

KIDS, COURTS AND QUEERS: LESBIAN AND GAY YOUTH IN THE JUVENILE JUSTICE AND FOSTER CARE SYSTEMS

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| I. | SCARY FAIRY TALES: NARRATIVES OF LESBIAN AND GAY TEENAGERS | |
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*I haven't told my parents that I'm gay yet, and probably
won't for quite a while either. I don't think they would*

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understand. In fact, I should say that I know they wouldn't.

—Sue Cline, 17.¹

Anna, an eighteen year old attending the Hetrick Martin Institute,² found herself living in a group home after “coming out”³ to her parents. Her parents were, at first, very angry (primarily with each other) and felt guilty. They almost filed for divorce, each blaming the other for Anna’s sexuality. With counseling, Anna’s parents decided not to divorce. Instead they filed a P.I.N.S. petition⁴ requesting that Anna be placed outside their home due to her sexual orientation.⁵

Anna was angry and frequently became involved in fights at school and at her foster care and group home placements. She was continually harassed and insulted by other youths because of her sexuality and fought back in retaliation. The group home counselor, not knowing about the victimization of Anna by the other youths, had characterized Anna as an angry child who acted out and harassed other youths because of her anger. Once Anna attempted suicide, the counselor began to look more deeply into Anna’s problems and eventually referred her to the Hetrick Martin Institute.⁶

D.B., a fifteen year old boy, was unable to get along with students in his school because they thought he was gay. He dropped out of high school and went to work. He was forced to live on the street, in a group home, at his boss’s house and at an aunt’s house because his mother did not approve of his sexuality.⁷ His mother filed a P.I.N.S. petition with

1. TWO TEENAGERS IN TWENTY: WRITINGS BY GAY AND LESBIAN YOUTH 59 (Ann Heron ed., 1994). The title refers to the estimated number of gay or lesbian teenagers based upon the Kinsey Studies. See, ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

2. The Hetrick Martin Institute is a community-based agency in New York City which provides a range of services to lesbian and gay adolescents and to their families.

3. This term is used to describe both the process of accepting one’s own homosexuality and of telling others about that sexual orientation.

4. See N.Y. FAM. CT. ACT § 712 (McKinney 1983). Persons in Need of Supervision (P.I.N.S.) petitions can be filed with the Family Court when minors are not committing crimes but their parents are nevertheless unable to control them. In other words, parents can petition the court to assist them in their role as parents. The remedies the court has are limited; however, one possible solution for the court is to place the child in a nonrestrictive group home setting. Generally, this solution is employed when parents refuse to take their child home. See *id.* §§ 754, 756.

5. See Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. INTERPERSONAL VIOLENCE 295, 298 (1990).

6. See *id.*

7. See Heron, *supra* note 1, at 81.

the Family Court, after which he was arrested and temporarily placed in St. Barnabas House.⁸

M. Mario Doe, a high school student in Illinois, brought suit against his school district for failing to protect him while at school.⁹ He was threatened and harassed on a daily basis with such epithets as “fag” and “fucking fag.” Death threats were made to him by other students as a result of his perceived sexual orientation. He was pushed down by two students who, while he was on the ground, began pinching him and grabbing his genitals. He was hit with ice, rocks, pens, and spit balls on many occasions. In a particularly appalling incident, a group of male students continually blew kisses at Doe in front of a teacher, while one student glared at him and then asked him if he wanted to “dance and fuck.”¹⁰ Doe alleges that the constant harassment he received at school, and the lack of assistance he received from teachers and administrators,¹¹ resulted in failing grades at school where he had previously been an “A” student.¹²

Jim, a seventeen year old boy, upon coming out to his mother, was verbally and eventually severely physically abused by his parents. He was escorted almost immediately to a psychiatrist who was chosen by his parents and his school principal for the express purpose of “deprogramming” him. His parents prevented him from attending his private high school and committed him to a psychiatric hospital. He was forced to live in a foster home, was stalked by private detectives when he moved in with his lover, and was inundated with harassing mail from his mother including Mass cards and other religious paraphernalia. Jim’s lover, who was thirty-two years old, was arrested and charged with contributing to the delinquency of a minor upon the filing of charges by Jim’s parents.¹³

Stacey Harris, a Massachusetts high school student who was confused about her sexuality, was given no services to help her work out her problems. In fact, Stacey’s teachers and counselors labeled her confusion as rebellion and categorized her as a troubled child and a

8. St. Barnabas House is a group home in New York City.

9. See *Doe v. Riverside-Brookfield Township High Sch.* Dist. 208, No. 95-C-2437, 1995 WL 680749, at *1 (N.D. Ill. Nov. 14, 1995).

