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## "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse

Karolyn Ann Hicks

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# "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse

## **Keywords**

Sexual Orientation, "Reparative" Therapy, Child Abuse, Reasonably Prudent Parent Standard, First Amendment

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# “REPARATIVE” THERAPY: WHETHER PARENTAL ATTEMPTS TO CHANGE A CHILD’S SEXUAL ORIENTATION CAN LEGALLY CONSTITUTE CHILD ABUSE

KAROLYN ANN HICKS\*

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## INTRODUCTION

The debate over whether gay, lesbian, bisexual, and transgender<sup>1</sup> people are born into their sexual orientation or nurtured into it has continued for almost a century.<sup>2</sup> The debate originally was confined to the medical community, but recently has shifted to the political sphere.<sup>3</sup> Gay rights activists argue that sexual orientation is either an immutable characteristic<sup>4</sup> or an exercise in free will, and that there

1. See Chai Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 238 n.1 (1996) (providing a commonly used definition of transgender). Feldblum defines transgender as “those who desire to change their gender, are in the process of changing their gender, or have completed the process of changing their gender.” *Id.* Although the term transgender deals primarily with gender identity and not sexual orientation, the term is included throughout this Comment because many transgender youths are perceived to be gay, lesbian, or bisexual because they do not fit the stereotypical characteristics of their gender. As a result, transgender youths are subjected to “reparative” therapy to “cure” their *perceived* sexual orientation.

2. See Jack Drescher, *I’m Your Handyman: A History of Reparative Therapies*, 36 J. HOMOSEXUALITY 19, 21 (1998) (tracing the nature (immutability-biological)/nurture (environment and choice) debate to Sigmund Freud’s writings on homosexuality, which spanned a 20 year period beginning in 1905). Drescher further explains that Freud’s position is often “opaque,” and that taken out of the historical context, Freud can be portrayed as “virulently anti-homosexual.” *See id.* When viewed in a historical context, as done by Drescher, however, Freud is portrayed as tolerant for his time toward homosexuals and more receptive to the “nature” side of the debate. *See id.*

3. *See id.* at 19, 21 (noting that the debate began as early as 1905, when some psychoanalytically-oriented practitioners such as Freud claimed that gay people were trapped in a juvenile state). The debate has since moved to anti-gay political movements, thus illustrating the permeability of the boundaries between clinical and political issues. *See id.* Drescher, however, notes that “Freud’s position on homosexuality cannot be understood in the language of the contemporary debate about homosexuality.” *Id.* at 22-23. “In fact, [Freud’s] original intent is sometimes obscured when his opinions are brought to bear on the modern controversy.” *Id.* at 23.

4. The immutability argument has been successful. *See, e.g.,* *Watkins v. United States Army*, 837 F.2d 1428, 1446 (9th Cir.) (holding that sexual orientation is an immutable characteristic for equal protection purposes), *amended by* 847 F.2d 1329 (9th Cir. 1988), *reh’g granted*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert denied*, 498 U.S. 957 (1990). The Ninth Circuit interpreted the Supreme Court’s historical use of the term “immutability” to determine whether a group constitutes a suspect class. *See id.* The Supreme Court has never intended *strict* immutability because no specific characteristic that defines the group generally is consistent among individual

need not be a consensus because all gay, lesbian, bisexual, and transgender citizens deserve equal rights in either instance.<sup>5</sup> Others, largely opponents to gay rights, argue that sexual orientation is immoral and chosen, not biological;<sup>6</sup> therefore, gay, lesbian, and bisexual people do not deserve the same legal protections that other "legitimate" minority groups enjoy.<sup>7</sup>

Recently this debate has taken on a new characteristic with the

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members of the group. *See Watkins*, 847 F.2d at 1347. For example, people can change their sex, aliens can become citizens, and light-skinned blacks can sometimes pass for whites. *See id.* Rather, the court concluded that a trait is immutable if changing it would require great difficulty. *See id.*

5. *See* URVASHI VAID, VIRTUAL EQUALITY 334 (1995) (outlining gay activists' assertion that homosexuality is innate, such as when they cite studies on the occurrence of homosexuality in identical and fraternal twins). Vaid also argues that this assertion radically limits the original reach of the political movement because, as history has shown, "the shelter of biology has never protected a people from persecution." *See id.*; *see also* Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994) (stating that the pro-gay legal argument should steer a middle ground between essentialism (biological immutability) and constructivism (choice and mutability), toward legal strategies that emphasize political dynamics and avoid being seduced into a debate over sexual identity and causation).

6. *See* John M. Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1054 (1994) (claiming that homosexuality is in manifest opposition to moral beliefs and teachings, and stating that homosexual conduct is evil). Furthermore, Finnis states that homosexuality is incompatible and counter to marriage, that Platonic-Aristotelian philosophy rejects homosexual acts as intrinsically unreasonable and unnatural, and that homosexual acts are similar to masturbation. *See id.* at 1062-63. He also asserts that homosexual acts (presumably referring to sodomy—an act not uniquely homosexual) are "unworthy of the human being and immoral." *See id.*

7. *See id.* at 1070 (asserting that communities have a fundamental interest in promoting heterosexual family lifestyles and discouraging gay lifestyles because homosexuality is detrimental to the properly functioning family unit, which is the foundation of the community). One anti-gay activist has been quoted as stating that:

Homosexuals were not born that way. They chose to be gay . . . and they could influence young people to choose to be homosexual as well. That was why they wanted gay rights protections, so they could work at playgrounds and public schools and recruit young people to their way of life. They were flagrant law breakers and now they want 'special privileges' of gay rights guarantees.

VAID, *supra* note 5, at 332 (quoting Anita Bryant); *see also* Peter LaBarbera, *Gay Youth Suicide: Myth is Used to Promote Homosexual Agenda*, Insight (Family Research Council, Washington, D.C.), Feb. 1994, at 8 (discussing homosexuality as a choice, not an immutable characteristic, in a newsletter that attempts to discredit gay teen suicide study). The newsletter states:

A significant body of evidence exists that a sizeable percentage of men and women experiment with homosexual acts in their youth but go on to lead normal, heterosexual lives. Such evidence is resisted by the gay lobby, which increasingly argues that one's homosexual 'identity' is fixed at birth or in one's very early years and cannot be changed.

*Id.* at 8 (emphasis omitted). LaBarbera criticizes state programs, which, in his estimation, push teenagers into homosexual lifestyles. *See id.* Massachusetts, for example, adopted pro-gay programs that help teenagers accept their homosexuality rather than promoting a heterosexual lifestyle. *See id.*

emergence of the “ex-gay” movement<sup>8</sup> and “reparative”<sup>9</sup> therapy. This new “ex-gay” movement advocates that gay, lesbian, and bisexual people can, and should, change their sexual orientation to that of heterosexuality through prayer, sound Christian psychological teachings, repentance, faith in Jesus Christ as Savior and Lord,<sup>10</sup> and therapy.<sup>11</sup> The “ex-gay” movement has its roots in and financial support from right-wing, Christian organizations.<sup>12</sup> Although some activists argue that this movement presents nothing more than the

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8. See John Leland & Mark Miller, *Can Gays ‘Convert’?*, NEWSWEEK, Aug. 17, 1998, at 47 (declaring July 13, 1998, as the date the “ex-gay” ministries were no longer the better-kept secret of the church because they began taking out full page ads in major newspapers, claiming, “we’ve changed, so can you”); see also Jon Barrett, *Hate the Sin, Kill the Sinner: The Lost Brother*, THE ADVOCATE, Nov. 24, 1998, at 26 (discussing how the “ex-gay” campaign has led to anti-gay rhetoric and an increase in hate crimes—ultimately leading to the brutal death of Matthew Shepard); Stuart Miller, *It Didn’t Work*, THE ADVOCATE, Nov. 24, 1998, at 43, 57 (discussing the author’s undercover investigation of “ex-gay” ministries). Miller makes it clear that the “ex-gay” movement truly is an emergence; there are now more than 160 Christian-based programs in 39 states and the District of Columbia aimed at “curing” homosexuals. See *id.* at 57.

9. The word “reparative” will remain in quotation marks throughout this Comment to make the point that it incorrectly presupposes that a gay, lesbian, bisexual, or transgender identity is one that needs to be repaired. Similarly, the word “ex-gay” will remain in quotes because whether someone can actually be converted to heterosexuality is highly debatable given the low success rate discussed below.

10. See Leland & Miller, *supra* note 8, at 50 (noting that one psychologist in the movement likened gays in “reparative” therapy to priests who have taken a vow of celibacy); see also Surina Khan, *Homosexual Healing*, BOSTON MAG., July 1998, at 24 (finding that the basic premise of the “ex-gay” movement is that people are not born homosexual because all people are made in the image of God, that God is heterosexual, that God does not make mistakes and therefore, it is impossible to be born gay; thus homosexuality must be a choice). Khan further explains that the “ex-gay” movement claims that to become a “whole person again,” gay persons must pray to God to become the persons they were before they succumbed to their homosexual feeling. He also claims that they must either become heterosexual or abstain from sexual activity. See *id.* Khan quotes a member of Exodus, an “ex-gay” ministry with 87 chapters in the United States and Canada, as saying that Exodus’ goal is “to proclaim that freedom from homosexuality is possible through the power of Jesus Christ,” and that “Exodus cites homosexual tendencies as one of the many disorders that has beset fallen humanity.” See *id.* at 27-28.

11. See Leland & Miller, *supra* note 8, at 49 (naming the National Association for Research and Therapy of Homosexuality (“NARTH”), headed by Joseph Nicolosi, as the psychologically based branch of the “ex-gay” movement). NARTH claims that homosexuality is a disorder that can and should be treated. See *id.*

12. See *Towards Hope and Healing for Homosexuals*, USA TODAY, July 15, 1998, at 4D (displaying “ex-gay” ads paid for by Christian organizations, including Alliance for Traditional Marriage-Hawaii, American Family Association, Christian Family Network, Christian Coalition, Concerned Women for America, Coral Ridge Ministries, Kerruso Ministries, Center for Reclaiming America, and Family Research Council); see also Leland & Miller, *supra* note 8, at 47 (noting that in the summer of 1998, Exodus International, a nondenominational Christian fellowship dedicated to converting homosexuals, in conjunction with groups such as the Christian Coalition, began taking out full-page ads in major newspapers to promote “reparative” therapy).

latest in right-wing politics,<sup>13</sup> neither the history<sup>14</sup> nor the individuals affected by the "ex-gay" movement should be ignored.<sup>15</sup>

For purposes of this Comment, the form of "reparative" therapy under examination is that type imposed by parents on their minor children in an attempt to change the child's perceived sexual orientation. To avoid any legal ambiguity that may be presented when adults consent to undergo this therapy, this Comment focuses on children, specifically those subjected to "reparative" therapy against their will.<sup>16</sup>

To ascertain whether a person's sexual orientation is even capable of being changed or repaired, this Comment begins with a brief exploration of whether gay, lesbian, bisexual, or transgender orientation comes from nature or nurture. Part I of this Comment looks at a sampling of the biological evidence that has been introduced over time, specifically within the past two decades, that links sexual orientation to biology. Part I then focuses on what opponents to these particular studies have argued to refute claims of biological connections. Although a claim that "reparative" therapy is a form of child abuse or neglect is strongest if sexual orientation is somehow biologically determined, this Part concludes that even if no

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13. See *Calculated Compassion: How the Ex-Gay Movement Serves the Right's Attack on Democracy*, NGLTF Newsletter (Political Research Associates & The Policy Institute of The National Gay and Lesbian Task Force, Washington, D.C.), Oct. 1998, at 1 [hereinafter *Calculated Compassion*] (claiming that the ad campaign by the Christian Right organizations represents a re-framing of the same old message that homosexuals do not deserve rights). See generally Jim Maynard, *Gays, Lesbians Live in Secrecy and Fear*, THE COMMERCIAL APPEAL, Jan. 31, 1999, at B5 (reporting that Janet Folger, the architect of the "ex-gay" campaign, told *The New York Times* that the purpose of the full page ads and the movement was "to strike at the assumption that homosexuality is an immutable trait"). The advertisements were also placed to advocate that gay people do not need protection under anti-discrimination laws because homosexuals can choose to abandon their minority status through conversion, whereas other minorities cannot. See *id.*

14. See Drescher, *supra* note 2, at 19 (discussing the evolution of the definition of "reparative" therapist, from medically concerned practitioners to anti-gay political activists); see also Leland & Miller, *supra* note 8, at 48 (reporting that for more than a century, the history of the "reparative" therapy movement involved drugs, electroshock, and testicular transplants). After the American Psychiatric and Psychological Associations voted in the 1970s to no longer recognize homosexuality as a disorder, however, most therapists abandoned sexual conversion practice. See *id.*

15. See *infra* notes 42-46 & 55-58 and accompanying text (discussing the psychological harm suffered by those who have been put through "reparative" therapy and specifically the psychological problems of gay, lesbian, bisexual, and transgender youths who are not in supportive environments).

16. This Comment is also an attempt to further the goal of queer theory by arguing that the inherent hetero/homo binary present in "reparative" therapy (i.e., that one must be either heterosexual or homosexual, preferably heterosexual) should be troubled, deconstructed, and eroded. See generally INSIDE/OUTSIDE 6 (Diana Fuss ed., 1991) (suggesting ways to disturb the hetero/homo binary and heterosexual hegemony without reinforcing them).

ample evidence supports such a claim, “reparative” therapy on children should still be considered abuse and neglect because of its damaging effects.

Part II defines the practices of “reparative” therapy and discusses both the methodology and results it entails, focusing on gay, lesbian, bisexual, and transgender youths. Part III analyzes case law and child abuse and neglect statutes, focusing specifically on the State of New York. This Part explores the New York state courts’ movement toward recognizing psychological harm as a form of child abuse that is as damaging as physical abuse and neglect. Part IV compares the methodology used in “reparative” therapy to child abuse and neglect cases in New York and concludes that “reparative” therapy on children constitutes child abuse. Part IV then argues that “reparative” therapy can, and should, be legislatively and judicially recognized as a form of child abuse and neglect. Part IV also anticipates that parents who seek to place their children in “reparative” therapy will raise two defenses to a charge of abuse: a First Amendment free exercise of religion claim and a Fourteenth Amendment liberty interest claim of parental autonomy in raising their children. This Part then weighs the state’s interest in raising psychologically sound and productive citizens, regardless of their sexual orientation, with parents’ rights to raise their children as they see fit.

This Comment concludes that although “reparative” therapy could be legislatively interpreted and judicially determined to constitute child abuse, the likelihood of such an act to protect gay, lesbian, bisexual and transgender children is unlikely. Finally, this Comment recommends that the judiciary interpret the child abuse statutes and case law to apply to “reparative” therapy to protect gay, lesbian, bisexual, and transgender youths from its damaging effects. This Comment also suggests a means through which the gay liberation movement can facilitate this legal extension.

#### I. THE NATURE V. NURTURE DEBATE ON SEXUAL ORIENTATION

The case for or against biological evidence of sexual orientation has at least two sides.<sup>17</sup> In 1991, scientist Simon LeVay found evidence of a biological origin for sexual orientation in the human brain.<sup>18</sup> LeVay discovered that the hypothalamus<sup>19</sup> of gay men was

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17. See *infra* notes 19-33.

