸ 15A Ind. Prac., Family Law--Children In Need Of Services § 20:4 (2012-2013 ed.).

¹⁸⁹ Anne R. Mahoney, *PINS and Parents*, in Harris et al., Children, Parents, and the Law: Public and Private Authority in the Home, Schools, and Juvenile Courts 337 (3rd ed. 2012).

¹⁹⁰ *L.A.M. v. State*, 547 P.2d 827 (Alaska 1976), as excerpted in WALTER WADLINGTON & RAYMOND C. O'BRIEN, DOMESTIC RELATIONS: CASES AND MATERIALS 876 (6th ed. 2007).

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of court proceedings.¹⁹¹ 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.¹⁹² CHINS is a framework that is concerned primarily with the parental rights paradigm.¹⁹³ It is decisively not designed to consider the child’s best interest, particularly her identity, self-determination or autonomy interests. Nowhere in the opinion does the court consider the child’s emotional wellbeing, 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.¹⁹⁴ This statement reveals the court’s real priority in rehabilitating children – preserving parental rights.

CHINS proceedings then place blame on the child and her behavior, and assumes (because of 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, protest parents’ unlawful control? *Matter of Andrew R.*, who resisted his parents’ efforts to involuntarily return him to foster care,¹⁹⁵ helps illuminate these questions. Andrew’s parents placed him in residential care, where he remained for seven months without review.¹⁹⁶ 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.”¹⁹⁷ 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

¹⁹¹ *Id.* 878.

¹⁹² *Id.* 879.

¹⁹³ The L.A.M. court is so preoccupied with the parents’ perspective that it twice makes the point that “It is impossible to discuss severing this relationship without considering the *heartache and anguish of the parents...*” at 880, first paragraph at top and last full paragraph at bottom.

¹⁹⁴ *Id.* at 881.

¹⁹⁵ *Matter of Andrew*, 454 N.Y.S.2d 820 (Fam. Ct., 1982) as excerpted in Wadlington and O’Brien, *supra* note 190, at 883.

¹⁹⁶ *Id.* at 886.

¹⁹⁷ *Id.* at 885.

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opportunity to hold a hearing, Andrew's troubled behavior was the only meaningful avenue he had to fight his placement.¹⁹⁸

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, either she 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.¹⁹⁹

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.²⁰⁰ 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 be a result of stereotypes associating sexual minorities with illegal, immoral or otherwise socially undesirable conduct.²⁰¹ 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.

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

¹⁹⁸ *Id.* 886-87.

¹⁹⁹ *Andrew R.* 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.”)

²⁰⁰ 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].” Similarly, truancy by LGBT youth is a result of the discrimination and abuse LGBT students experience in schools. See GAY LESBIAN AND STRAIGHT EDUCATION NETWORK, 2009 NATIONAL SCHOOL CLIMATE SURVEY (2010), http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1675-2.pdf.

²⁰¹ See Rosky, *supra* note 18.

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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 another categorical exception where children's rights 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. This vocabulary 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 sexuality. Implementing this vocabulary in courts' analysis will develop a workable, reliable jurisprudence that emphasizes family cohesion and support for LGBT youth. This jurisprudence might ultimately include several suitable frameworks to address the problem. In this Article I propose one potential solution. I suggest new ways to resolve these family conflicts according to the assimilation demands/identity vocabulary, and accurately position these demands outside the contours of parental rights.

A. Distinguishing Assimilation Demands from Parental Rights

Courts generally understand that parental assimilation demands foreclose children's identity achievement and violate children's anticipatory rights.²⁰² However, courts have yet to articulate a coherent doctrinal method to flesh out when parents' conduct indeed constitutes assimilation demands that violate children's identity rights. Some courts focus on harm to children, but do not elaborate on what comprises 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 sexuality 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 parent's 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

²⁰² Feinberg *supra* note 135, 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).

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show that a child's identity interest²⁰³ was target for parents' heteronormative coercive requirement to change, conceal, mute or flaunt that identity, rather than merely exposing the child to other identity options. Once a party has demonstrated that the parents' 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 vs. 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 targets a child's unfavorable sexual identity and attempts to control or manipulate it in coercive ways. Perpetuating heterosexuality or gender and sex binaries is the impetus for such assimilation demands.²⁰⁴ The elements of this prong are that the parental action is coercive and goes beyond mere exposure to identity alternatives.