10. See *id.*

11. Student Doe reported the abuse he received from other students to several teachers, to the Dean, to an acting Dean, to the school psychologist, and to guidance counselors. No one took definitive measures to curtail the incidents. See *id.* at *2.

12. See *id.*

13. See Heron, *supra* note 1, at 89.

discipline problem. In her sophomore year, after receiving no help with her self proclaimed identity problem, Stacey explains, "I woke up in a psych hospital . . . after taking my father's camping knife violently to my wrists and hoping for success."¹⁴ By her junior year, Stacey had been placed in thirteen hospitals, she had made five suicide attempts, she had been through several different high schools, and she had lived in four halfway houses.¹⁵

These narratives are consistent with many first person accounts of lesbian and gay youth. For example, in *Two Teenagers in Twenty*,¹⁶ the forty-three teenagers who contributed personal narratives to the book had common experiences which include the following: five had attempted suicide, one of whom succeeded prior to the publication of her story in the book; at least ten had seriously considered suicide; seven spent time in the child welfare system, including foster homes, group homes, lock up facilities, and psychiatric hospitals; at least six of the youths report having been the recipient of either or both formal or informal aversion therapy from psychologists, psychiatrists, counselors, parents, parent figures, priests, principals, and guidance counselors; twenty-five expressed feelings of hopelessness, despair, and depression; ten experienced some form of verbal or physical violence; four were homeless at one time or another; fourteen identified as having problems in school—primarily with other students—as a result of their sexuality; three were forced to drop out as a result of such problems. Furthermore, twenty-six of the youths report having had families and friends who were not supportive of their sexuality, while thirteen others report not having come out to their families and friends for fear of rejection. Only four of the forty-three youths in the book report coming out as a good experience—two of those four were children of gay parents. Virtually all of the youths in the book attribute the majority of their problems to dealing with society's rejection of them due to their sexuality.¹⁷

This Article examines the ways in which the law negatively impacts on gay and lesbian youth and proposes changes in order to effectuate the positive impact that law can have on gay and lesbian youth. This Article first examines whether gay and lesbian youths are more often exposed to the juvenile justice and child welfare systems because of the

14. Massachusetts Governor's Commission on Gay and Lesbian Youth, *Making Schools Safer for Gay and Lesbian Youth: Breaking the Silence in Schools and in Families*, Education Report 12 (1993).

15. *See id.* at 19.

16. Heron, *supra* note 1.

17. *See id.* at 8-9.

criminalization of certain sex acts and the breakdown of the parent-child relationship. Second, this Article explores whether gay and lesbian youth are provided services appropriate to their special needs.

It is not this Article's contention that entry into the juvenile justice or foster care systems is exclusively due to a child's (homo)sexuality¹⁸ or that all gay youths enter the system. Nevertheless, there is a link, perhaps a very strong one, between a child's sexuality, the ability of families to cope with a gay child, and the likelihood of entry into either system.

The magnitude of this problem is impossible to gauge without further study. A commission should therefore be established to make statistical findings on the issues discussed in this Article. In addition, family court systems¹⁹ should be forced to look into how to better serve gay and lesbian youth. Thus far, family court systems have ignored the presence of this segment of our population, thereby contributing to their delinquency, their death, and their continued oppression.

II. GAY AND LESBIAN TEENAGERS IN FAMILY (VALUES) COURT²⁰

Two of the staff members [in the group home] wanted to "help" me. . . . I was told that two thousand years ago, I would have been stoned to death. That shook me up a little. . . . They quoted the Bible to me, told me I would never have true sexual satisfaction, and asked me if I didn't want a man's strong arms around me. I didn't really care if I went to Hell or not; if I had cared, I would have really been in bad shape.