18. See Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 *SCIENCE* 1034, 1035 (1991) (finding that homosexual males have smaller hypothalamus glands than heterosexual males and hypothesizing that



smaller than that of heterosexual men.<sup>20</sup> In addition, studies conducted on twins show that in identical male twins, fifty-two percent are both homosexual, whereas only twenty-two percent of male fraternal twins are both homosexual.<sup>21</sup> In non-biological families, this study found only an eleven percent correlation in *adopted* brothers, which is closest to that in the general population.<sup>22</sup> Similarly, a recent study found that heterosexual women tend to have index and ring fingers that are the same length whereas lesbians tend to have index fingers that are shorter than their ring fingers.<sup>23</sup> These studies represent strong support for the argument that homosexuality is determined genetically or biologically.<sup>24</sup>

To refute these conclusions, other scientists have questioned the very premise of these studies.<sup>25</sup> For example, geneticist Anne Fausto-Sterling pointed out that LeVay's study rested on the central assumption that sexual dimorphism exists in the human brain.<sup>26</sup> Fausto-Sterling claims that the dimorphism finding has not only been

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the difference in gland size controls sexual orientation); *see also* CHANDLER BURR, A SEPARATE CREATION: THE SEARCH FOR BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION 21 (1996) (outlining the scientific debate on sexual orientation and examining criticisms of recent studies, such as LeVay's, postulating that homosexuality is genetic).

19. *See* WEBSTER'S DICTIONARY 325 (3d ed. 1993) (defining hypothalamus as "a region of the brain that regulates visceral functions, as sleep cycles").

20. *See* LeVay, *supra* note 18, at 1036 (studying 41 brains during routine autopsies to measure the hypothalamus gland and discovering that the gland was smaller in individuals sexually attracted to men, both heterosexual females and homosexual men); *see also* BURR, *supra* note 18, at 21 (noting that LeVay's discovery sent shock waves through the scientific community).

21. *See* J. Michael Bailey & Richard Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES OF GEN. PSYCHIATRY 1089, 1090 (1991) (examining the instances of similar genetic traits in fraternal and identical twins and ultimately concluding that homosexuality is at least partially determined genetically). This study found that identical twins who share exactly the same genes are twice as likely to share homosexual traits and homosexual orientation as fraternal twins who only share half of their genes. *See id.* at 1094.

22. Consequently, the study determines the difference to be genetic, not environmental. *See id.*

23. *See A Clue To Sexual Orientation*, WASH. POST, Apr. 3, 2000, at A07 (summarizing a recent study on biological origins of sexual orientation).

24. *See* BURR, *supra* note 18, at 36 ("From all this evidence scientists have conclusively decided: homosexuality is biological.").

25. *See id.* at 36 (reporting that not all scientists are convinced that homosexuality is genetic and that some attack LeVay's methodology which, they claim, distorts his ultimate conclusion).

26. *See id.* at 42 (highlighting the disagreement between LeVay and Fausto-Sterling, a developmental geneticist, regarding their differing opinions on the origins of sexual orientation). Burr reports that Fausto-Sterling believes that merely because the hypothalamus gland is smaller in homosexual men and heterosexual women does not necessarily mean that the size of the actual gland is determinative of sexual orientation. *See id.* Fausto-Sterling also points out that assertions that the size of the hypothalamus gland determines one's sex drive have already been refuted. *See id.*

refuted, but that the doctrine is questionable because its roots are in the “well-known” theory that Caucasians are mentally superior to other races.<sup>27</sup> Similarly, others argue that the brain samples LeVay used were from men who had died of AIDS-related complications; therefore, the medication and the effects of the disease may have altered the body chemistry and consequently, the hypothalamus.<sup>28</sup> Furthermore, those who refuted the twin studies pointed out that the identical twins were raised in the same environment, and that they were often treated similarly, right down to the way they were dressed.<sup>29</sup> Accordingly, those who refute the biological side of the debate believe that the twin study provides as much support for the nurture side of the debate as it does for the nature side.<sup>30</sup>

With both sides of the debate strongly supported, it is impossible to make an impartial decision on whether gay, lesbian, bisexual, or transgender orientation is the product of nature or nurture.<sup>31</sup> Due to

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27. *See id.* Fausto-Sterling attacks LeVay’s study at its most basic assumption: that sexual orientation can be pinpointed to a particular part of the human brain. *See id.* As an example of how scientists can be fooled into believing sexuality is controlled by one particular part of the brain, Fausto-Sterling cites E.A. Spitzka’s 1908 study comparing the brains of eminent scientists with white and black laborers and concluding that great men (the scientists) had larger corpora callosas. *See id.* Burr also cites Evan Balaban, a Harvard biologist who rejected LeVay’s hypothalamus study because the dye used on the brain tissue was unreliable; it is known to fluctuate seasonally in studies done on particular types of birds. *See id.* at 37. Balaban also claims that it is hard to know exactly what one is observing when looking at a group of brain cells. *See id.* at 38. He further states that even if there is a difference in these particular cells, there is no indication that these cells control a person’s sexual orientation. *See id.*

28. *See id.* at 47 (noting Bill Byne’s rejection of LeVay’s methodology and pointing out that the environment was not controlled, and that those who were in the study were volunteers and not from random sampling, which is indicative of unreliable data). The Family Research Council, a right-wing think tank, often employs Bill Byne to refute any claims of biological origin for sexual orientation. *See id.* at 49. This fact further supports the argument of the permeability of the boundaries between politics and clinical issues. *See supra* note 3.

29. *See id.* at 47 (maintaining that the twin study has been interpreted to demonstrate that homosexuality is not purely genetic). Burr goes on to note that some argue that because twins are 100% genetically identical, their sexual orientation should be identical as well; yet only 50% had identical sexual orientation. *See id.*

30. *See id.* at 48 (“The studies are said to ‘prove’ something one way or another about homosexuality. And these comments reflect a common misconception of science: that science ‘proves’ things . . .”).

31. *See id.* at 50 (discussing the conflict between Bill Byne and Dr. Lauren Allen). Dr. Allen testified in the trial concerning Colorado’s Amendment 2 in *Romer v. Evans*, 882 P.2d 1335, 1346 (Colo. 1994), *aff’d*, 517 U.S. 620 (1996), in support of LeVay’s study; Bill Byne testified against the LeVay study. *See BURR, supra* note 18, at 50. The case as a whole is considered a victory by gay rights activists, but the court did not decide the nature/nurture debate. *See id.* *But see* *Watkins v. United States Army*, 837 F.2d 1428, 1446 (9th Cir.) (finding that sexual orientation *is* an immutable characteristic i.e., biological), *amended by* 847 F.2d 1329 (9th Cir. 1988), *reh’g granted*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

the difficulty of making this decision, this Comment does not take a position on the debate, but rather points out that regardless of the "correct" answer, "reparative" therapy is psychologically damaging and should not be administered on gay, lesbian, bisexual, and transgender people, and especially not on children.<sup>32</sup>

## II. "REPARATIVE" THERAPY: IS IT PSYCHOLOGICALLY DAMAGING TO GAY, LESBIAN, BISEXUAL, AND TRANSGENDER YOUTHS?

### A. *What is "Reparative" Therapy?*

"Reparative" therapy, a program of psychotherapy, attempts to "cure" homosexuals by turning them into heterosexuals.<sup>33</sup> Both the American Psychoanalytic Association and the American Psychiatric Association have expressed their opposition to "reparative" therapy.<sup>34</sup> At the 105th annual meeting in Chicago on August 14, 1997, the American Psychological Association announced:

[T]he APA opposes all portrayals of lesbian, gay and bisexual people as mentally ill and in need of treatment due to their sexual orientation and supports the dissemination of accurate information about sexual orientation, and mental health, and appropriate interventions in order to counteract bias that is based in ignorance and unfounded beliefs about sexual orientation.<sup>35</sup>

In addition, the APA maintains that scientific evidence does not

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32. See *infra* Part III (discussing the damaging effects of "reparative" therapy).

33. See Drescher, *supra* note 2, at 19, 20 (noting that "reparative" therapy is generally defined as "to change an individual's homosexual orientation to a heterosexual one," and attributing the coining of the term "reparative" therapy to Joseph Nicolosi from his book *REPARATIVE THERAPY OF THE MALE HOMOSEXUAL: A NEW CLINICAL APPROACH* (1991)); see also Leland & Miller, *supra* note 8, at 49 (asserting that Nicolosi is the foremost expert on "reparative" therapy).

34. See Barry Yeoman, *Gay No More?*, *PSYCHOL. TODAY*, Mar.-Apr. 1999, at 29 (indicating that in December 1998, the American Psychiatric Association's board unanimously voted to oppose "reparative" or conversion therapy). The American Psychiatric Association's decision was based on the belief that these therapies reinforce self-hatred and could lead to depression, addiction, and even suicide. See *id.* The American Psychoanalytic Association, which was once in favor of attempts to "cure" homosexuality, has distanced itself from endorsing "reparative" therapy, calling homosexuality a "variant of normal sexuality." *Id.* See generally John McCoy, *Workshop Canceled on Gay, Lesbian Youths: Mesquite Superintendent Halted Training for Middle School Counselors After Protests*, *DALLAS MORNING NEWS*, Feb. 21, 1999, at 35A (reporting that both the American Psychological Association ("APA") and the American Psychiatric Association have denounced "reparative" therapy as unethical and potentially harmful).

35. American Psychological Association Council of Representatives, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation* (last modified Aug. 14, 1997) <<http://www.apa.org/pi/sexual.html>> [hereinafter APA Resolution] (urging all mental health professionals to take the lead in removing the stigma of mental illness that has been associated with homosexuality).

show that “reparative” or conversion therapy works.<sup>36</sup>

The American Academy of Pediatrics believes that therapy “directed at specifically changing sexual orientation . . . can provoke guilt and anxiety while having little or no potential for achieving changes in orientation.”<sup>37</sup> Further, the president of the American Psychological Association’s Society for the Study of Lesbian, Gay, and Bisexual Issues stated: “Our concern is that a person, *especially a young person*, who enters into therapy to deal with issues of sexual orientation should be able to have the expectation that such therapy would take place in a professionally neutral environment absent any societal bias.”<sup>38</sup> Although mainstream medical communities continue to stress the negative consequences of “reparative” therapy, “ex-gay”

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36. See *APA Passes Resolution on Homosexuality Conversion Therapy (American Psychological Association) (Special Issue: Report from the 105th Annual Meeting of the American Psychological Association)*, BEHAVIORAL HEALTH TREATMENT, Sept. 1, 1997, at 5, available in 1999 WL 9955704 [hereinafter BEHAVIORAL HEALTH TREATMENT] (reporting on the APA’s denouncement of conversion therapy). The article further states:

Members agreed that conversion therapies have not been proven effective, and they prey on prejudice and ignorance about sexual orientation. Supporters of the resolution, approved by the APA’s Council of Representatives by an overwhelming margin, argued that it was critical for the APA to make such a statement due to questions of ethics, efficacy, and benefits of conversion therapy.

*Id.* But cf. Robert Knight, *Longtime Foe of Normalizing Homosexuality Shines in “A Freedom Too Far”* (visited Mar. 13, 1999) <<http://www.episcopalian.org/CCLEC/bookreview-socarides.htm>> (book review) (reviewing CHARLES SOCARIDES, *HOMOSEXUALITY: A FREEDOM TOO FAR* (1995)) (opposing what is seen as pro-gay activism leading to the APA’s denouncement of “reparative” therapy). Knight honors Charles Socarides by recounting the events that occurred in 1973 when the APA took homosexuality out of the Diagnostic and Statistical Manual of Mental Disorders (“DSM”). See *id.* Knight claims Socarides and a “small band of fellow therapists stood in the breach as homosexual activists made their bid to commandeer the APA.” *Id.* Knight further claims that Socarides’ group was armed with “truth, common sense, and decades of well-documented therapeutic research and clinical experience,” and the homosexual activists had no scientific backing, but prevailed based on “political savvy.” See *id.* Knight goes on to say that since 1973, homosexuals have taken over “the major professional psychiatric and psychological associations,” and, as a result, the “gay is good” philosophy permeates society in a “media-led campaign to force Americans to accept homosexuality as normal.” *Id.*

37. Kim I. Mills, *Mission Impossible: Why Reparative Therapy and Ex-Gay Ministries Fail* HRC Newsletter (Human Rights Campaign, Washington, D.C.), Aug. 1998, at 4 [hereinafter *Mission Impossible*] (citing a policy statement from the American Academy of Pediatrics entitled “Homosexuality and Adolescence,” published in the *JOURNAL OF PEDIATRICS* (Oct. 1993)). The study notes that although confusion about sexual orientation is not unusual during adolescence, and that counseling may be helpful to clarify sexual orientation, psychological problems in homosexual adolescents are primarily caused by societal stigma, hostility, hatred, and isolation. See *id.* These factors may help explain why homosexuals account for 30% of all adolescent suicides. See *id.*

38. BEHAVIORAL HEALTH TREATMENT, *supra* note 36, at 5 (emphasis added) (noting that no study can conclusively prove that “reparative” therapy works, however, because the therapy assumes homosexuality is a disorder; therefore, practitioners begin with an “unacceptable bias”).

ministries and certain psychologists continue to persuade clients that they need to change their sexual orientation.<sup>39</sup>

Those who have gone through "reparative" therapy and have been involved in "ex-gay" ministries speak of the medically unsound methods employed by these therapists and organizations, such as behavioral therapy, electrical shock therapy, chemical aversive therapy, drug and hormone therapy, surgery, and psychotherapy.<sup>40</sup> Other accounts are similar and include homophobic counseling, religious propaganda, isolation, unnecessary medication (including hormone treatment), subliminal therapies designed to inculcate "feminine" or "masculine" behavior, and "covert desensitization" therapies that teach a young person to associate homosexual feelings with disgusting images.<sup>41</sup> These forms of "treatment" frequently result in nervous breakdowns and feelings of guilt; some patients have witnessed others in their programs commit suicide and mutilate their genitals.<sup>42</sup> Many "reparative" therapy tactics are likely to cause mental breakdowns in otherwise healthy gay, lesbian, bisexual, and transgender persons.<sup>43</sup>

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39. See *infra* notes 40-53 (discussing methods used to convince clients to change their sexual orientation). See generally Khan, *supra* note 10, at 27 (discussing compelling speakers, like Joe Dallas, who promote "reparative" therapy as a way to return an individual to the person they originally were before homosexual feelings began).

40. See Rev. Laurene Lafontaine, *Understanding "Ex-Gay" Christian Ministries*, THE EQUALITY TIMES, at 3 (providing an overview and critique of the techniques used by the "ex-gay" ministries and "reparative" therapy from a Christian perspective). Lafontaine not only lists techniques used in "reparative" therapy, but states that they are not effective in changing sexual orientation. See *id.*; see also Bruce Mirken, *Setting Them Straight*, 10 PERCENT, June 1994, at 55 (reporting an account where a plethysmography, which uses electric sensors attached to a person's genitals to measure sexual arousal, was used, in conjunction with shock therapy, to electrically shock the "patient's" penis when he became sexually aroused by same-sex images). Mirken also discusses other victims' experiences at a residential treatment center for troubled adolescents, such as sedation, isolation, physical restraints, hypnosis, and "hold therapy," in which a girl was held down while staff members screamed at her until she admitted that she was hurting her family by being a lesbian. See *id.* at 56.

41. See *Project to Stop Mental Health Abuse of Lesbian, Gay, Bisexual, and Transgender Youth*, NCLR NEWSLETTER (National Center for Lesbian Rights, San Francisco, Cal.), May 1994, at 6.

42. See *Mission Impossible*, *supra* note 37, at 8 (discussing testimony from Michael Bussee, co-founder of Exodus, at the gathering "Ex-Gay Ministries Founders Recant," regarding how one member of his group slashed his genitals with a razor blade and poured Drano on his wounds as a result of the psychological abuse) (citation omitted); cf. Bill Schafer, *Is Reparative Therapy Murder?*, THE BUGLE, Aug. 1998, at 18 (reporting that the Community Counseling Center's Executive Director, Ron Lawrence, is looking for ex-"ex-gays" who have experienced some of these techniques and are strong enough to bring a law suit against "ex-gay" ministries). Lawrence claims that his clients who have been through "reparative" therapy exhibit symptoms of post-traumatic stress syndrome. See *id.*

43. See *Mission Impossible*, *supra* note 37, at 8-9 (determining that although a person's behavior can be changed, her sexual orientation will not be altered).