Exposure increases pluralism while coercion is inconsistent with the pluralistic goals of American society because it standardizes children. The Supreme Courts' concerns regarding the standardization of children²⁰⁵ are not fully alleviated unless children are free from the assimilation demands at home that standardize them to their parents. The 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 may cause them.²⁰⁶ 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.

²⁰³ Following Erikson's theory, identity interests would be those imperative to identity exploration or achievement: developing, pursuing or expressing a sexual identity.

²⁰⁴ Generally speaking, Yoshino and others are concerned with assimilation demands that perpetuate mainstream dominance over minority identity. Though assimilation demands may be objectionable regardless of the identities they promote by virtue of the identity foreclosure they impose on children, I – as 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., *Family Rejection Study*, *supra* note 54; RYAN ET AL., SUPPORTIVE FAMILIES, HEALTHY CHILDREN *supra* note 77; RAY, *supra* note 81; Himmelstein & Bruckner, *supra* note 88.

²⁰⁵ *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²⁰⁶ Lau, *Pluralism*, *supra* note 8, at 337.

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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,²⁰⁷ or participate in activities associated with that position.²⁰⁸ Coercion is also exclusionary, as it does not make space for different positions and considers only one as truthful or correct.²⁰⁹ On the other hand, exposure engages children in critical thinking and diverse views without coercing them into adopting or endorsing them.²¹⁰ In the family cases, some demands were coercive because of their violent and abusive nature which harshly penalized children for their sexual orientation or gender identity.²¹¹ Other parents imposed coercive demands by threatening the child with family separation.²¹² Some coerced the children into particular gender presentation that they could not resist by opting to present differently.²¹³

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. It might be helpful to think of most parental actions that exert pressure on

²⁰⁷ *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).

²⁰⁸ *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).

²⁰⁹ *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974).

²¹⁰ *Mozert*, 827 F.2d 1058, 1065-65, 1070.

²¹¹ *Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007); *In re C.O.*, No. B206425, 2008 WL 4670513 (Cal. Ct. App. Oct. 23, 2008); *In re Zion J.*, No. A111895, 2006 WL 2709831 (Cal. Ct. App. Sept. 22, 2006); *Landreneau v. Fruge*, 676 So. 2d 701 (La. Ct. App. 1996); *In re Matter of Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982); *In re Catherine W. v. Robert F.*, 455 N.Y.S.2d 519 (N.Y. Fam. Ct. 1982); *Duff's Petition for Appointment*, *supra* note 111; *Duff, I Was A Teenage Test Case*, *supra* note 111.

²¹² *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008); *Morales*, 507 F.3d 651; *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (N.Y. Fam. Ct. 1997); *In re Lori M.*, 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985); *Duff's Petition for Appointment*, *supra* note 111; *Duff, I Was A Teenage Test Case*, *supra* note 111.

²¹³ In *Buxton*, the mother painted the son's nails and covered it with super glue, thus preventing the removal of the nail polish. *Buxton v. Storm*, 238 P.3d 30 (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 App. LEXIS 1282 (Ohio Ct. App. Mar. 23, 2007); *see also*, *Shrader v. Spain*, No. 05-95-01649-CV, 1998 WL 40632 (Tex. App. Feb. 4, 1998) (including a recommendation from the child's therapist that he spend more time with the father to enhance his masculine gender identity).

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children as not meaningfully coercive, that is that 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 the child with a choice only between compliance and extreme consequences that demand is effectively coercive. Thus the gay son in *Dzierson*,²¹⁴ 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 and try to somehow finance his education on his own. 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 protected 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. These factors may include the demand's impact on the child's short term and long term emotional and physical health, her performance at school and relationships with peers, and any substance abuse or other risky behavior.²¹⁵ These factors are not all necessary for a showing of harm. Instead, similarly to the best interest of the child test, courts may weigh each factor separately, or in combination with the other factors, would be sufficient to meet the required standard of harm.

Several decisions highlight harms that children experience. In *Shane T.*,²¹⁶ for example, the court is quite concerned with the emotional hardship and confusion Shane's father caused him.²¹⁷ Shane's father abused him

²¹⁴ *Dzierson*, 661 N.Y.S.2d 779.

²¹⁵ See part I.A.-B.

²¹⁶ *In re Matter of Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982).