—Kimba Hunter, 18.²¹

A. Juvenile Justice in the Family Court System

Although the nomenclature differs depending on the jurisdiction,²² minors come into the care of the state either by committing

18. See discussion *infra* Part II.

19. "Family court system" in this context includes both the foster care and the juvenile justice systems.

20. Although the purpose of this Article is to focus on the problems faced by lesbian and gay adolescents, existing programming in this country offers services to what is termed "sexual minority youth," including bisexual, transsexual, and transgender youth. The references in this Article are primarily to adolescents who identify as gay or lesbian.

21. Heron, *supra* note 1, at 55.

22. For example, in California all children who are in the child welfare system are called "wards of the state" whether they have been adjudicated juvenile delinquents, see CAL. WELF. &

a crime or due to some breakdown in the parent-child relationship. There are slight variations amongst the different states; however, New York is typical and is used as an illustration for this discussion.

In the first instance, when a minor is accused of committing an act that would be considered a crime, the state of New York files a juvenile delinquency petition against the child. Subsequent to the filing of a petition, but prior to any finding of guilt, the child may be remanded to the care of the state.²³ Additionally, once there has been an adjudication of juvenile delinquency,²⁴ a child may be placed with the Division for Youth²⁵ for an initial period not to exceed three years.²⁶

When a situation arises which adversely affects the parent-child²⁷ relationship, the state intervenes *in loco parentis*²⁸ unless and until the problem is solved. This state action is manifested in the New York system through either Persons in Need of Supervision petitions (P.I.N.S. petitions) filed against the child,²⁹ or abuse or neglect proceedings brought against the parent(s).³⁰

There are two phases of a Family Court proceeding which are separate and distinct from one another. First, there is an adjudicatory phase which is comparable to a criminal trial in which guilt or innocence

INST. CODE § 602 (West 1996), or determined to be abused or neglected children as a result of proceedings brought against their parents. *See id.* at § 300.

23. In other words, a child may be placed in a juvenile detention center immediately following the filing of a petition by the state. Although there are due process requirements the court must meet, a child may await her hearing or trial in a lock-up facility. One of the factors the judge will consider is the stability of the child's home life and the ability of the parents or guardians to control the child. If the parent indicates to the judge that the child is somehow ungovernable at home or that the parent is not interested in taking the child home the judge may remand the child to the care of the state and place her in a juvenile detention center to await trial. *See* N.Y. FAM. CT. ACT §§ 301.2(3), 320.5 (McKinney 1983); N.Y. EXEC. LAW § 503(1) (McKinney 1996).

24. An adjudication of juvenile delinquency is equivalent in criminal trials to a "finding of guilt."

25. The Division for Youth was created in 1960 to establish, operate, and maintain youth centers to prevent delinquency and youth crime. The Division serves youths who have been judicially removed from their homes and communities. *See* 1922 N.Y. LAWS, ch. 547; N.Y. EXEC. LAW § 501 (McKinney 1996).

26. *See* N.Y. FAM. CT. ACT § 353.3(5) (McKinney 1983) (governing felonies and misdemeanors) and § 353.5(5)(a)(1) (governing designated felonies). According to section 355.3, an extension of a respondent's placement may be applied for sixty days prior to the expiration of their placement and may be granted every year up until respondent's eighteenth birthday.

27. Parent is the term used to refer to the parent figure in the child's life. It could be the legal guardian of the child or any person responsible for the care of the child.

28. "*In loco parentis*" means "in the place of a parent."

29. *See* N.Y. FAM. CT. ACT § 711 (McKinney 1983).

30. *See id.* § 1011.

is determined.³¹ However, in Family Court the determination is whether the child is a juvenile delinquent, a P.I.N.S., or abused or neglected.³² Second, there is a dispositional phase comparable to the sentencing part of a criminal trial.³³ The judge has several options. For instance, she can suspend sentence, she can place the child with the Division for Youth after a determination of juvenile delinquency,³⁴ or she can place the child in a nonrestrictive group home setting or with the child welfare administration.³⁵

B. Gay and Lesbian Youth are More Susceptible to Contact with the System

Gay and lesbian teenagers face a host of difficulties due to their sexuality regardless of whether or not they are open about it. The “normal” concerns of teenagers—learning self-acceptance, gaining acceptance in an identified group, doing well in school, dating, and maintaining relationships with friends and family—are significantly more difficult for gay youth. Minors who are gay or lesbian, or who are perceived as such, are often ostracized at school, faced with irreconcilable family problems, excluded from their homes, and unable to locate information or supportive adults, gay or straight, who might be able to help them.³⁶

31. A fact-finding hearing is one which is held to determine whether the respondent committed the crime or crimes alleged in the petition. *See id.* § 301.2(6).