Kidnapping gay, lesbian, bisexual, and transgender youths and taking them to in-patient centers by transportation or escort services has emerged as another un-therapeutic “reparative” therapy technique.<sup>44</sup> Kidnapping can inflict profound trauma and emotional damage resulting in post-traumatic stress syndrome.<sup>45</sup> A number of cases that involved kidnappings have resulted in physical abuse, ranging from restraints and handcuffs that cause bruises to bloody beatings and hair pulling.<sup>46</sup>

Similarly, members of some groups have gone to gay and lesbian bars<sup>47</sup> to “recruit” unsuspecting victims.<sup>48</sup> Members of Exodus, one of the largest “ex-gay” groups, have led victims to believe that they were developing relationships while attempting, by use of emotional abuse and “ministering,” to convince the victim that he or she should

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*Compare supra* notes 40-41 and accompanying text (detailing the mentally unhealthy tactics; specifically, isolation, unnecessary medication, electric shock, and chemical aversion therapy), *with supra* notes 34-37 and accompanying text (stating a professional position on how psychiatrists and mental health professionals *should* counsel gay patients).

44. *See* Letter from Karen Jones-Mason, Director of Legal Services for Children, to Shannon Minter, Staff Attorney at National Center for Lesbian Rights (Feb. 6, 1998) (on file with the *American University Law Review*) [hereinafter Letter] (describing how Exodus’ escort service is unsafe and illustrating the psychological effect kidnapping has on children).

45. *See* Schafer, *supra* note 42, at 18 (discussing that some people who underwent reparative therapy suffer from post-traumatic stress syndrome); Letter, *supra* note 44 (asserting that the tactics employed by parents attempting to kidnap their own children to place them in behavior modification camps is nothing short of outrageous, resulting in emotional abuse of the youth; concluding that when children are kidnapped and sent to abusive camps, it is possible to criminally prosecute the parents). The letter reveals that to capture gay youth, kidnappers have resorted to such tactics as impersonating relatives and school officials and grabbing youths off the street. *See id.* Although these tactics are not uncommon in the child welfare system, the letter postulates that they should be treated as abuse when used to facilitate “reparative” therapy because treatment for homosexuality is neither medically sound nor accepted by the mainstream medical community; therefore, such kidnapping is not in the best interest of the child. *See id.*; *see also* APA Resolution, *supra* note 35 and accompanying text (explaining APA’s position on “reparative” therapy).

46. *See* Letter, *supra* note 44 (discussing kidnapping and behavior modification camps and stating that “a number [of] cases have arisen where children were handcuffed, beaten, pulled by the hair, bloodied, and emotionally battered by such kidnapping”). The author notes the case of one lesbian, Lynn Duff, who was sent to a camp to “cure” her of homosexuality. Duff was subjected to “multiple psychotropic drugs and subconscious conditioning to convince her that she was ‘sick.’” *See id.*

47. Although children will not be subjected to these methods of “conversion” because they are unlikely to be in bars, this section of the Comment is thoroughly examining methods used by the “ex-gay” ministries and “reparative” therapists.

48. *See* Shannon Turner & Surina Khan, *Saving Us From Sin*, CURVE, Nov. 1997, at 22 (describing how an Exodus member would recruit lesbians by going to lesbian bars or hangouts posing as a lesbian, flirting with women, exchanging phone numbers, and eventually having sex with women all in the name of getting close to lesbians to convert them to heterosexuality).

become heterosexual.<sup>49</sup> These tactics have left victims feeling paranoid and unable to trust anyone.<sup>50</sup> Some of the most subtle and almost comical tactics these groups employ include having the men play basketball and football, and having the women learn how to manicure their fingernails and wear makeup.<sup>51</sup> One of the most interesting tactics involves placing the two genders together in a "misogyny training course" and having the women apologize to the men for the feminist movement because it has "created so many unattractive women that, of course, gay men would turn away from them."<sup>52</sup>

*B. The Effects of "Reparative" Therapy on Gay, Lesbian, Bisexual, and Transgender Youths*

Attempting to convert gay, lesbian, bisexual, and transgender youths is even more dangerous than attempting to convert adults.<sup>53</sup> Gay, lesbian, bisexual, and transgender youths are more likely than adults to face tremendous social pressures to deny or reject their feelings, actions, and thoughts.<sup>54</sup> Likewise, gay, lesbian, bisexual, and transgender youths are more likely than their heterosexual

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49. *See id.* One woman recalled how her one-time "girlfriend," who was a member of Exodus, began the conversion process by making subtle homophobic comments such as "a man would really appreciate your body better than a woman could." *See id.* This escalated into Exodus attempting to bribe her into becoming heterosexual by offering her money and a better job and threatening to sabotage her career if she did not cooperate. *See id.* at 23. Exodus told her that she had no idea how well-connected Exodus was in her town (Topeka, Kansas) and that she would not be able to get a job if she did not become straight. *See id.*

50. *See id.* at 23 (recounting how a former victim of Exodus feared that the authors of the article, who were interviewing her for an article in a lesbian magazine, were simply posing as lesbians and were going to "use all this information and turn it against me somehow or use it in a Christian Coalition video or something").

51. *See* Lawrence Ferber, *When Art Imitates Life*, THE ADVOCATE, Nov. 24, 1998, at 63 (describing experiences of a gay actor and writer who went undercover as an "ex-gay" to research for a screenplay entitled *Save Me*).

52. *See id.*

53. *See* Thea Jourdan, *They believe this is love but what these men really need is a wife. Right?*, THE SCOTSMAN, Aug. 20, 1998, at 13, available in 1998 WL 16856104 (quoting interview with Dr. Barbara Hedge, a consultant clinical psychologist at London's St. Bartholomew's Hospital). Dr. Hedge believes that the "ex-gay" advertisements will make insecure homosexuals, who are already uncomfortable with their sexuality, especially young people, feel worse about themselves. Gay and lesbian youths "are vulnerable because they are just discovering they are gay. It takes time for them to adjust and accept who they are." *Id.*

54. *See* Mary Jane Rotheram-Borus & M. Isabel Fernandez, *Sexual Orientation and Development Challenges Experienced by Gay and Lesbian Youths*, 25 SUICIDE AND LIFE-THREATENING BEHAV. 26 (Supp. 1995) (finding that "coming out" is a developmental process, which is more difficult for youths, consisting of four stages: (1) recognizing one's self as lesbian or gay; (2) exploring sexual orientation by gaining information about the gay and lesbian community; (3) disclosing to others; and (4) accepting one's sexual orientation).

counterparts to feel isolated and withdrawn,<sup>55</sup> to be victims of assaults,<sup>56</sup> and to attempt suicide.<sup>57</sup> Despite the fragile mental state of gay, lesbian, and bisexual youths,<sup>58</sup> and the low success rate of this form of therapy,<sup>59</sup> “reparative” therapists and “ex-gay” ministries continue to claim that homosexuality is a mental illness that can, and should, be changed.<sup>60</sup> Rather than exploiting mentally vulnerable

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55. See Anthony R. D’Augelli, *Lesbian, Gay and Bisexual Development During Adolescence and Young Adulthood*, in TEXTBOOK OF HOMOSEXUALITY AND MENTAL HEALTH 267, 273 (R.P. Cabaj & T.S. Stein eds., 1996) (discussing a sense of “otherness” in gay, lesbian, and bisexual youths resulting from a societal message that homoerotic desires and gay, lesbian, and bisexual identity are legitimate targets for rejection and hate).

56. See *id.* at 275 (calculating results of various studies that show 59% of gay men and 21% of lesbians report victimization in high school, and 50% and 12%, respectively, report victimization in junior high school).

57. See *id.* at 279 (reporting one study’s finding that 59% of gay male youths had serious suicidal thoughts). See generally Gary Remafedi, *The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study*, 88 AM. J. PUB. HEALTH, 57-60 (1998) (finding that suicide attempts were reported in 28.1% of gay males and only 4.2% of heterosexual males, thereby drawing the conclusion that a strong correlation between sexual orientation and suicide exists). But see Peter Muehrer, *Suicide and Sexual Orientation: A Critical Summary of Recent Research and Directions for Future Research*, 25 SUICIDE AND LIFE-THREATENING BEHAV. 72 (Supp. 1995) (stating that because there is no national or statewide data on the frequency and causes of completed suicides, it is unknown whether gays and lesbians have a higher percentage); LaBarbera, *supra* note 7 (claiming that the higher percentage is a myth used by gay activists based on a “deeply flawed and pro-homosexual report by San Francisco homosexual activist Paul Gibson”).

58. See Anthony D’Augelli & Scott Hershberger, *Lesbian, Gay and Bisexual Youth in Community Settings: Personal Challenges and Mental Health Problems*, 21 AM. J. COMMUNITY PSYCHOL. 421, 443-44 (1993) (concluding that lesbian, gay and bisexual youths are at risk for psychological problems and that 60% reported being overwhelmed within the last year).

59. See Hanna Rosin, *Religious Movement is Claiming Success in Converting Gays*, PORTLAND OREGONIAN, Aug. 27, 1998, at A14 (reporting that only 3% of those who go through “reparative” therapy are mentally stable and have no homosexual fantasies); cf. Ralph Blair, *The Real Changes Taking Place*, OPEN HANDS, Fall 1986, at ¶ 24 (claiming that, as of 1986, most of the leaders of “ex-gay” ministries have never been homosexuals); Chris Bull, *Peddling The Cure*, THE ADVOCATE, Nov. 24, 1998, at 55 (describing a conversation with a counselor who said he had never been a homosexual but chose to work with homosexuals because, “he saw so many men dealing with the issues of male-to-male intimacy and masculinity”). These two articles suggest that, for the most part, it is heterosexuals who are, and have been for some time, leading the “reparative” therapy movement. See *id.* The “ex-gay” ministries claim a 30% success rate, but no long-term studies are available. See Leland & Miller, *supra* note 8, at 49. Leland & Miller go on to mention that the founders of Exodus, Gary Cooper and Michael Bussee, left the organization in 1979 because they fell in love and since then, thirteen Exodus ministries closed because their directors decided to return to homosexuality. See *id.*

60. See Rosin, *supra* note 59, at A14 (reporting that attempts to treat homosexuality range from counseling abstinence in homosexual activity to practicing exorcisms). Further, an early study shows a success rate of only 10%. See *id.* Nineteen of the original 30 patients, however, refused to participate in a follow-up study; eight of the 11 who did participate reported having “neurotic conflicts” about their sexual identity; only three reported having no homosexual fantasies. See *id.* See generally Miye A. Goishi, *Unlocking the Closet Door: Protecting Children From Involuntary*



youths, therapists should be working towards ending the stigma of mental illness that has for too long been associated with homosexuality.<sup>61</sup>

### III. WHAT CONSTITUTES CHILD ABUSE AND NEGLECT

#### A. *Child Abuse and Neglect Law*

##### 1. *History and developments*

Today, most states recognize mental and emotional abuse under child abuse and neglect statutes.<sup>62</sup> Historically, however, the law recognized only those claims that rested on physical injuries because mental and emotional distress claims were considered too speculative.<sup>63</sup> During the early part of the twentieth century, psychology came to be regarded as a science.<sup>64</sup> Consequentially, mental and emotional harms were recognized as compensable injuries at common law.<sup>65</sup> Eventually, recognition of emotional abuse

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*Civil Commitment Because of Their Sexual Orientation*, 48 HASTINGS L.J. 1137, 1154 (1997) (reviewing some of the major changes within the American Psychiatric Association's treatment of sexual orientation). Goishi notes that the American Psychiatric Association removed homosexuality from the list of mental illnesses in the DSM in 1973, thus deciding that homosexuality should not be considered a per se mental disorder. *See id.* at 1154-55. Further, the APA removed "Ego-Dystonic Homosexuality" in the revised DSM-III-R in 1987, eliminating all mental illness traditionally associated with gays, lesbians, and bisexuals. *See id.* Goishi also notes that transgender individuals, as well as lesbian, gay, and bisexual youths, can still be diagnosed as suffering from GID, which remains a mental illness today in the DSM-IV published in 1994. *See id.* at 1156.

61. *See APA Resolution, supra* note 35, at 2 (reporting that the APA "urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientation"); *see also* D'Augelli, *supra* note 55, at 283 (claiming that the appropriate method for mental health professionals to deal with gay, lesbian, bisexual, and transgender individuals is to help them overcome society's stigmas around their identity and to take the lead in developing affirmative services and support groups).

62. *See, e.g.*, ARK. CODE ANN. § 9-30-103(3) (Michie 1987) (recognizing mental injury in Arkansas' child abuse statute); D.C. CODE ANN. § 6-2101(13) (1995) (recognizing "mental injury" in the District of Columbia child abuse statute); IND. CODE ANN. § 31-34-1-2 (Michie 1997) (recognizing "endangerment of physical or mental health" as a form of child abuse); LA. CHILD. CODE art. 1103(5)(a) (West 1995 & Supp. 1999) (defining abuse, *inter alia*, as "infliction of physical or mental injury which causes deterioration to the child"); MICH. COMP. LAWS ANN. § 722.622(2)(e) (West 1993 & Supp. 1999) (determining that "mental injury" constitutes child abuse); N.Y. FAM. CT. ACT § 1012 (McKinney 1999) (recognizing "impairment to emotional health" in New York's child abuse statute).

63. *See* G. Edward White, TORT LAW IN AMERICA 103 (1985) (noting that during the Realist Period, between 1910 and 1945, psychological harms began to be recognized within the legal system as bona fide injuries).

64. *See id.* (discussing how psychology's diagnostic techniques began to be recognized as capable of identifying bona fide emotional distress).

65. *See id.* (explaining the progression of willingness by the courts to award

as a crime emerged with regard to child abuse and neglect.<sup>66</sup>

## 2. *New York state case law*

The State of New York is a sizable state with thorough statutory law and sufficient case law on child abuse and neglect.<sup>67</sup> This Comment, therefore, selected the laws of the State of New York as a framework for analyzing whether “reparative” therapy constitutes child abuse and neglect.<sup>68</sup> In New York, child abuse and neglect cases repeatedly arise from the following situations: sexual assault on the child,<sup>69</sup> failure to maintain contact with the child,<sup>70</sup> a third party witness of abuse of the child accompanied by non-intervention,<sup>71</sup> the child witnessing domestic violence,<sup>72</sup> administering excessive corporal

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damages for emotional harm). White claims that, as psychology began to be regarded as a science, the court system began to realize that bona fide emotional distress could be distinguished from the feigned variety (i.e., it could be distinguished through expert testimony). *See id.*

66. *See supra* note 62 (listing some states that include emotional abuse in their child abuse statutes). Today, not all states have emotional abuse in their child abuse laws even though they do in other areas of law. *Compare* TEX. FAM. CODE ANN. § 101.009 (West 1998) (naming only physical abuse as constituting child abuse in Texas), *with* TEX. BUS. & COM. CODE ANN. § 17.50(a) (West 1996 & Supp. 1999) (recognizing mental anguish in Texas tort law).

67. *See* N.Y. FAM. CT. ACT § 1012. New York defines “neglected child” as any child under 18 years of age “whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.” *Id.* § 1012(f) (i). The Act defines “impairment of emotional health” and “impairment of mental or emotional condition” as “a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason, or acting out or misbehaving, including incorrigibility, ungovernability or habitual truancy.” *Id.* § 1012(h).