²¹⁷ *Id.* at 593.

verbally, yet Shane's psychological wellbeing became the focal point of the decision and the material set of facts that led the court to intervene on his behalf. 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.²¹⁸ Coercive demands cause identity foreclosure harms. Parents' heteronormative infringements on identity interests are a form of rejection that weaken attachments and create a risk of family disengagement. Because issues of sexuality 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.²¹⁹ It is important that any framework that guides dispute resolution attempts to preserve or rehabilitate these attachments.

3. Identity Foreclosure Harms

Coercion is inconsistent with children's identity interests because it leads to identity foreclosure.²²⁰ Conversely, exposure is a way to increase the number of identity possibilities children have and thus is a way to preserve future identity developments, pursuits or expressions. 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 Joel Feinberg's idea of an open future for children, at least in principle, if not in practice. According to the open future concept, parents hold children's rights in trust, and should be obligated to "save" them until the children are able to fully enjoy those rights as adults.²²¹ Because assimilation demands burden children's identity interests by coercing children to convert, pass or cover their sexuality, such parental conduct limits children's opportunity for independent identity pursuit. Identity foreclosure violates the child's rights in trust and denies her future options regarding her sexuality.²²² According to Feinberg, in conflicts regarding children's rights, the options that privilege the child's open future by keeping as many possible choices available to her when she is able to make her own decisions should

²¹⁸ Duff's Petition for Appointment, *supra* note 111.

²¹⁹ Allen et al., *Peer Influences*, *supra* note 61, at 458.

²²⁰ See ERIKSON, CHILDHOOD AND SOCIETY *supra* note 45 and accompanying text.

²²¹ Feinberg, *supra* note 135, at 127.

²²² *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.").

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prevail.²²³

When a child's options are limited, her identity interests are foreclosed and her emotional wellbeing is at risk. The inability to experiment with different identities and social roles causes cognitive difficulties, hampers social ties, and prevents identity stability.²²⁴ 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."²²⁵

Based on Erikson and Fienberg's work, as well as the case law,²²⁶ 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 prohibit parents from imposing them when they cause such harm as inability to perform at school or at work, rebellious behavior, social maladjustment, or depression.

a. Weakened Attachments and Disengagement Harms

The distinction 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 the assimilation demands undermine the child's attachment with family members or their engagement as a healthy, constructive social unit, and might result in family separation or in disengagement between parents

²²³ *Id.* at 132-33.

²²⁴ ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 42, at 131-32; PATTERSON, *supra* note 8, at 544.

²²⁵ ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 42, 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) a range of harms may result for that teen. *Id.*

²²⁶ 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. This was an extreme burden because it was constant and all encompassing. 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. These assimilation demands meant that the child's feminine identity would be entirely foreclosed. The child could no use feminine names or pronouns, express a feminine gender identity through clothing or other conduct or consider pursuing medical intervention to transition physically. The child was depressed and confused about gender and potentially suicidal.

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and children, then the assimilation demands are harmful.

Arguably, family disengagement might allow parents and child to conduct their lives separately without the child having to conform to the parents' assimilation demands. Conduct that is likely to cause the family disengagement is a harmful assimilation demand because it exposes powerless family members, i.e. children, to the risks of weakened attachments. Children and youth, who have been rejected by their families, could experience disengagement as a heightened pressure to create or sustain engagement by way of succumbing to their parents' assimilation demands. Thus in the unique context of the family, disengagement pluralism²²⁷ is not meaningful pluralism. Since it examines the family's likelihood of disengaging because of assimilation demands the identity/assimilation test 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.²²⁸ 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 sexuality are far more likely than youth who have not experienced such rejection to exhibit higher rates of suicide, depression, substance abuse and unprotected sexual practices.²²⁹ Similarly, Allen and his colleagues found that weakened attachments lead to teenage delinquency, drug use, depression, anxiety, unsafe sexual practices and poor academic achievement.²³⁰ Studies also found that insecure family relationships undermine one's ability to achieve either intimacy or autonomy within relationships.²³¹ Considering these findings, it is not surprising that family rejection and broken attachment bonds lead to such destructive outcomes for LGBT youth.²³²

Many of the cases included in this Article illustrate that parents' assimilation demands cause family disengagement. In cases where a

²²⁷ See Douglas NeJaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 348 (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. In families, this would be similar to family separation intended to allow family members to retreat without imposing assimilation on each other.

²²⁸ Allen et al., *Adolescent Problem Behavior*, *supra* note 67, at 458.

²²⁹ Ryan et al., *Family Rejection Study*, *supra* note 54, at 350 tbl.4.