68. Child abuse is governed by state law. A similar analysis, however, can be done with any state law recognizing psychological harms in its child abuse statutes. *See supra* note 62 (listing several state child abuse laws); *see also* N.Y. FAM. CT. ACT § 1012 (discussing at length the basis for penalizing child abuse in New York).

69. *See In re* Olivia “YY,” 619 N.Y.S.2d 212, 212 (App. Div. 1994) (concluding that, absent an innocent reason explaining otherwise, the element of sexual gratification necessary for a finding of neglect could be inferred from a mother’s act of touching her child’s genitalia).

70. *See In re* C., 677 N.Y.S.2d 177, 178 (App. Div. 1998) (holding that, even while incarcerated, a parent is obligated to maintain contact with a child and plan for his or her future; failure to do so constitutes neglect).

71. *See In re* Rita “XX,” 672 N.Y.S.2d 481, 482 (App. Div. 1998) (finding that a mother neglected her children where she defended the abusive father rather than intervene to protect the children).

72. *See In re* Deandre T., 676 N.Y.S.2d 666, 667 (App. Div. 1998) (finding neglect where the father violently abused the child’s mother in the child’s presence). The court noted that witnessing domestic violence constitutes neglect because it can impair the child’s mental and emotional health. *See id.* The court also found derivative neglect of a sibling who did not witness the abuse. *See id.* Where no physical injury to the child results, the child is generally found to be neglected, rather than abused. *See id.*

punishment,<sup>73</sup> and living with a parent who has a drug-abuse problem.<sup>74</sup> New York, however, also recognizes less extreme cases of abuse and neglect.<sup>75</sup>

With regard to "reparative" therapy, a child who is kidnapped, taken to an in-patient center, and drugged for most of their teenage years would legally qualify as an abused and neglected child.<sup>76</sup> In determining what constitutes abuse and neglect, however, the trier of fact must look to both the language of the child abuse and neglect statute and the case law interpreting the statute.<sup>77</sup> Although a child who is kidnapped and drugged for non-therapeutic purposes may be a clear case of abuse and neglect, deciding whether a child is abused or neglected is more difficult where the abuse is less severe.<sup>78</sup> An example of less severe abuse is a child seeing a therapist who employs behavioral modification, or a child spending time at an "ex-gay" ministry praying to be saved.<sup>79</sup> The following section provides a framework for which types of "reparative" therapy would constitute abuse and neglect.

### 3. *Specific child abuse and neglect cases*

Examining situations in which New York courts have found abuse or neglect will provide a framework for determining whether less extreme instances of "reparative" therapy can constitute abuse or neglect.<sup>80</sup> In *In re Glenn "II,"*<sup>81</sup> the court determined that allowing a

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73. See *In re Clarice B.*, 677 N.Y.S.2d 569, 570 (App. Div. 1998) (holding that a father neglected children when he inflicted corporal punishment on them and left children unattended). The court also stressed that the children's best interests must be considered; here, as in the other cases, it was in the best interests of the children to be removed from their abusive parent. See *id.*; see also N.Y. FAM. CT. ACT § 1012(f)(i)(B) (stating that excessive corporal punishment constitutes neglect).

74. See *In re Masa Qwawi D.*, 665 N.Y.S.2d 437, 438 (App. Div. 1997) (holding that a mother's drug abuse problem, coupled with her failure to complete a rehabilitation program, was sufficient to evidence her failure to plan for her children's future and therefore, constituted permanent neglect).

75. See *In re Glenn II*, 650 N.Y.S.2d 49, 50 (App. Div. 1996) (concluding that a parent neglected children when children continued to have access to cigarettes, lighters, and matches).

76. Because homosexuality and bisexuality are not illnesses, see *APA Resolution*, *supra* note 35, and "reparative" therapy frequently involves severe tactics, see *supra* notes 40-52 and accompanying text, this Comment argues that subjecting a child to such "therapy" constitutes abuse and neglect.

77. See N.Y. FAM. CT. ACT § 1012(f)(i) (defining neglect as physical, mental, or emotional impairment, or imminent danger of impairment, as a result of a parent's failure to exercise due care, which a trier of fact must apply to the facts of a given case).

78. See *infra* notes 96-100 and accompanying text (explaining the reasonably prudent parent standard in determining parental neglect of a child).

79. See *infra* notes 107-08 and accompanying text (explaining "ex-gay" ministries as a type of "reparative" therapy).

80. Because there are no abuse and neglect cases directly examining "reparative"

child access to cigarettes, lighters, and matches constituted neglect because the parent had knowledge of the child's previous experimentation with these items.<sup>82</sup> The court reasoned that where a parent fails to recognize how his or her actions or inactions affect a child with a unique disposition to a particular harmful activity, the state may determine that the child is neglected and therefore, may deem the parent unfit and remove the child.<sup>83</sup> The court in *In re Glenn "II"* stressed that a mother failed to take necessary precautions to protect her children from danger and therefore, was not a proper guardian.<sup>84</sup>

Similarly, *In re Jerry "XX"*<sup>85</sup> involved a mother who petitioned the court to get her children back after they were deemed permanently neglected and placed in foster care.<sup>86</sup> The court found that the mother "refused to acknowledge the existence or severity of her children's problems, particularly those of her three older children who were emotionally disturbed."<sup>87</sup> Accordingly, the court held that the mother did not deserve to be reunited with her children.<sup>88</sup>

These cases are not unique. Parents who do not acknowledge their child(ren)'s special needs are often found to be unfit and courts have considered their children to be neglected.<sup>89</sup> In these cases, courts

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therapy, this Comment draws out standards based on precedent and compares those cases with the reported and published accounts of what occurs in "reparative" therapy to determine whether "reparative" therapy constitutes child abuse or neglect.

81. 650 N.Y.S.2d 49 (App. Div. 1996).

82. *See id.* at 50 (acknowledging that parental failure to protect children, by locking up cigarettes, lighters, and matches, impaired the physical, mental, and emotional well-being of the children).

83. *See id.* (stating that the mother failed to intervene meaningfully after children attempted to burn her bed while the mother and daughter were asleep in it).

84. *See id.* (determining that allowing children access to dangerous items amounts to neglect).

85. 671 N.Y.S.2d 160 (App. Div. 1998).

86. *See id.* at 161 (finding that the mother consistently failed to recognize her responsibility in adhering to a comprehensive social work plan to regain custody, and that the mother refused to acknowledge the existence and severity of her children's emotional problems).

87. *Id.*

88. *See id.* at 162 (finding that the mother failed to plan for children's future by refusing to address the reasons why the children were placed in foster care originally). The court pointed out that the state's department of social services developed a comprehensive plan designed to make the mother fit to take care of her children and worked with the mother for three years leading up to the placement of her children in foster care. Still, the mother failed to acknowledge her role in why the children were taken away and also failed to acknowledge her need for the services that were offered in the agency's plan. *See id.*

89. *See, e.g., In re Kaleb "U,"* 674 N.Y.S.2d 825, 826 (App. Div. 1998) (adjudging a child neglected because the child required extra-sensitive care due to a central nervous system disorder and the mother failed to understand the severity of her child's condition); *In re Jerry "XX,"* 671 N.Y.S.2d 160, 161 (App. Div. 1998) (finding the children neglected because the mother refused to acknowledge the existence

require parents to know and understand their children's special needs and to make strong efforts to address them.<sup>90</sup>

In *In re Jamie "J,"*<sup>91</sup> the court found that a mother had neglected her children where she made no effort to ensure that her child attended school, and failed to notice her other child's anti-social behavior.<sup>92</sup> This decision emphasizes the duty of all parents to be attentive to their child's specific needs.<sup>93</sup> The court found that her indifference to, and lack of understanding of, her parental duties put her children at the risk of being impaired.<sup>94</sup> These cases are indicative of the state's interest in ensuring that parents are not only actively involved in their children's lives, but also that they are responsive to the individual child's specific circumstances.<sup>95</sup>

### *B. The Reasonably Prudent Parent Standard*

New York courts have adopted the reasonably prudent parent standard<sup>96</sup> to determine whether a parent has abused or neglected his or her child.<sup>97</sup> The courts have applied this standard to find that a

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and severity of her children's emotional problems and, as a result, the children were unreceptive to treatment); *In re Glenn "II,"* 650 N.Y.S.2d 49, 50 (App. Div. 1996) (declaring children neglected because the mother failed to take responsible precautions to limit children's access to cigarettes and lighters despite knowledge of children's dangerous propensity to use these items).

90. In *Glenn*, the court found that the parents were required to take necessary precautions with regard to locking up the cigarettes, lighters, and matches. See *Glenn*, 650 N.Y.S.2d at 50. In *Kaleb*, the court stated that parents needed to possess "quick and effective" responses to their child's special needs. See *Kaleb*, 674 N.Y.S.2d at 826. In *Jerry*, the court emphasized that, to be a fit parent, the mother should have sought mental health and alcoholism counseling. See *Jerry*, 671 N.Y.S.2d at 161. In all of these cases, the parents failed to do what was necessary given their child's specific situation, and in each case, the court removed the children from the parents' homes.

91. 619 N.Y.S.2d 367 (App. Div. 1994).

92. See *id.* at 368.

93. See *id.* (noting that the mother failed to report her child missing when he disappeared for the entire weekend and allowed him to associate with a convicted pedophile).

94. See *id.* (asserting that a parent's inability to comprehend that their action, or inaction, could lead to mental, emotional, or physical impairment of their child is sufficient to find that the children are neglected).

95. See *Jerry*, 671 N.Y.S.2d at 62 (terminating parental rights specifically because a parent failed to exercise diligent efforts to strengthen parental relationship and eliminate the very reasons for the child's placement in foster care).

96. See *Enright v. Busy Bee Playschool*, 625 N.Y.S.2d 453, 454 (App. Div. 1995) (discussing personal injury action brought by preschool student who fell from slide against a preschool, and determining that school owed duty of "prudent parent," which is a higher duty than "ordinary reasonable care"); *In re Robert "YY,"* 605 N.Y.S.2d 418, 420 (App. Div. 1993) (characterizing the reasonably prudent parent standard as both "knew or reasonably should have known" and "that a reasonably prudent parent would have acted differently and, in doing so, prevented the injury").

97. See *Robert*, 605 N.Y.S.2d at 420 (explaining that a parent or other custodial party may only be held responsible for the abusive acts committed by another if he or she "knew or should have known" that the child was in jeopardy) (citations omitted);

reasonably prudent parent has a duty to investigate the places where the child will spend time and the people who will supervise the child.<sup>98</sup> This is relevant to “reparative” therapy because, before providing “reparative” therapy to a child, a parent would be required to investigate the “ex-gay” ministries and the “reparative” therapy movement.<sup>99</sup> The parents would discover that “reparative” therapy is not accepted in the mainstream medical community.<sup>100</sup> Support for the argument that the reasonably prudent parent would, upon investigation, discover the potential dangers of “reparative” therapy can be found in the national attention that both the horrible history of “reparative” therapy<sup>101</sup> and the views of its current critics<sup>102</sup> have received in national magazines such as *Newsweek*,<sup>103</sup> and on national television programs such as NBC’s *Dateline*.<sup>104</sup> Parents of gay, lesbian,

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*see also In re Rhiannon B.*, 654 N.Y.S.2d 537, 538 (App. Div. 1997) (applying reasonably prudent parent standard to sexual abuse case and concluding that the parent had “a fundamental defect in [her] understanding of the duties and obligations of parenthood, and created an atmosphere detrimental to the physical, mental and emotional well-being of the [other children] as well”) (citation omitted); *In re Joseph “DD,”* 624 N.Y.S.2d 476, 477 (App. Div. 1995) (holding that a reasonable prudent parent would not leave a child at a house with no stove, running water, or refrigerator, and where the front doorway was covered only by a plastic sheet); *In re N.Y. City Dep’t of Soc. Servs.*, 599 N.Y.S.2d 66, 68 (App. Div. 1993) (applying the “should have known” version of the reasonably prudent parent standard in sexual abuse case and concluding that, although parent may not have had actual knowledge, she should have known that child was in imminent danger of sexual abuse); *In re Jose Y.*, 576 N.Y.S.2d 297, 299 (App. Div. 1991) (finding that mother’s neglect in not recognizing or intervening in father’s sexual abuse of one child posed a continuous danger to the physical, mental and emotional health of children).

98. *See Joseph*, 624 N.Y.S.2d at 478 (“Simply stated, we find it inconceivable that a reasonably prudent parent would leave his or her child for an extended period of time *without first investigating* where the child would be staying.”) (emphasis added).

99. *See id.* (adopting an investigating requirement).

100. *See* BEHAVIORAL HEALTH TREATMENT, *supra* note 36, at 5 (reporting that APA members “agreed that conversion therapies have not proven effective, and that they prey on prejudice and ignorance about sexual orientation”).

101. *See Leland & Miller*, *supra* note 8, at 47.

102. *See id.* at 48 (stating that the APA officially declared “reparative” therapy scientifically ineffective and possibly harmful).

103. *See id.* (reporting on criticisms of “reparative” therapy to a national audience).

104. *See Dateline Interview with Jane Pauley* (NBC television broadcast, Nov. 28, 1997). This broadcast reported that gay men who went through “aversion therapy” were shocked with electrodes as they looked at photos of nude men, were given injections of testosterone when they were shown pictures of nude women, and in the most extreme cases, were given lobotomies. *See id.* The visibility of the “ex-gay” movement is gaining national attention. *See Khan*, *supra* note 10, at 28. Khan describes the growth of the “reparative” therapy movement:

The visibility of the ex-gay movement is growing not only within the Christian Right but also on the Internet, within mainstream news media, and in society at large. FRC [Family Research Council] is showcasing the movement’s ideas in a new video, movement leaders have been appearing on TV and radio shows, and CBS’s 60 Minutes aired a segment about ex-gays this past March [1997]. Exodus has received mention in other national

bisexual, and transgender children should also be aware of the hardships that their children face as a result of societal homophobia.<sup>105</sup> A reasonably prudent parent who discovers that some "ex-gay" ministries perform exorcisms<sup>106</sup> and provide unsound psychological counseling<sup>107</sup> would not place their child in the care of such an "ex-gay" ministry or "reparative" therapist.<sup>108</sup>

### C. *The Breadth of the Child Abuse and Neglect Statute*

The New York state statute grants courts discretion to decide whether certain activities constitute abuse or neglect where the statute is vague or silent on a given issue.<sup>109</sup> Section 1012(f)(I)(B) of the New York statute has been interpreted to mean that actual injury is not a prerequisite to a finding of neglect.<sup>110</sup> Because actual injury is

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media including the *Washington Post*, National Public Radio, Hard Copy, the Jerry Springer Show, and the Sally Jesse Raphael Show.

*Id.*

105. See generally D'Augelli & Hershberger, *supra* note 58, at 420. Information on gay, lesbian, bisexual, and transgender youths is published in mainstream journals such as the *American Psychological Association's Journal* and *The American Journal of Community Psychology*, which are available to the public. See *id.*

106. See Rosin, *supra* note 59, at A14 (noting that some of the more fringe groups within the movement, such as Life Ministries, practice exorcisms to "cure" homosexuals).

107. See *supra* notes 34-39 and accompanying text (describing the denouncement of "reparative" therapy by the APA, the American Psychiatric Association, the American Psychoanalytic Association, and the American Academy of Pediatrics).

108. See generally David Kirby, *From Soft Words to Hard Fists*, THE ADVOCATE, NOV. 24, 1998, at 39 (providing an example of a parent who did put his child in "reparative" therapy). Kirby describes an article in *Focus on the Family Magazine* that recounts a father's disgust over his son's homosexuality and portrays the father's feelings as perfectly acceptable. See *id.* The parent glamorized in the article threatened to kill his child or the person who encouraged the child to become a homosexual. See *id.* The article states that the only reason the father decided not to kill anyone was because he did not want to go to prison, and instead sent his son to an "ex-gay" ministry. See *id.*; see also CHRIS BULL & JOHN GALLAGHER, PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990'S at 98 (1996) (stressing the importance of the fact that James Dobson founded *Focus on the Family Magazine* in 1977, seven years after he wrote the book *Dare to Discipline*, where he encouraged corporal punishment for children). Dobson later took over The Family Research Council ("FRC"), which endorses "reparative" therapy. See *supra* notes 7 & 12 (discussing the FRC's position endorsing "reparative" therapy).

109. See N.Y. FAM. LAW § 1012(f)(I)(B) (McKinney 1998) ("In providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof or by any other acts of a similarly serious nature requiring the aid of the court . . .") (emphasis added). "Reparative" therapy is not specifically named in the statute. See *id.*

110. See *In re Billy Jean "II,"* 640 N.Y.S.2d 326, 327 (App. Div. 1996) (holding that actual physical, emotional, or mental injury to the child is not necessary to find that a child has been neglected). The court found that, because the child was described as "dirty," and the trailer in which he lived as "disgusting," the child was considered neglected even absent actual injury. See *id.* at 328. An analysis of the socio-economic bias present in many of these cases is beyond the scope of this Comment. For a discussion on the classism and racism prevalent in the child welfare system, see

not required, it is clear that the statute was intended to reach a large number of cases.<sup>111</sup> Poor hygiene or unsanitary and unsafe living conditions can constitute neglect, even where the conditions did not harm the child.<sup>112</sup> Further evidence of the statute's breadth is found in *In re Madeline R.*,<sup>113</sup> in which the court interpreted the statute as not requiring a "showing of *past* or *present* harm to the children to support a finding of neglect."<sup>114</sup>

#### IV. ANALYSIS

##### A. *Precedent Applied to Cases Involving "Reparative" Therapy*

The points outlined above support the argument that "reparative" therapy could constitute child abuse and neglect under the New York statute for the following reasons: (1) the courts' readiness to protect children who are at danger of being physically, mentally, or emotionally harmed;<sup>115</sup> (2) the courts' focus on a parent's need to recognize a child's specific situation;<sup>116</sup> and (3) the easily discoverable information on the negative consequences of "reparative" therapy that a reasonably prudent parent would find.<sup>117</sup> In the child abuse and neglect cases outlined above, the courts held a parent negligent for failing to understand the specific needs of his or her child.<sup>118</sup> If this line of reasoning is applied to lesbian, gay, bisexual, and transgender youths who are forced to go through "reparative" therapy, parents should be held responsible for not recognizing the delicate mental and emotional states of gay children.<sup>119</sup> Rather than subjecting their children to a medically unsound procedure<sup>120</sup> with a

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generally Jennifer Aynes Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Grounds For Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1267 n.92 & n.93 (1996).

111. *See id.* ("Neglect determination is based upon respondent's failure to provide the child with the proper supervision of guardianship by misusing alcoholic beverages to the extent that he loses self-control of his actions.").

112. *See id.* at 327 (finding neglect where there were "dirty dishes with encrusted food all over the kitchen").

113. 625 N.Y.S.2d 512 (App. Div. 1995).

114. *See id.* at 513 (emphasis added).

115. *See supra* Part III.A.3 (summarizing abuse and neglect cases).

116. *See supra* Part III.B (describing how the reasonably prudent parent standard requires parents to understand and provide for their child's specific needs).

117. *See supra* notes 101-04 and accompanying text (summarizing national visibility of the "ex-gay" movement).

118. *See supra* Part III.A.3 (discussing specific cases of potential neglect in which parents failed to provide basic needs for their children).

119. *See supra* notes 54-57 and accompanying text (discussing societal pressures specific to gay, lesbian, bisexual, and transgender youths).

120. *See supra* notes 34-38 and accompanying text (summarizing the views of the APA, American Psychiatric Association, American Psychoanalytic Association,



very low success rate,<sup>121</sup> these parents should be held legally responsible for ensuring their child's emotional well-being.<sup>122</sup>

*B. Further Considerations in Finding Abuse and Neglect*

It is likely that other forms of abuse already exist in a family that would seek "reparative" therapy.<sup>123</sup> Studies on violence directed at gay, lesbian, and bisexual youths indicate that as much as sixty-one percent of sexual-orientation-related violence occurs within the family.<sup>124</sup> Specialists in gay and lesbian youth violence also note that "for many of the youth, their families' *religious commitments* set the stage for rejections of different kinds, ranging from begrudging acknowledgements to forceful rejections from the household."<sup>125</sup> In these situations, if a child is removed from the abusive home, the child will not be returned to the home unless the parents take measures to correct the problems that led to the child's removal.<sup>126</sup> Courts have required parents to make diligent efforts to ensure that if a child is returned, the problems are no longer present.<sup>127</sup> In one

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American Academy of Pediatrics, and other researchers on the negative effects of "reparative" therapy).

121. See Rosin, *supra* note 59, at A14 (reporting that only three percent of those in the study who went through "reparative" therapy demonstrate the results the program sets out to provide).

122. See, e.g., *In re Jerry "XX,"* 671 N.Y.S.2d 160, 161 (App. Div. 1998) (validating the "termination of mother's parental rights as warranted by her consistent failure to acknowledge the existence or severity of her children's problems, particularly those of her three older children who were emotionally disturbed"); *In re Glenn "II,"* 650 N.Y.S.2d 49, 50 (App. Div. 1996) (reasoning that a parent allowing her children to have continued access to cigarettes and lighters amounted to child neglect in light of her knowledge that the children had previously experimented with cigarettes and fire).

123. See Anthony D'Augelli & Lawrence J. Dark, *Lesbian, Gay and Bisexual Youth, in REASONS TO HOPE: A PSYCHOSOCIAL PERSPECTIVE ON VIOLENCE AND YOUTH* 177, 183-84 (L.D. Eron et al. eds., 1995) (summarizing studies on abuse in homes with gay and lesbian youths and finding that 61% of violence against gay, lesbian, and bisexual youths occurred within the family; 19-41% of the abuse involved verbal insults and threats; and four to seven percent of the abuse involved physical violence).

124. See *id.* at 183 (gathering data from a 1990 study of lesbian and gay youths at a New York social service agency).

125. Anthony D'Augelli, *Developmental Implications of Victimization of Lesbian, Gay, and Bisexual Youths, in STIGMA AND SEXUAL ORIENTATION, UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN AND BISEXUALS* 187, 198 (G.M. Herek ed., 1998) (emphasis added).

126. See *In re Society For Seaman's Children,* 638 N.Y.S.2d 668, 669 (App. Div. 1996) (holding that to be reunited with a child previously determined to be abused or neglected, a parent must plan for the child's future, which includes correcting the conditions that led to the original removal). Although the mother attended therapy sessions, the court found that her failure to make therapeutic progress was a failure to meet her parental obligation. See *id.*

127. See *id.* (finding that parental obligations include addressing and overcoming the problems that originally endangered the child); see also *Santosky v. Kramer,* 455 U.S. 745, 766 (1982) ("Under New York law, a judge has ample discretion to ensure

case, a court noted that even where a parent attended therapy sessions, failure to make therapeutic progress meant that she was not fulfilling her parental responsibility to ensure that the conditions which led to the removal were eradicated.<sup>128</sup>

All parents must ensure a healthy domestic setting.<sup>129</sup> For a parent of a gay, lesbian, bisexual, or transgender child this may involve supporting the child's sexual identity, promoting his or her healthy well-being, helping to educate the public about the facts on homosexuality and bisexuality, and advocating an end to discrimination.<sup>130</sup> If a parent believes that placing his or her child in "reparative" therapy is an appropriate way of supporting his or her child, the court can, and indeed must, still find abuse or neglect if the child suffers as a result, because the parent's motives, no matter how genuine, are irrelevant.<sup>131</sup>

Another step for parents to take to ensure correction of an unacceptable condition within the family could be to join a parent support group<sup>132</sup> or to help their children find an affirming support group.<sup>133</sup> Parents' attendance at these support groups alone,

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that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment.").

128. See *Seaman's Children*, 638 N.Y.S.2d at 668; see also *Santosky*, 455 U.S. at 767 (relying on N.Y. SOC. SERV. LAWS § 384-b.1(a)(iv) to find that failure to make progress was sufficient evidence that the parent could not provide a suitable family home).

129. See *In re Christopher "O,"* 611 N.Y.S.2d 930, 931 (App. Div. 1994) (holding that overcoming the personal and familial problems that led to the child being removed from the house is, at minimum, required before a parent can be reunited with his or her child); see also *Santosky*, 455 U.S. at 766 (proscribing that a child will not be returned to a hostile environment); *supra* Part III.B (describing requirements for adequate parenting).

130. See "Reparative" Therapy or "Ex-Gay" Ministries, PFLAG Newsletter (Parents and Friends of Lesbians and Gays Issue Guide, Washington, D.C.), July 1998, at 1 (suggesting that support, education, and advocacy to end discrimination are important ways for parents to demonstrate to their gay and lesbian children that they accept them). Although a parent who believes homosexuality is unhealthy or immoral may not wish to work towards eliminating societal homophobia, the mainstream medical community has spoken out against irrational fear of homosexuals. Thus, if a parent's fear or hatred of homosexuality results in emotional injury to the child, it should constitute abuse and neglect under N.Y. FAM. LAW § 1012 (McKinney 1999). See *id.* at 2.

131. See *Dumpson v. Daniel M.*, N.Y. Law Journal (Oct. 16, 1974) 17 c. 7, *appeal dismissed*, 389 N.Y.S. 2d 860 (N.Y. App. Div. 1976), reprinted in JUDITH AREEN, FAMILY LAW 1399, 1402 (3d ed. 1992) (deciding that even though the court was sympathetic to the parent's motive in "disciplining" his child, the motive was irrelevant in the context of child abuse and neglect law because child welfare is superior to the rights of the parent).

132. See D'Augelli & Hershberger, *supra* note 58, at 443 (recommending that parent support groups, such as those offered by Parents and Friends of Lesbians and Gays ("PFLAG") in metropolitan areas, would help the parent-child relationship when a child discloses sexual orientation to his or her parent).

133. See D'Augelli, *supra* note 125, at 205 (recommending support groups to

however, may not constitute a correction of the problem; rather, the parents may also have an obligation to progress in their understanding and acceptance of their lesbian, gay, bisexual, or transgender child.<sup>134</sup>

Thus, where “reparative” therapy constitutes the only form of abuse, a court has the power to remove the child.<sup>135</sup> Similarly, where abuse already exists in some form and the child has been removed, a family will have to correct the hostile environment that led to abuse in the first instance before the child is reunited with the family.<sup>136</sup> Part IV.C discusses possible roadblocks to judicial recognition that a gay, lesbian, bisexual, or transgender child placed in “reparative” therapy has been abused or neglected.

### C. Foreseeable Problems with Judicial Recognition

A potential roadblock to a judge’s finding that “reparative” therapy constitutes child abuse is that Gender Identity Disorder (“GID”) is still considered a mental illness.<sup>137</sup> The American Psychiatric Association, which publishes the Diagnostic and Statistical Manual of Mental Disorders (“DSM”), defines GID as a mental illness.<sup>138</sup> This definition is problematic because some psychiatrists use behavior therapy to treat GID because they believe that successful treatment of GID will prevent homosexuality or bisexuality.<sup>139</sup> “Reparative”

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ensure development into well-functioning gay, lesbian, and bisexual adults).

134. See *In re Society For Seaman’s Children*, 638 N.Y.S.2d 668, 669 (App. Div. 1996) (finding that making “therapeutic progress,” not just attending therapy, was the prerequisite for a mother to be reunited with her child). See generally *In re Leslie C.*, 614 N.Y.S.2d 855, 863 (Fam. Ct. 1994) (finding that parents were not negligent where their teenage daughter was pregnant). It is important to note that if a parent knows that their gay, lesbian, or bisexual teenager is sexually active and they do not act to prevent the activity, they will not be found to have neglected their child. See *id.* at 856. The court in *Leslie C.* held that an abuse finding could not be based on the mere fact that the teenage daughter was pregnant. See *id.* The court stated that where parent knows their child is sexually active, they are not legally responsible for intervening unless they have personal knowledge that the sexual encounter is forced, i.e., not consensual. See *id.*

135. See *supra* Part III.A.2 (defining neglect and abuse).

136. See *supra* Part IV.B (discussing reuniting requirements).

137. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1997) [hereinafter DSM]. The American Psychiatric Association defines GID as a strong and persistent cross gender identity, accompanied by discomfort with one’s own sex, distress or impairment in societal role, and not accompanied by an intersexed condition. See *id.* at 536. Children suffering from GID manifest such symptoms as: frequently passing as the other sex, desiring to live or be treated as the other sex, and believing that she or he has feelings typical of the other sex. See *id.*

138. See *id.* at xv (recognizing that the “DSM-IV” is considered the most widely accepted source of mental illnesses for reference by both mental health practitioners and the medical community in the United States).

139. See Goishi, *supra* note 60, at 1157-58 (stating that because some mental health

therapists, however, do not claim to be treating GID, but rather to be treating homosexuality.<sup>140</sup>

In a family in which no other form of abuse exists, the seemingly contradictory position of the American Psychiatric Association disavowing “reparative” therapy and condoning treatment for GID could cause confusion as to whether “reparative” therapy endangers the child.<sup>141</sup> Therefore, in applying the reasonably prudent parent standard, a judge may not know whether a parent who subjected his or her child to “reparative” therapy because of GID was acting unreasonably.<sup>142</sup>

Another problem with ascertaining whether the parents’ true intention was to change their child’s sexual orientation is that, until very recently, the entire “reparative” therapy movement was secretive.<sup>143</sup> Because very few “reparative” therapists openly admit

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professionals believe that GID is a predicate to homosexuality, they disagree with the removal of homosexuality from the DSM). Goishi notes that some psychiatrists believe behavioral therapy that teaches children to act in the stereotypical “correct” ways of their biological gender can prevent potential homosexuality. *See id.* Goishi also argues that these psychiatrists are among the minority within the mental health profession and that GID is very controversial when it is used to disguise attempts to “cure” homosexuality. *See id.*; *see also I Was Never Meant to Survive*, NCLR NEWSLETTER (National Center For Lesbian Rights, San Francisco, Cal.), Spring 1996, at 11 (discussing treatment used to “prevent” a teenager from becoming a lesbian). This article was written by a survivor of “reparative” therapy, Daphne Scholinski, who spent most of her teenage life in a mental hospital because of her “masculine” appearance. *See id.* Her parents were afraid she would grow up to be a lesbian; she was diagnosed with GID, and her parents’ insurance covered her four-year stay in the facility to learn to be more feminine. *See id.*; *cf. Daly v. Daly*, 715 P.2d 56, 60 (Nev. 1986) (discussing, in a child custody case involving a transsexual father, the medical professions’ belief as to the best way to treat transsexuality). In *Daly*, the dissenting judge argued that the father should not be penalized for getting a sex change operation because “sex reassignment surgery is the best treatment available for a transsexual” and thus, the father was getting the appropriate treatment. *See id.* at 60 n.1.

140. *See generally* Leland & Miller, *supra* note 8, at 49 (reporting that NARTH, the psychoanalytic branch of the “ex-gay” movement, believes that *homosexuality*, not GID, is a disorder that can and should be treated); *see also* Surina Khan, *Homosexual Healing*, BOSTON MAG., July 1998, at 25-28 (examining the mission of “ex-gay” ministries and “reparative” therapists to convert homosexuals into heterosexuals and mentioning GID nowhere in this discussion).