²³⁰ *Id.* at 425-26; Allen et al., *Adolescent Problem Behavior*, *supra* note 56, at 456.

²³¹ Allen et al., *Conflicts in Families*, *supra* note 67, at 426.

²³² See Ryan et al., *Family Rejection Study*, *supra* note 54 and accompanying text.

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parent's conduct was abusive, like in *In re Zion J.*,²³³ *In re Shane T.*²³⁴ or *In re C.O.*,²³⁵ the assimilation demands were so overtly egregious that they brought on family separation as a matter of law. 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*²³⁶ and *Catherine W.*,²³⁷ the fathers discontinued their relationships with their gay sons and used the litigation as a way to end their financial obligations toward their children, citing their sons' sexual orientation as cause for the relationships' dissolution. In *Lori M.*²³⁸ and Lyn Duff's case,²³⁹ 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. Lyn's mother placed her in a residential education setting, which Lyn escaped. Lyn eventually petitioned to be placed in the guardianship of a lesbian couple in order to terminate her mother's custody rights. In the custody disputes of *Smith*²⁴⁰ and *Shrader*,²⁴¹ a parent tried to convert the child's gender nonconformity by restricting the child's interaction with the opposite-sex parent. Because the parents and *Smith* and *Shrader* imposed assimilation

²³³ *In re Zion J.*, No. A111895, 2006 WL 2709831 (Cal. Ct. App. Sept. 22, 2006). 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.*

²³⁴ *In re Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982) (holding that father's verbal abuse intended to "cure girly behavior" was not within parental rights and constituted abuse).

²³⁵ *In re C.O.*, No. B206425, 2008 WL 4670513 (Cal. Ct. App. Oct. 23, 2008) (mother threatened to have a man rape her daughter to "cure" her same-sex orientation).

²³⁶ *Dzierson v. Dzierson*, 661 N.Y.S.2d 779 (N.Y. Fam. Ct. 1997).

²³⁷ *In re Catherine W. v. Robert F.*, 455 N.Y.S.2d 519 (N.Y. Fam. Ct. 1982).

²³⁸ *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).

²³⁹ Duff's Petition for Appointment, *supra* note 111 (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, *I Was A Teenage Test Case*, *supra* note 111.

²⁴⁰ *Smith v. Smith*, No. 05 JE 42, 2007 Ohio App. LEXIS 1282 (Ohio 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).

²⁴¹ *Shrader v. Spain*, No. 05-95-01649-CV, 1998 WL 40632 (Tex. App. Feb. 4, 1998). Father followed therapist's recommendation to limit child's contact with mother as a way to strengthen MTF child's masculine gender identity. The court assigned custody to father based on therapist's recommendation. *Id.*

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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.²⁴² It also strongly indicates potential harms to children's emotional wellbeing, physical health and social function. Assimilation demands that cause family separation then should be considered harmful to children and should not be permitted as within parental rights.

b. Harms to Child's General Wellbeing

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. The court in *Buxton*²⁴³ 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 so 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. The therapist further cautioned that the child might experience gender confusion or that his relationship with the father might continue to suffer. The derogatory name-calling by the fathers in *Shane T.*²⁴⁴ and in *Catherine W.*²⁴⁵ affected the two boys' emotional health, as they caused them lower sense-of-self and 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*,²⁴⁶ and *Lori M.*,²⁴⁷ but also when a parent decides

²⁴² Rachmilovitz, *Achieving Due Process*, *supra* note 161, at 824-27.

²⁴³ *Buxton v. Storm*, 238 P.3d 30 (Or. Ct. App. 2010).

²⁴⁴ *In re Shane T.*, 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982).

²⁴⁵ *In re Catherine W. v. Robert F.*, 455 N.Y.S.2d 519 (N.Y. Fam. Ct. 1982).

²⁴⁶ *Duff's Petition for Appointment*, *supra* note 111 (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, I Was A Teenage Test Case*, *supra* note 111.

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to cut financial ties with the child, as was the situation in *Dzierson*.²⁴⁸ There, 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.

c. 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 this is an extreme intervention that carries grave consequences for children, as well as potential implications for parents' and children's rights,²⁴⁹ 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 impairment, or cause a substantial impairment to

²⁴⁷ *In re Lori M.*, 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985) (mother petitioned to declare bisexual daughter a child in need of supervision, which would have resulted in the daughter's removal into foster care). *See also* *Morales v. Keisler*, 507 F.3d 651 (8th Cir. 2007). The immigration court decided not to deport a gay son who escaped physical abuse at home and came to the United States undocumented. The court found family abuse because of sexual orientation to constitute persecution under immigration law; *Bromfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008) (deciding a deportation case of a gay son who came to the United States undocumented after his father disowned him because of his sexual orientation).