141. Given the strong stance against “reparative” therapy by the mainstream medical community, a court easily could find that a parent should have known of the dangers of “reparative” therapy. *See In re Joseph “DD,”* 624 N.Y.S.2d 476, 477 (App. Div. 1995) (holding that a parent either knew or should have known the child was in danger). If, however, a parent claims that he or she placed the child in “reparative” therapy because of a belief that the child suffered from GID, it may be harder for a judge to hold that the parent acted unreasonably because GID is classified as a mental illness. *See DSM, supra* note 137, at 532-38.

142. *See Joseph*, 624 N.Y.S.2d at 477-78.

143. *See Mirken, supra* note 40, at 58 (describing failed attempts to persuade centers to admit they performed “reparative” therapy). Ultimately, “reparative” therapy-type actions were confirmed during a “sting” operation, where a woman posed as a mother of a gay teen and the center offered to treat her son’s

that they attempt to change a child's sexual orientation, proving such an attempt to the court may be difficult.<sup>144</sup> Similarly, in addition to classifying a child as having GID, these therapists and in-patient clinics would often diagnose a child with other APA-approved illnesses recognized in the "DSM," such as "oppositional defiant disorder" and other so-called "adolescent conduct disorders."<sup>145</sup>

Establishing that a parent sought "reparative" therapy to change a child's sexual orientation is only the first step in protecting the child from future abuse.<sup>146</sup> Parents have certain legal rights that can prevent the state from intervening.<sup>147</sup>

#### *D. Parental Defenses to a Claim of Child Abuse or Neglect*

There is a symbiotic relationship between "reparative" therapy and right-wing, Christian, political organizations.<sup>148</sup> Therefore, this Comment addresses whether a finding that "reparative" therapy constitutes child abuse or neglect is unconstitutionally interfering in either a parent's free exercise of religion<sup>149</sup> or the Fourteenth Amendment's guarantee of parental autonomy.<sup>150</sup>

##### *1. First Amendment free exercise claim*

###### *a. Free Exercise Clause*

The Free Exercise Clause of the First Amendment, which applies to

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homosexuality. *See id.*

144. *See id.* (noting that a leading proponent of "reparative" therapy denied attempting to change a child's sexuality by claiming that "reparative" therapy will not work on people against their will).

145. *See Project to Stop Mental Health Abuse of Lesbian, Gay, Bisexual and Transgender Youth*, NCLR NEWSLETTER (National Center for Lesbian Rights, San Francisco, Cal.), May 1994, at 4 (naming these disorders and adding that "LGBT teens are dangerously vulnerable to psychiatric labels that scapegoat and stigmatize teens for social and family problems, and that frequently result in some form of institutionalization.").

146. *See* Mirken, *supra* note 40, at 56 (discussing parental prerogative in selecting mental health treatment and even institutionalization for their children).

147. *See infra* Part IV.D (discussing potential defenses by parents to charges of abuse).

148. *See supra* notes 10-13 and accompanying text (discussing right-wing, Christian, political organizations' support for "reparative" therapy and the "ex-gay" movement). It is important to note that this Comment differentiates between Christianity generally and *right-wing*, Christian, *political* organizations. Any reference to right-wing, Christian, political organizations is a reference specifically to those organizations that support "reparative" therapy.

149. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

150. *See* Santosky v. Kramer, 455 U.S. 745, 752 (1982) (recognizing the "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

the states through the Fourteenth Amendment,<sup>151</sup> states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”<sup>152</sup>

In *Employment Division, Department of Human Resources v. Smith*,<sup>153</sup> a plurality of the Supreme Court interpreted the Free Exercise Clause to mean that the free exercise of religion is the “right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all governmental regulation of religious *beliefs* as such.”<sup>154</sup> *Smith*, however, also held that religious beliefs do not excuse disobeying an otherwise valid law.<sup>155</sup> In *Smith*, petitioners ingested sacramental peyote, an illegal drug under the state’s criminal laws, during a Native American religious ritual.<sup>156</sup> The Court held that even though religious beliefs are protected, the illegal act of ingesting peyote was not.<sup>157</sup>

The ability of the state to regulate religion, despite the strong protection afforded to the free exercise of religion in the Constitution, is further explained in *Cantwell v. Connecticut*.<sup>158</sup> *Cantwell* involved a man and his two sons, all Jehovah’s Witnesses, arrested for inciting a breach of the peace.<sup>159</sup> The Cantwells went door to door playing a phonograph and trying to sell books about their faith.<sup>160</sup>

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151. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (extending the Free Exercise Clause of the First Amendment to the states through the Fourteenth Amendment). In analyzing the First Amendment, the *Cantwell* Court noted that there are two concepts:

Freedom of conscience and freedom to adhere to such religious organizations or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.

*Id.* at 303-04.

152. U.S. CONST. amend. I.

153. 494 U.S. 872 (1990).

154. *Id.* at 877 (citation omitted) (emphasis added).

155. See *id.* (“The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.”); see also *Bowen v. Roy*, 476 U.S. 693, 701 (1982) (holding that even where a parent believed that the use of a social security number would impair the child’s spirit, a belief that stemmed from a Native American religion, the state’s interest in administering the number was stronger than the parent’s free exercise of religion).

156. See *Smith*, 494 U.S. at 874 (citing OR. REV. STAT. § 475.992(4) (1987)) (noting that Oregon law prohibited possession of controlled substance unless prescribed by a doctor).

157. See *id.* (differentiating between having a religious belief and performing (or abstaining from) a physical act with regard to that religion).

158. 310 U.S. 296 (1940).

159. See *id.* at 300.

160. See *id.* at 301 (explaining that the men went to every house in the

One of the records they played included a description of the book "Enemies," which included an attack on Catholicism.<sup>161</sup> Approximately ninety percent of the people in that neighborhood were Catholic; the Cantwells were promptly arrested.<sup>162</sup> In *Cantwell*, the Court held that the right to believe and adhere to a religion is absolute, but the freedom to act based on religious beliefs is subject to regulation for the protection of society.<sup>163</sup>

The Supreme Court recently reaffirmed *Smith* and *Cantwell* in *City of Boerne v. Flores*.<sup>164</sup> *Flores* stressed that a valid state law of general applicability which only incidentally burdens someone's religious beliefs is constitutional.<sup>165</sup> Because most religions involve some physical act in compliance with the belief, for example drinking wine or assembling, these religious acts are only permissible if they do not violate a neutral and valid state law, such as the state's child abuse and neglect laws.<sup>166</sup> To hold otherwise would permit conduct that not only hurts society as a whole but, in the case of "reparative" therapy, facilitates violence against individuals under the guise of the freedom of religion.<sup>167</sup>

*b. Applying this law to "reparative" therapy*

Under the theory that religious beliefs are protected but certain religious acts are not, parents are constitutionally permitted to

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neighborhood attempting to play religious records and distribute literature to the neighbors, as well as solicit donations).

161. *See id.* at 303.

162. *See id.* (noting that none of the residents questioned about the incident were Jehovah's Witnesses).

163. *See id.* at 303-04 (stating that although the Fourteenth Amendment "embraces" both the freedom to believe and to act, the latter is not an absolute freedom).

164. 521 U.S. 507 (1997). The Court reaffirmed *Smith* and declared that The Religious Freedom Restoration Act of 1993 ("RFRA") was an unconstitutional attempt by Congress to overrule *Smith* by requiring the stringent "compelling interest" test. *See id.* at 534. The Court found that a compelling interest test would impermissibly intrude on a state's right to enact its own laws and that the means used by Congress are disproportionate to its legitimate ends. *See id.*

165. *See id.* at 534-35 (explaining that a general, valid law which is applicable to everyone, yet incidentally burdens some citizens' exercise of religion, is constitutional, unless motivated by bigotry or an impermissible legislative motive).

166. *See Employment Div. v. Smith*, 494 U.S. 875, 877 (1990) (detailing the various practices and acts involved in religions such as: "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation"). Writing for the majority, Justice Scalia stated that a law that bans acts that are only performed for religious purposes is unconstitutional, whereas a law that exists for the protection of society, which only incidentally affects religious acts, would be constitutional. *See id.*

167. *See id.* at 888-89 (stating that requiring a "compelling state interest" to prohibit certain religious acts would set a dangerous precedent that would effectively provide religious exemptions from almost every civil obligation).

believe that homosexuality or bisexuality is immoral and should be changed.<sup>168</sup> If parents act consistent with this belief in violation of an otherwise valid law, however, they could be subject to government regulation.<sup>169</sup> Similarly, a court ruling or legislative interpretation that “reparative” therapy is a form of child abuse, or more likely a form of neglect,<sup>170</sup> would be constitutional because the child abuse and neglect laws that a court would interpret are passed for the protection of children and society.<sup>171</sup> These laws are not passed to prevent an act that is only engaged in for religious purposes.<sup>172</sup> This law would only be unconstitutional if its enactment or decision was motivated by religious bigotry.<sup>173</sup>

If a court interprets “reparative” therapy as constituting emotional abuse,<sup>174</sup> as defined in a child abuse and neglect statute, it would be interpreting a valid state law that was passed without any religious

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168. See generally *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944) (holding that a mother who used her children to disseminate religious materials could be prosecuted under child labor laws, despite her religious beliefs). Under this reasoning, a parent could be prosecuted for acting on his or her religious beliefs that homosexuality is immoral.

169. See *Smith*, 494 U.S. at 878-79 (explaining that an individual must comply with state law regardless of his or her religious beliefs); see also *Gillette v. United States*, 401 U.S. 437, 462 (1971) (upholding the federal government’s right to compel those who object to war to fight despite the religious nature of their objections).

170. See *Child Maltreatment* Urban Justice Center Memo (Urban Justice Center, New York, N.Y.), Oct. 5, 1998, at 67-69 (on file with *American University Law Review*) (discussing the New York State Family Court Act and child abuse cases and suggesting that “reparative” therapy is more likely to be considered neglect than abuse). This internal memo suggests that whether a parent’s conduct constitutes “protracted impairment of the emotional health” of a child will be a difficult determination and will require a psychiatrist or psychologist. See *id.* at 69. It is suggested that the result is more likely to be a finding of neglect than abuse. See *id.*

171. See *id.* at 67-69; see also Collin Gotham, *A Proposed Solution for False Memory Cases: A Cross Negligence Standard*, 8 KAN. J.L. & PUB. POL’Y 205, 211 (1999) (stating that “child abuse laws in this country exist not to promote reports by individuals who are now adults of abuse . . . but to protect minors from further abuse”); Ellen Marnus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 514 (1998) (noting that “[c]hild abuse laws, as do most laws concerning children in society, stem from society’s need to protect children”).

172. See N.Y. FAM. LAW § 111 commentary, at 6 (McKinney 1999) (stating that the purpose of the Family Court system is to act as a “special agency for the care and protection of the young and the preservation of the family” (quoting The Family Court Act, 1962 N.Y. Laws 3420)).

173. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) (holding that a law was not neutral, and was thus unconstitutional, because it targeted a religious belief). In *Lukumi Babalu Aye*, the Court invalidated a city ordinance prohibiting the slaughter of animals because it found that the ordinance was intended to suppress Santerian worship services. See *id.* at 533.

174. See N.Y. FAM. CT. ACT § 1012(h) (McKinney 1983) (defining “emotional abuse” as “a state of diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressiveness or self-destructive impulses, ability to think or reason, or acting out or misbehavior”).



bigotry or impermissible legislative motivation.<sup>175</sup> Thus, a free exercise claim under the First Amendment would not be a valid defense for parents who attempt to change their child's sexual orientation against the will of that child.<sup>176</sup> Furthermore, the Supreme Court has said that a law which is not neutral and generally applicable, and has been directed at a religious practice, is not per se unconstitutional; it may be justified by a compelling state interest that is narrowly tailored to advance that law's purpose.<sup>177</sup>

## 2. *The parental autonomy rights*

### a. *Origins and current law*

Just as the Free Exercise Clause of the First Amendment is not absolute, neither is parental autonomy in raising one's child.<sup>178</sup> In *Meyer v. Nebraska*,<sup>179</sup> the Supreme Court recognized the importance of parental autonomy in raising children.<sup>180</sup> *Meyer* involved a man who taught a young boy German in violation of a state law that prohibited the teaching of foreign languages.<sup>181</sup> The Court decided that because learning German did not hurt the child's health, morality, or

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175. There is no indication that religious bigotry is present in passing child abuse and neglect statutes. Quite the contrary, there is evidence that religion is considered favorably. In Pennsylvania's child abuse and neglect statute, the legislature stated that "such commitment shall be made, to select, so far as it may be possible, families of the same religious denomination as that to which the parents of children committed to its care shall belong." See PA. STAT. ANN. tit. 11, § 31 (West 1999) (favoring placement of child in foster care with a family from the same religion as child's family).

176. See *Employment Div. v. Smith*, 494 U.S. 877, 889 (1990) (holding that a state's criminal law, as applied to the respondent's ingestion of peyote, did not violate the Free Exercise Clause).

177. See *Lukumi Babalu Aye*, 508 U.S. at 546 (ruling that a law directed at a specific religious practice is not per se unconstitutional, but rather, the law will be constitutional if it survives strict scrutiny); cf. *Goldman v. Weinberger*, 475 U.S. 503, 504 (1986) (holding that the military's interest in preserving a uniform dress code outweighed petitioner's First Amendment right to wear a yarmulke).

178. See *Lee TT. v. Dowling*, 87 N.Y.2d 699, 710-13 (1996) (balancing a parent's liberty interest against the state's interest in regulating child abuse). The court in *Lee* held that parents who are accused of abusing children have a due process interest in not being "branded" as abusers by having their names appear on a central register of child abuses without sufficient investigation of the claims. See *id.*

179. 262 U.S. 390 (1923).

180. See *id.* at 400 (stating that a teacher's right to instruct a child in German, and a parent's right to "engage him" to do so, are protected by the Fourteenth Amendment); see also *Santosky v. Kramer*, 455 U.S. 745 (1982) (recognizing that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

181. See *id.* at 396-97 (explaining that the teacher was convicted of violating a Nebraska law criminalizing instruction of a foreign language to children who had not completed the eighth grade). The law was intended to preserve English as the national language by ensuring that all school children were educated in English. See *id.*

understanding, it could not be against the law.<sup>182</sup> A few years later, the Court reaffirmed this rationale in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,<sup>183</sup> in which it decided that parents have autonomy under the Fourteenth Amendment with regard to raising their children.<sup>184</sup> In *Pierce*, the State of Oregon passed a law that required attendance at a public school for all children in a certain age group.<sup>185</sup> The appellees, the Society of the Sisters and Hill Military Academy, would have had to close their private schools as a result of enforcement of this law.<sup>186</sup> The Court determined that the law was void and stated that “the child is not a mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”<sup>187</sup>

A parent’s Fourteenth Amendment rights, however, are not absolute. For example, courts have found the state’s interest compelling enough to permit regulation in child labor,<sup>188</sup> in mandatory school attendance,<sup>189</sup> and in child abuse.<sup>190</sup> In *Lee T.T. v.*

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182. *See id.* at 403 (dismissing the argument that the statute was enacted to protect the health of children because the statute only prohibited instruction in foreign languages, not any other subject matter that presumably could have been equally injurious).

183. 268 U.S. 510 (1925).

184. *See id.* at 534-35 (deciding that under the doctrine of *Meyer*, an Oregon law requiring parents to send their children to public schools interfered with the parents’ Fourteenth Amendment right to direct the upbringing of their child).