²⁴⁸ *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. 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. The court found that son's abandonment was a consequence of the father's rejection of his son because of son's sexual orientation. *Id.*

²⁴⁹ *See generally* Rachmilovitz, *Achieving Due Process*, *supra* note 161 (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).

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intellectual or psychological functions.²⁵⁰

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.²⁵¹ Thus, harm is established when parents’ acts jeopardize the child’s mental or physical wellbeing.²⁵² In custody disputes involving third parties’ challenges to parental rights, the standard is intermediate – again, as a way to protect parents’ fundamental rights. This standard tends to require clear and convincing evidence that the parent is not acting in the child’s best interest.²⁵³

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 constitute 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. 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.

Courts’ incoherence around children’s identity rights and the limits of parents’ assimilation demands coupled with inadequate remedies leave 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. These systems are unable to repair family relationships, or

²⁵⁰ Gary B. Melton, *Toward “Personhood” for Adolescents: Autonomy and Privacy as Values in Public Policy*, in MARTIN R. GARDNER & ANNE PROFFITT DUPRE, CHILDREN AND THE LAW: CASES AND MATERIALS 4 206-09 (2d ed. 2006).

²⁵¹ *In re Marriage of Hadeen*, 619 P.2d 374 (Wash. Ct. App. 1980).

²⁵² *In re Marriage of Jensen-Branch*, 899 P.2d 803 (Wash. Ct. App. 1995).

²⁵³ 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).

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to 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. 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 they fail. 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. 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 generally limited to abuse and neglect cases. As such, they are unhelpful to LGBT 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.²⁵⁴ It appears that the court would want Lori's mother to learn to accept Lori's sexuality 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."²⁵⁵ 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. 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,

²⁵⁴ *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.").

²⁵⁵ *Id.*

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and a court found the parents' 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 transfer into abuse/neglect case. Only then should courts consider removal, and still – 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 the type of litigation (i.e. abuse or neglect cases) that takes place. Therefore, the contribution of extending intervention is in exploring compromise and assistance at parents' or children's request, social services professionals' recommendation or at 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 Huntington²⁵⁶ 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.²⁵⁷ Similarly, the non-interventionist position that the state normally takes toward family law hinders policies that might contribute to family repair.²⁵⁸ 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 [family] members in light of individual needs while still allowing for the tremendous pluralism that marks family life in a diverse society.”²⁵⁹ To do so, Huntington proposes family law become less adversarial and incorporate alternative dispute resolution methods such as mediation, collaborative law, and family group conferencing.²⁶⁰ 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

²⁵⁶ Clare Huntington, *Happy Families? Translating Positive Psychology Into Family Law*, 16 VA. J. SOC. POL'Y & L. 385, 393-94 (2009).

²⁵⁷ *Id.* at 393.

²⁵⁸ *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.”).

²⁵⁹ *Id.* at 395.

²⁶⁰ *Id.* at 406.

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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 PFLAG.²⁶¹

1. Mediation

LGBT youth and their parents could benefit from a system of litigation alternatives. There are a variety of professionals that children and families could come across who can help mitigate crises in families.²⁶² But perhaps Huntington's suggestions best comes to life through establishing court ordered mediation. In mediation, parties resolve their conflict with the help of a neutral third party who facilitates better understanding of each other's positions, identifying mutual perspectives and discover potential solutions.²⁶³ The mediator has no authority to impose a solution on the parties.²⁶⁴ 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.²⁶⁵ 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.²⁶⁶ The increase of mediation in these areas is designed to motivate better decision making for children,²⁶⁷ and better account for children's needs, interests and perspectives in family dispute resolution.²⁶⁸

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

²⁶¹ Parents, Families and Friends of Lesbians and Gays:
<http://community.pflag.org/Page.aspx?pid=194&srcid=-2>

²⁶² 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 paper.

²⁶³ ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 914 (3rd ed., 2012).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Carrie Menkel-Meadow, *MEDIATION: PRACTICE, POLICY, AND ETHICS* 98 (2006).