185. *See id.* at 530-34 (providing the text of the Compulsory Education Act, which required that any person having custody of a child between the ages of 8 and 16 to send the child to public school, and providing that every day the child missed would be a misdemeanor).

186. *See id.* at 531-34 (explaining that the Society of the Sisters, which operated an orphanage, several private religious schools, and the Hill Military Academy, would be destroyed if all Oregon children were compelled to attend public schools).

187. *Id.* at 535; *see Prince v. Massachusetts*, 321 U.S. 158, 158 (1944) (“Neither rights of religion nor rights of parenthood are beyond limitation.”); *see also Parents United For Better Sch., Inc. v. School Dist.*, 978 F. Supp. 197, 212 (E.D. Pa. 1997) (holding that a condom distribution program did not violate parents’ liberty interest).

188. *See Sturges v. Beauchamp*, 231 U.S. 320, 326 (1913) (upholding a state law prohibiting employment of children under 16 years of age); *People v. Ewer*, 36 N.E. 4, 6 (N.Y. 1894) (holding a state law that prohibited children from being exhibited in the theater and in other occupations as a valid exercise of the state’s legislative power). *But see Farias v. New York*, 421 N.Y.S.2d 753, 756 (Sup. Ct. 1979) (declaring that juveniles are not prohibited by law from performing in “The Greatest Show on Earth,” Ringling Bros.-Barnum & Baily Circus, despite a New York law prohibiting exhibition of a child without a permit from the Mayor). The court in *Farias* found that a “blanket prohibition against children under sixteen performing as acrobats, gymnasts, etc.” was too vague and outdated to be constitutional. *See id.* at 756-57. The court held that because the children’s circus performance did not bear a reasonable relationship to the public health, safety, or morals, the statute prohibiting such performance should not be enforced. *See id.*

189. *See State v. Bailey*, 61 N.E. 730, 731-32 (Ind. 1901) (holding that a law which required every parent to send their children to school was not an unauthorized

*Dowling*,<sup>191</sup> the highest court of New York decided that "the laws against child abuse and child neglect are an implicit recognition that even the rights of parents are not absolute and that society, through its courts and social service agencies, should intervene to protect endangered children."<sup>192</sup> When the state does decide to intervene, however, they must meet certain procedural due process requirements.<sup>193</sup> The stringent procedural requirements are in place because of the fundamental liberty interest that parents have in the care, custody, and management of their children.<sup>194</sup> The state will have to meet these procedural requirements by clear and convincing evidence to remove the child or children from the abusive parent(s).<sup>195</sup>

*b. Parental rights in the area of mental health*

In *Parham v. J.R.*,<sup>196</sup> the Supreme Court granted broad power to parents when placing their children involuntarily in mental hospitals.<sup>197</sup> In *Parham*, the Court decided that if there is a "neutral fact finder" to evaluate a parent's decision regarding institutionalization, a child's due process rights are not violated when he or she is institutionalized by a parent.<sup>198</sup> The Court held that parents should have a dominant, but not absolute, role in the

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invasion of the natural right of the parent because parents' rights are "subordinate to the power of the state").

190. See *Chayo v. Kaladjian*, 844 F. Supp. 163, 172 (S.D.N.Y. 1994) ("Even in the absence of parental consent or judicial order, children may be removed from their parent's custody without a violation of due process when the removal is taken as an emergency measure to protect the child's interest.").

191. 87 N.Y.2d 699 (1996).

192. *Id.* at 710.

193. See *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (adopting a test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires a balancing of: the private interests affected; the risk of error created by the state's procedure; and a countervailing government interest).

194. See *Santosky*, 455 U.S. at 753 ("The fundamental liberty interest of natural parents . . . does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

195. See *id.* at 769 (explaining that a majority of the states have adopted the clear and convincing standard of proof and that such a standard is appropriate to satisfy due process).

196. 442 U.S. 584 (1979).

197. See *id.* at 604 (holding that parents should retain "plenary authority" to institutionalize their children for psychological disorders, "subject to an independent medical judgment").

198. See *id.* at 605-07 (stating that a child's interests may best be protected by the presence of a neutral party to review a parent's decision). *But cf.* *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (holding that the transfer of a prison inmate to a mental hospital for behavior modification violates due process).

decision to commit their child where no evidence of parental abuse or neglect is present.<sup>199</sup> The Court determined that the neutral fact finder must use medical standards in evaluating whether the child should be committed.<sup>200</sup> Because the American Psychiatric Association, the APA, the American Psychoanalytic Association, and the American Academy of Pediatrics all reject the notion of “reparative” therapy,<sup>201</sup> and because homosexuality has not been classified as a mental illness since 1973,<sup>202</sup> a neutral fact finder relying on “traditional medical techniques” should find a parent’s commitment of a homosexual child for “reparative” therapy inappropriate.<sup>203</sup>

### 3. *Parent autonomy claim together with free exercise claim*

#### a. *Current state of these claims*

It is well established that where no other constitutional right is compromised, a valid state law that only incidentally interferes with someone’s religious practice does not violate the Free Exercise Clause of the First Amendment.<sup>204</sup> Similarly, the very existence of state child abuse laws demonstrates that parents’ autonomy rights are not absolute.<sup>205</sup> When a constitutional right (e.g., the First

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199. See *Parham*, 442 U.S. at 604 (presuming that parents generally act in the best interest of their children).

200. See *id.*

201. See *supra* notes 33-39 and accompanying text (discussing these medical organizations’ positions condoning “reparative” or conversion therapy).

202. See Leland & Miller, *supra* note 8, at 48 (noting that because the APA and American Psychiatric Association voted that homosexuality was not a disorder in the 1970s, most therapists have abandoned the “sexual conversion” business); see also Goishi, *supra* note 59, at 1154 (naming 1973 as the year homosexuality was removed from the DSM); Rosin, *supra* note 59, at A14 (mentioning the 1973 landmark decision by the American Psychiatric Association to declassify homosexuality as a mental illness).

203. If the parents are explicit in their desire to convert their child’s sexual orientation, *Parham* establishes enough safeguards for the child. See 442 U.S. at 608 (emphasizing that commitment decisions should represent an independent judgment and that medical resources, including behavioral specialists, should be consulted). If the parents say their child is not conforming to gender typical norms, however, e.g., their son is effeminate or their daughter is a tomboy, the child loses all of those protections because Gender Identity Disorder is still considered a mental illness. See DSM, *supra* notes 137-41 and accompanying text.

204. See *Employment Div. v. Smith*, 494 U.S. 875, 879 (1990) (holding that the Free Exercise Clause did not prohibit enforcement of a state law banning the use of peyote, even in Native American religious ceremonies); *Minersville Sch. Dist. Bd. of Educ. v. Gobitis*, 310 U.S. 586, 594-95 (1940) (holding that one’s religious beliefs do not excuse a person from complying with laws enacted without bias and for the public good).

205. See *Lee TT v. Dowling*, 87 N.Y.2d 699, 710 (1996) (noting the importance of state intervention, even in family matters, to protect children in danger).

Amendment) is coupled with another right (e.g., the parental autonomy right), however, a state's interest is judged by a higher standard than where only one right is present.<sup>206</sup> Therefore, the rule pronounced in *Smith* and reaffirmed in *Flores* arguably is not applicable precedent because both cases involved only one right, whereas many "reparative" therapy cases are likely to involve two rights.<sup>207</sup>

*Wisconsin v. Yoder*<sup>208</sup> involved both the parental autonomy right claim and a free exercise of religion claim.<sup>209</sup> The Supreme Court, in deciding whether Amish children could be compelled to attend public school until the age of sixteen, decided that a free exercise claim coupled with "the traditional interest of parents with respect to the religious upbringing of their children" was strong enough to trump the state law requiring attendance.<sup>210</sup> The Court stated that "however strong the state's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."<sup>211</sup>

The Court's major concern in *Yoder* was that the enforcement of the compulsory attendance law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs."<sup>212</sup> The Court was reluctant to find the state's interest in this law compelling enough to lead to the possible elimination of the Amish religion.<sup>213</sup>

*b. Distinguishing Yoder from cases involving "reparative" therapy*

*Yoder* is distinguishable from a case of "reparative" therapy. First, with regard to Christianity, "reparative" therapy is not a "basic

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206. See *Smith*, 494 U.S. at 881 (noting that if a law offends both the Free Exercise Clause and another constitutional right, i.e., freedom of speech, the First Amendment will preclude application of the statute).

207. When a parent places his or her child in "reparative" therapy, parental autonomy is always at issue, and frequently the free exercise of religion is involved as well. See *supra* Part IV.D.1.b (discussing free exercise of religion and "reparative" therapy).

208. 406 U.S. 205 (1972).

209. See *id.* at 209 (noting that the plaintiffs claimed that a compulsory attendance law violated their First and Fourteenth Amendment rights).

210. See *id.* at 214 (noting that a court must balance a state's interest in universal education with an individual's fundamental rights).

211. *Id.* at 215 (stating that only the highest state interests can "overbalance legitimate claims to the free exercise of religion").

212. *Id.* at 219 (stating that this concern was based on the teachings of educational and religious history).

213. See *id.* at 216. The Court stated that with regard to the Old Order Amish people, religion is not just a matter of theocratic belief but is "an entire way of life, regulating with it the detail of Talmudic diet through the strictly enforced rules of the church community." *Id.*

religious tenants and practice of the . . . [Christian] faith”<sup>214</sup> because most Christian faiths do not condone “reparative” therapy, and some speak out directly against it.<sup>215</sup> Second, unlike the Amish, there is no ultimatum posed to a Christian to either assimilate into society at large or abandon his or her religion upon a finding that “reparative” therapy constitutes child abuse and neglect.<sup>216</sup> Third, the Amish “beliefs and attitudes towards life, family and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge . . .”<sup>217</sup> whereas the idea of “reparative” therapy is a recent belief and attitude held by only a small portion of Christian faiths.<sup>218</sup> Last, the children in *Yoder* agreed with their parents and did not want to attend school, whereas in the context of “reparative” therapy the children are often involuntarily placed.<sup>219</sup>

Furthermore, the Court in *Yoder* suggested that the state’s interest in education would be compelling enough to defeat the parents’ rights had the children been completely lacking in knowledge.<sup>220</sup> “No one can question the State’s duty to protect children from ignorance

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214. See *id.* at 218 (noting that the effects of integrating children into the secular world can be destructive to the Amish religious institution).

215. See *Calculated Compassion*, *supra* note 13, at Executive Summary (noting that the views of the “ex-gay” movement and Christian Right leaders are not shared by mainstream religious organizations, including the Roman Catholic Church, The National Council of Churches, the United Methodist Church, the American Jewish Congress, and the Union of American Hebrew Congregations); see also Letter from Charles L. Cox, Executive Director, Dignity/USA, to Kerry Lobel, Executive Director, National Gay and Lesbian Task Force (Aug. 14, 1998) (on file with the National Gay and Lesbian Task Force) (discussing a faith based anti-gay-violence initiative called The Solidarity Sunday Project). The letter explains that over 1,200 individuals and faith communities are participants in the initiative, and asks the National Gay and Lesbian Task Force to join because of “the escalating violence against lesbians, gay men, bisexuals, and transgender persons.” See *id.* at 1. The letter refers to the full page ads taken out by the “ex-gay” movement in the *New York Times*, *Washington Post*, and *USA Today* as “questioning the value of our very existence,” and adding “[i]t is ads like these that inspire hate crimes.” See *id.*

216. See *Yoder*, 406 U.S. at 218 (noting that the mandatory attendance law, in practice, will give the Amish the ultimatum of abandoning their faith or assimilating).

217. *Id.* at 216.

218. See Leland & Miller, *supra* note 8, at 47 (naming July 13, 1998, as approximately the time the “reparative” therapy campaign began); see also *Calculated Compassion*, *supra* note 13, at Executive Summary (naming religious leaders and faiths that oppose “reparative” therapy).

219. See *Yoder*, 205 U.S. at 237 (Stewart, J., concurring) (remarking that had the children’s religious beliefs differed from their parents’ beliefs, there would have been an “interesting and important issue” before the Court which was not present and therefore, did not need to be addressed).

220. See *id.* at 222. See generally *United States v. Lee*, 455 U.S. 252, 261 (1982) (requiring the Amish to participate, over their religious objections, in the social security system in deference to Congress’ judgment that only self-employed Amish people should be exempted from paying the tax).

but this argument does not square with the facts disclosed in the record."<sup>221</sup>

The Court's ruling in *Yoder* should be construed narrowly to apply only to the facts present in the case and not as a broad and absolute grant of religious freedom and parental autonomy in raising their children.<sup>222</sup> A thorough analysis of *Yoder* leaves open the question of *Yoder's* precedential value in a case where there is evidence that a gay, lesbian, bisexual, or transgender child has been abused or neglected in the name of religion.<sup>223</sup>

*c. Solving the unanswered question in Yoder*

The Supreme Court has focused on a state's interest in the way children are raised and has held that parental autonomy and free exercise of religion are not absolute, but rather that they can be defeated where there is a compelling government interest.<sup>224</sup> In *Prince v. Massachusetts*<sup>225</sup> the Court held:

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221. *Yoder*, 406 U.S. at 222. The state argued, and the Court agreed, that just as Thomas Jefferson pointed out early in our country's history, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." *Id.*

222. See James C. Farrell, *Johnny Can't Read or Write, But Just Watch Him Work: Assessing the Constitutionality of Mandatory High School Community Service Programs*, 71 ST. JOHN'S L. REV. 795, 837 (1997) (describing the decision in *Yoder* as restricted to "long-established organized groups that can demonstrate commitment to an established way of life").

223. The court in *Yoder* specifically noted that the case is not one involving "harm to the physical or mental health of the child," suggesting that such circumstances would warrant a different result. See *Yoder*, 406 U.S. at 230.

224. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (determining whether a state has a right to act on behalf of its young citizens and concluding that "the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation."). The *Prince* Court discussed cases where the Court upheld a state law despite a claim of parental autonomy or religious conviction. See *id.* The Court maintained that a state is permitted to restrict a parent's rights by requiring school attendance and regulating child labor. See *id.* The Court also explicitly stated that a religious conviction does not nullify the state's authority. See *id.* The Court further noted that requiring vaccinations is one example of an area where the state supercedes parental rights, even when coupled with religious conviction, because the right to practice religion does not include exposing the community to a communicable disease or possible death. See *id.* at 166-67. The Court concluded this discussion by noting that "[i]t is sufficient to show what indeed appellant hardly disputes, that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." *Id.* at 167; see also *Bowen v. Roy*, 476 U.S. 693, 696, 712 (1982) (holding a federal law requiring people to have social security numbers to participate in government programs did not violate the Free Exercise Clause of the First Amendment even where the parents who were contesting the law believed that requiring social security numbers would destroy the spirit of their young child).

225. 321 U.S. 158 (1944).

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A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.<sup>226</sup>

Therefore, examining cases where the state has a compelling interest illustrates that a parent's right, even when coupled with a religious conviction, is not absolute.<sup>227</sup> For example, in *Prince* the compelling state interest defeated both the parental autonomy claim and the Free Exercise of religion claim.<sup>228</sup>

A court in New York also found that the state's interest can trump parents' Fourteenth Amendment rights to raise their children, even when accompanied by the First Amendment claim of Free Exercise of Religion. In *In re Sampson*,<sup>229</sup> the court held that a fifteen-year-old boy was neglected when his mother, because she was a Jehovah's Witness, refused to provide him with appropriate medical and surgical care.<sup>230</sup> The court stated that although the mother's religious objection was founded upon the scriptures and sincerely held, it nevertheless was defeated by the state's paramount duty to insure the child's health and safety. The court held that "[p]arents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have

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226. *Id.* at 168 (noting that the state has broader power over children than over adults).