²⁶⁷ 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).

²⁶⁸ Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Dispute: 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.")

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continued to litigate custody disputes.²⁶⁹ In a 12-year follow-up, co-parenting conflict decreased for mediation families and increased in litigation families.²⁷⁰ The study concluded that mediation improves relationships in families as well as protects them from the harmful effect of litigation because mediation is non-adversarial,²⁷¹ and because it is cost and time efficient.²⁷² The decreased cost the mediation requires compared to litigation should make it an appealing form of state intervention.²⁷³ Mediation may also be conducive to children's mental health. Anger in children is linked, among others, to behavioral problems, poor academic achievement, depression, strained relationships with parents.²⁷⁴ Because mediation helps participants work through their anger, it is an important mechanism to potentially prevent the outcomes associated with anger. Indeed, perceived control over decisions can help improve mental health,²⁷⁵ and perhaps facilitate better autonomy development in children.²⁷⁶

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 concern is to guarantee that children do not become burdened with adult decision-making,²⁷⁷ or are asked to favor one parent over the other. But excessive caution with 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.²⁷⁸ Instead, mediators could solicit children's opinions and help them express their feelings about the conflict, and leave them out of the

²⁶⁹ David A. Sbarra and Robert E. Emery, *Deeper Into Divorce: Using Actor-Partner Analyses to Explore Systemic Differences in Coparenting Conflict Following Custody Dispute Resolution*, 22(1) J. FAM. PSYCH. 144 (2008).

²⁷⁰ *Id.* at 150.

²⁷¹ *Id.*

²⁷² Kelly, *supra* note 268, at 138.

²⁷³ On developing alternatives that rely on social services, but are cost-effective compared to litigation, see Rachmilovitz, *Achieving Due Process*, *supra* note 161, 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 180, at 134-35.

²⁷⁴ Solangel Maldonado, *Taking Account of Children's Emotions: Anger and Forgiveness in "Renegotiated Families"*, 16 VA. J. SOC. POL'Y & L. 443, 445 (2009).

²⁷⁵ Kelly, *supra* note 268, at 149.

²⁷⁶ See ERIKSON, CHILDHOOD AND SOCIETY *supra* note 45, at 249-53.

²⁷⁷ 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 (2002).

²⁷⁸ Kelly, *supra* note 268, at 148.

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negotiating meetings.²⁷⁹ While 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 traces 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.²⁸⁰ But, as in domestic violence cases, safeguards can be developed to counter these concerns.²⁸¹ One such safeguard can be selecting a mediator trained to understand the imbalanced dynamics between parents and children, is familiar with the development of autonomy and agency in children and youth, and (perhaps most importantly) is 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 perspective with respect, which validates children’s thinking, needs, and feelings.²⁸² The process softens the conflict and fosters productive communication.²⁸³ Indeed, mediation has been found to be particularly advantageous when parents and children’s views are polarized,²⁸⁴ thus preventing disengagement even in the most extreme of family conflicts. Mediation brings Douglas’ *Yoder* dissent to life because it gives children a voice and signals that their identities and interests are valued.

C. Potential Challenges to FINS:

Despite the recognition of children’s identity rights and the potential risk assimilation demands pose to children’s wellbeing, advocating increased protections to children’s identities might elicit concerns. In this Part, I contend with three possible counterarguments to the interventions I propose in this Article.

²⁷⁹ Maldonado, *supra* note 274, at 457.

²⁸⁰ Bartlett, *supra* note 267, at 13.

²⁸¹ Bartlett, *supra* note 267, at 14.

²⁸² Kelly, *supra* note 268, at 151.

²⁸³ *Id.* at 159.

²⁸⁴ *Id.* at 160.

1. Which Identity To Protect

As a natural progression of this Article's focus on children's sexuality, 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 inter-racial or inter-faith families, children who convert to religious faiths that differ from their parents', children with disabilities (or vice versa),²⁸⁵ or children adopted into families of a different racial or ethnic background.²⁸⁶ 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? Would a child whose parents are pressuring her to play sports over music have a claim?²⁸⁷ 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.²⁸⁸ This is a good point of departure, but it is limited because 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.²⁸⁹

²⁸⁵ Jenny L. Singleton and Matthew D. Tittle, *Deaf Parents and Their Hearing Children*, 5 J. DEAF STUD. DEAF EDUC. 221 (2000).

²⁸⁶ Kim Pearson, *Legal Solutions for API Transracial Adoptees*, (forthcoming 2013, on file with author).

²⁸⁷ 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 below regarding the constitutional framework of identity protection, or the socio-psychological theories on identity formation and identity salience. See *infra* notes 278-280, and accompanying text.

²⁸⁸ *Statewide Employment Laws and Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/employment_laws_062013.pdf (last visited July 9, 2013); *Statewide School Anti-Bullying Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/school_anti-bullying_laws_062013.pdf (last visited July 9, 2013); *Statewide School Non-Discrimination Laws & Policies*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/school_non-discrimination_laws_062013.pdf (last visited July 9, 2013).

²⁸⁹ 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

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Psychology's identity theories fill in that gap and suggest flexibility in identity protection. Utilizing identity theory, Lau recommends two limits on the identities that the law should protect from assimilation demands.²⁹⁰ First, he advocates for protecting identities that are a result of the development process Erikson envisioned: through exploration and ultimately commitment to ideas, values and goal associated with a social category. The other limit is that the identity is salient to that person's sense-of-self, as society constructs certain identities as more vulnerable yet more significant to one's identity.²⁹¹

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.

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. Like in cases of abuse and neglect, interventions to protect children from assimilation demands require a comprehensive, multi-leveled solution. For instance, school administrators

associated with their gender identity rather than their birth-assigned sex, *Doe v. Yunits* 2000 WL 33162199 (Mass. Super. 2000). However, trans identity is not protected from marriage inequality. *See Littleton v. Prange*, 9 S.W.3d 223 (1999).

²⁹⁰ Lau, *Pluralism*, *supra* note 8, at 331.

²⁹¹ 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.

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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 schools are not supportive of LGBT youth, but if they were to improve they can 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 when "outing"²⁹² 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 and must have a compelling state interest warranting the disclosure.²⁹³

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 project aims to inspire this conversation.

3. "Bad Parenting" Claims

Advocates of the parental rights paradigm may also be concerned that this Article lays a path to judicial oversight on 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*,²⁹⁴ 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. After their divorce, the mother and father shared custody of their daughter, while the father had sole custody of their son. 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

²⁹² "Outing" is a third party's disclosure of one's sexual orientation or gender identity.

²⁹³ *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 legitimate 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.); *Sterling v. Borough of Minersville*, 232 F.3d 190 (3d Cir. 2000) (finding that a police man who threatened to tell a minor's grandfather that the minor was gay had no legitimate interest. The minor committed suicide because of the threat.).

²⁹⁴ *Miner v. Garrity*, No 1-10-3023, 2011 Ill. App. Unpub. LEXIS 2017 (Ill. App. Ct. Aug. 23, 2011).

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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.²⁹⁵ 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 fear for their safety, or that the mother's conduct was extreme and outrageous.²⁹⁶ The appeals 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 was extreme or outrageous. Prohibited parental conduct is that which is "so shocking."²⁹⁷

This Article demonstrates that assimilation demands are such "shocking" mistreatment that goes beyond "bad parenting." They constitute mistreatment that targets children'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,"²⁹⁸ 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,²⁹⁹ the workplace,³⁰⁰ schools,³⁰¹ and in racial communities.³⁰² This Article fills the

²⁹⁵ *Id.* at *2-8.

²⁹⁶ *Id.* at *14.

²⁹⁷ *Id.* at *25-27 (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.").

²⁹⁸ YOSHINO, *supra* note 13, 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 Devon Carbado & Mitu Gulati, Symposium, *Discrimination and Inequality Emerging Issues Working Identity*, 85 CORNELL L. REV. 1259 (2000).

²⁹⁹ See, e.g., Holning Lau, *Identity Scripts and Democratic Deliberation*, 94 MINN. L. REV. 897 (2010).

³⁰⁰ See, e.g., Tristin Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 370 (2009); Zachary Kramer, *After Work*, 95 CALIF. L. REV. 627 (2007).

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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, the Article introduces ways in which the legal and welfare systems can help families overcome these conflicts. I propose a new exception to parental rights – FINS – and a test for courts to apply in order to identify impermissible assimilation demands.

Though the 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 sexuality, this Article is a shift in the parental rights paradigm and a challenge to the assumption that parents do what is best for their children. Instead, this Article aspires to 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.

³⁰¹ See, e.g., Lau, *Pluralism*, *supra* note 8.

³⁰² See, e.g., Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809 (2007).