227. *See id.* at 166 (discussing the Court's role as *parens patriae*, acting in the general well-being of children); *see also* *Hoener v. Bertinato*, 171 A.2d 140, 143-45 (Bergen County Ct. 1961) (holding that a state has the right to declare a child neglected and to grant custody where the parents refuse a blood transfusion for their unborn child on religious grounds); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537, 538 (N.J. 1964) (holding that a mother's refusal to have a blood transfusion for her unborn child because of her religious beliefs will be trumped by the authority of the hospital if the doctors determine it is medically necessary at the time of birth).

228. *See Prince*, 321 U.S. at 166-71 (discussing the important state interest of child protection); *see also* *State v. Chenoweth*, 71 N.E. 197, 200 (Ind. 1904) (convicting father of manslaughter for failing to provide lifesaving medical care to his son). In *Chenoweth*, the father had followed his religious beliefs, and the court held that a parent must provide his or her child with medical assistance to relieve or cure the child of disease, regardless of whether the parent believes that it is against the teachings of the Bible and that prayer is a cure for all disease. *See id.* at 199-200.

229. 317 N.Y.S.2d 641 (Fam. Ct. 1970).

230. *See id.* at 652 (determining that a mother's religious objections to her son's surgery and possible blood transfusion were "untenable," and ordering her to permit her son to undergo surgery). *But see In re Green*, 448 Pa. 338, 349 (1972) (declining to find the parent's medical decision outweighed by the state's interest where the child's life is not in immediate danger).



reached the age of full and legal discretion when they can make that choice for themselves."<sup>231</sup>

#### CONCLUSION

Given the current hostile climate to gay, lesbian, bisexual, and transgender people in society,<sup>232</sup> the legislature<sup>233</sup> and the courtrooms,<sup>234</sup> the chances of a judge extending protection against child abuse and neglect in a situation involving "reparative" therapy is highly unlikely. Whether a court or legislature would ever extend protection to juveniles subjected to "reparative" therapy may turn in part on the jurisdiction and community in which the juvenile resides.<sup>235</sup> If a jurisdiction already prohibits discrimination against gays and lesbians in employment, public accommodations, education, housing, credit practices, and union practices, then it is more likely that the jurisdiction will protect gay, lesbian, bisexual, and transgender youths from "reparative" therapy.<sup>236</sup>

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231. *Id.* (quoting *Prince*, 321 U.S. at 170).

232. *See, e.g., From Wrongs to Rights: Public Opinion on Gay and Lesbian Americans Moves Toward Equality*, NGLTF Newsletter (Policy Institute of the National Gay and Lesbian Task Force, Washington, D.C.), July 1998, at 14-15 (analyzing societal opinions of gay men and lesbians and noting that only 35% of Americans support same-sex marriage, and only 40% support adoption rights for gays and lesbians). More generally, the report measured the public's feelings toward gays and lesbians and found that the mean score for feeling favorable towards gays and lesbians was forty out of one hundred. *See id.* at 19. This statistic is one indication that the American public does not favorably view gays and lesbians. *See id.* at 20. Further, the report showed that there was a 52% disapproval rate of gay and lesbian "lifestyles." *See id.* at 21.

233. *See* Leland & Miller, *supra* note 8, at 47-48 (assessing the overall climate in the 105th Congress and noting that Senate Majority Leader Trent Lott likened gays and lesbians to kleptomaniacs and alcoholics and blocked a Senate vote on the nomination of James Hormel, an openly gay man, to be ambassador to Luxembourg).

234. *See* *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding sodomy law and honoring the Georgia electorate's decision "that homosexual sodomy is immoral and unacceptable"); *Equality Found. v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir.) (determining that the removal of gays, lesbians, and bisexuals from the ranks of those protected by the Cincinnati Charter Amendment was not a discriminatory measure because it was rationally related to the city's economic interests), *cert. denied*, 119 S. Ct. 365 (1998); *Desantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 330-33 (9th Cir. 1979) (holding that Title VII does not prohibit discrimination based on sexual orientation); *Ward v. Ward*, 742 So. 2d 250, 252-54 (Fla. Dist. Ct. App. 1996) (granting custody of a child to a man who murdered his first wife so that the mother, a lesbian, would not have custody). *But see* *Romer v. Evans*, 517 U.S. 620, 635 (1996) (holding that a state is not permitted to pass a law that discriminates against gays and lesbians by making them inferior to everyone else).

235. *See generally* *Gay, Lesbian, Bisexual & Transgender Civil Rights Laws in the U.S.*, NGLTF Newsletter (Policy Institute of the National Gay and Lesbian Task Force, Washington, D.C.), June 1998, at i (discussing the likelihood that a state or locality would pass pro-gay legislation based upon the nature of prior civil rights laws passed by states and municipalities).

236. *See id.*

If a case involving a child involuntarily subjected to “reparative” therapy was before a non-hostile court there would be ample precedent for a finding of child abuse and neglect.<sup>237</sup> A judge would likely acknowledge that a reasonably prudent parent<sup>238</sup> would not subject his or her child to treatment that the mainstream medical community has warned is dangerous.<sup>239</sup> Further, a judge would have to acknowledge that the state child abuse statute includes emotional or mental abuse.<sup>240</sup> The court would then look to case law ordering a parent to be aware of, and to act in accordance with, his or her child’s particular needs.<sup>241</sup> If a parent places his or her child in “reparative” therapy for religious reasons, there is precedent holding that the state’s interest in the well-being of its young citizens is strong enough to defeat both a parental autonomy claim and a free exercise of religion claim.<sup>242</sup>

After determining that the child is neglected, the state should notify the parents that they must make diligent efforts to eradicate the homophobia within their home before the state will permit the child to be returned.<sup>243</sup> In finding either temporary or long-term placement for the child, the court should seriously consider placing the child with a lesbian or gay couple.<sup>244</sup>

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237. See *supra* Part III.A.3 (examining standards used in child abuse and neglect cases). See generally AREEN, *supra* note 131 (recording a decision that a parents’ motive for punishing a child is irrelevant to whether a child abuse statute was violated, no matter how sincerely held and regardless of whether the court is sympathetic); *In re Sampson*, 317 N.Y.S.2d at 652 (stressing that no matter how genuine a parent’s belief, such belief may be less than the State’s interest).

238. See *supra* Part III.B (discussing reasonably prudent parent standard).

239. See *supra* notes 33-39 and accompanying text (explaining the condemnation of “reparative” therapy by such organizations as the APA and the American Psychiatric Association).

240. See *supra* notes 62-66 and accompanying text (chronicling the emotional and mental abuse in state child abuse and neglect statutes).

241. See *supra* Part III.A.3 (discussing cases charging parents with the duty of recognizing their child’s special needs).

242. See *supra* Part IV.D; see also *In re Sampson*, 317 N.Y.S.2d 641, 653 (Fam. Ct. 1970) (providing an overview of cases in which the court found the states’ interest sufficiently compelling to override the parents’ right to raise their child); *State v. Chenoweth*, 71 N.E. 197, 200 (Ind. 1904) (finding a parent guilty of manslaughter for withholding medical care from his son despite the fact that the father claimed that he believed the Bible and prayer would heal his son).

243. See *supra* Part IV.B (discussing judicial holding that parents must remove hostile conditions that led to the removal of the child after a finding of abuse in order for them to be reunited).

244. See Nancy Polikoff, *Resisting “Don’t Ask, Don’t Tell” in the Licensing of Lesbian and Gay Foster Parents: Why Openness Will Benefit Lesbian and Gay Youth*, 48 HASTINGS L.J. 1183, 1184-87 (1997) (providing multiple reasons why a gay or lesbian child would benefit from living with a same-sex couple). Professor Polikoff states:

The most obvious connection between lesbian and gay youth and foster parents is the importance of the availability of gay and lesbian foster parents to provide homes for gay teenagers who need acceptance and support for

A major reason why courts have not been receptive to gay, lesbian, bisexual, and transgender issues historically is because of the pervasive belief in the legal system that gays and lesbians are immoral.<sup>245</sup> Because the role of the courts is to interpret laws, which were created based on a shared social vision of morality,<sup>246</sup> the gay liberation movement may not achieve true success unless the discourse of gay liberation shifts from a rights-based theory<sup>247</sup> to a moral-based argument.<sup>248</sup> If right-wing, Christian, political

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their journey into adulthood. But the open, publicly acknowledged and valued existence of gay foster parents serves another function. The state agency that licenses foster parents is the same agency that controls the lives of lesbian and gay youth in its care. Open licensing of gay foster parents sends a powerful message to those youth that it's okay to be gay, and we need the state to send that message in as many ways as possible.

*Id.* at 1184.

245. See *infra* notes 249-52 and accompanying text (discussing the general animus toward homosexuals and the perceived immorality of homosexuality); see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (noting Georgia's sodomy law is predicated upon a widely held view that sodomy is immoral).

246. See Feldblum, *supra* note 1, at 241 ("The role of government is to legislate based on a shared social vision of morality."). The logical extension is that if the courts interpret laws that the legislatures produce, then the courts are interpreting laws based on a shared vision of morality.

The Washington Post conducted a poll showing that most Americans prefer defending the community's standards of right and wrong over protecting the rights of individuals to live by their own moral standards. See Dan Balz, *Picking up Votes in a Maze of Ideas*, Wash. Post, Oct. 5, 1998, at A8. The conclusions made in this article indicate that whole communities will have to view discrimination against gays and lesbians as wrong before pro-gay bills gain support in the legislatures.

247. See URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 179 (1995) (discussing the shortcomings of a movement based on a civil rights paradigm). Vaid points out that "a rights-oriented movement can coexist with prejudice against lesbians and gay men" and can even progress without dismantling homophobia. See *id.* Although Vaid does not recommend either completely abandoning the rights-oriented model or adopting a moral argument, she does advocate an expansion of equality to the point of gay civil rights being seen as part of a broader human right along with sexual and gender equality, social and economic justice, and faith in a multiracial society. See *id.*

248. See Feldblum, *supra* note 1, at 241 (arguing that legislation based on shared morality would further gay liberation in ways that legislation based on equal rights could not). Professor Feldblum argues for a "gay is good" message:

[T]he role of government is to legislate based on a shared social vision of morality. Again, put most simply, laws and judicial decisions prohibiting discrimination based on sexual orientation would be justified under this view if society were to accept that it is immoral to force an individual to deny the integrity of his or her sexual orientation, and further, if society would come to believe that homosexual love embodies the same moral goods as does heterosexual love.

*Id.*; see also *Capitol Hill Update*, WASH. BLADE, Mar. 12, 1999, at 29 (discussing a gathering of over 120 civil liberties advocates). The article reports that Professor Feldblum led a discussion on what opponents to gay rights have decided to use as their message. She said they want to say that homosexuality is destructive and unhealthy. She also noted that polling numbers show that most Americans believe gays are immoral. She believes the best way to counter these messages and educate people is by showing that gays are "healthy and moral *because* they embrace their

organizations are permitted to have the only say on what is and is not moral, then gay, lesbian, bisexual and transgender people are not going to receive the protection they need from the legal system.<sup>249</sup>

One of the best examples of how the morality argument has worked against gay and lesbian civil rights is in *Bowers v. Hardwick*.<sup>250</sup> In *Hardwick*, the Supreme Court claimed that the majority of the population of Georgia believed homosexuality was immoral and affirmed the practice of basing laws on morality.<sup>251</sup> Regarding the morality of homosexuality, the Court in *Hardwick* stated:

The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but *insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree*, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis.<sup>252</sup>

Since the Supreme Court decided *Hardwick* in 1986, it has been cited as authority to deny gays and lesbians numerous civil rights.<sup>253</sup>

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sexual orientation." *See id.* (emphasis in original).

249. An example of what the right-wing political organizations say about the morality of homosexuality is presented by a letter distributed by the organization called Focus on the Family. *See* Letter from James Dobson, Executive Director, *Focus on the Family*, to Focus on the Family Membership (June 1998) (visited Mar. 30, 2000) <<http://www.family.org/docstudy/newsletters/a0001935.html>> (discussing the relationship between conservative Christian groups such as Focus on the Family, and homosexuals). Dobson claims that the gay civil rights movement has a radical social agenda that threatens society in general and the family in particular. *See id.* The letter stresses that "[a]ny nation that mocks the laws of God will ultimately fail." *Id.* Dobson believes that "homosexuality is immoral and contrary to God's plan for the human family." *Id.* He advocates that his followers direct homosexuals to groups such as Exodus International, where they can be delivered from the homosexual lifestyle. *See id.* He says there is "great suffering among homosexuals, and it is our desire to show compassion and concern for those caught in that lifestyle." *Id.*; *see also* Finnis, *supra* note 6, at 1054 (discussing Finnis' belief in the immorality of homosexuality).

250. 478 U.S. 186, 196 (1986) (holding that a rational basis exists for a Georgia sodomy law). This decision illustrates how the moral view of homosexuality influences, if not determines, the way the legal system responds to gay, lesbian, and bisexual legal issues. *See id.*

251. *See id.* (noting that 25 states have sodomy laws).

252. *Id.* (emphasis added).

253. *See, e.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) (noting that *Hardwick* determined that homosexual activity is not a fundamental right, and ultimately determining that Department of Defense's practice of examining the background of gay and lesbian applicants was not a violation of the Constitution); *Ben-Shalom v. Marsh*, 881 F.2d 454, 461 (7th Cir. 1989) (upholding a U.S. Army practice of disqualifying homosexuals from service, citing *Hardwick* for support); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (citing *Hardwick* to support the proposition that discrimination against homosexuals does not violate the Constitution); *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) (basing decision to uphold FBI's refusal to hire a homosexual on *Hardwick*, and noting that the decision "forecloses appellant's efforts to gain suspect

Holding such strong precedential value, *Hardwick* continues to convey the idea that homosexuality is immoral.<sup>254</sup> It is for this reason that the gay liberation movement should engage in the morality argument.<sup>255</sup> What engaging in the morality argument means in the context of "reparative" therapy is that the gay liberation movement will have to explain to the courts and legislatures why it is necessary, and morally right, to protect gay, lesbian, bisexual, and transgender youths.

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class status for practicing homosexuals"); *In re* Opinion of the Justices, 530 A.2d 21, 27 (N.H. 1987) (relying on *Hardwick* to find that a proposed bill prohibiting homosexuals from adopting children, being licensed as foster care parents, or from running daycare centers does not violate any substantive right to privacy); *Missouri v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986) (citing *Hardwick* for the proposition that no fundamental right to engage in homosexual behavior exists); see also WILLIAM B. RUBENSTEIN, *SEXUAL ORIENTATION AND THE LAW* 668 (2d ed. 1997) (explaining that *Hardwick* has also been used, in at least six cases, to conclude that classification based on sexual orientation deserves no more than rational basis review).

254. See RUBENSTEIN, *supra* note 253, at 668 (outlining the strong precedential "value" of *Hardwick*).

255. See generally Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 140 (1998) (arguing that the bare public morality does not have any force because it is inadequate if it lacks empirical connection to the public welfare). Public welfare is defined as a good such as health, safety, or economic prosperity. See *id.* at 141. Professor Cicchino argues that the bare morality argument is being proposed as a legitimate government interest despite its inability to pass the test of reasonableness required by the Equal Protection Clause. See *id.* at 193. He suggests that only a morality argument tied to public welfare would pass constitutional muster. See *id.* Thus, if the gay liberation movement is going to engage in the morality argument, it should note that any morality it wishes to espouse should likewise be tied to the public welfare. In the context of "reparative" therapy, the public welfare would be health and safety, i.e., ensuring the mental and physical health and safety of children.