32. *See id.* §§ 345.1(1), 752, and 1051(a), respectively.

33. A “dispositional hearing” is one which is held “to determine whether the respondent requires supervision, treatment or confinement.” *Id.* § 301.2(7).

34. The state may no longer place children in detention facilities if there has not been a finding of juvenile delinquency, but only an adjudication that they are a P.I.N.S. *See* 42 U.S.C. § 5633(a)(12)(A)(B) (1994).

35. *See* N.Y. FAM. CT. ACT § 352.2(1) (McKinney 1983).

36. *See* PAUL GIBSON, U.S. DEP’T HEALTH & HUMAN SERV., GAY MALE AND LESBIAN YOUTH SUICIDE, in REPORT OF THE SECRETARY’S TASK FORCE ON YOUTH SUICIDE 110 (1989). Gibson suggests that the high rates of suicide among gay and lesbian youth are attributable to problems gay youth have in accepting themselves due to internalization of a negative self-image and a lack of accurate information about homosexuality. Gay youth face extreme physical and verbal abuse, rejection, and isolation from family and peers. They often feel totally alone and socially withdraw out of fear of adverse consequences. As a result of these pressures, Gibson writes, “lesbian and gay youth are more vulnerable than other youth to psychosocial problems including substance abuse, chronic depression, school failure, early relationship conflicts, being forced to leave their families, and having to survive on their own prematurely.” *Id.* at 110. It should be noted that this controversial chapter on gay and lesbian youth suicide in the *Report* almost led to a rejection of the entire volume. After considerable debate, the report was accepted in its entirety but published only in limited edition. *See* DEATH BY DENIAL: STUDIES OF SUICIDE IN GAY AND LESBIAN TEENAGERS 8 (Gary Remafedi ed., 1994). Remafedi believes that the

As a result of these problems and the criminalization of certain sex acts, gay and lesbian youth may encounter the legal system more frequently. Their problems are often interrelated. There currently exists virtually no programming in this country to assist these youths through very difficult times.

C. *Gay Males and Lesbians as Juvenile Delinquents*

In New York, a juvenile delinquent is defined as a person over seven and less than sixteen years of age who commits an act which, if committed by an adult, would constitute a crime.³⁷ Under the statutory rape laws in most states, it is a crime to engage in sexual intercourse with another person who is less than a certain age.³⁸ It is also unlawful, under statutory sodomy statutes, to engage in deviate sexual intercourse with persons less than a certain age.³⁹ Most states have a statutory age of consent under which it is legally impossible to engage in consensual sexual acts.⁴⁰ These types of laws, along with laws forbidding the corruption of the morals of a minor and certain status offense prosecutions, generally exist in order to regulate the sexual activity of minors.⁴¹

In New York, there are differing degrees of culpability which are wholly dependent upon the age of the actors in relation to one another.⁴²

controversy over acceptance of the report is due to political forces attempting to suppress material identified as beneficial to homosexual communities.

37. See N.Y. FAM. CT. ACT § 301.2(1).

38. For example, the California Penal Code defines unlawful sexual intercourse as "an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor . . . under the age of 18 years." CAL. PENAL CODE § 261.5(a) (Deering 1996). See also N.Y. PENAL LAW § 130.25 (McKinney 1987) (defining rape in the third degree as sexual intercourse between a person 21 years old or more and a person to whom the actor is not married, who is less than 17 years old).

39. For example, section 130.40 of the New York Penal Code, contemplates a finding of guilt for sodomy in the third degree when, being 21 years old or more, a person engages in deviate sexual intercourse with another person less than seventeen years old.

40. The ages below which consent to sexual intercourse may not be given by minors and below which consent is not a defense to a criminal prosecution for rape varies from state to state and generally ranges between the ages of 12 and 18. For example, in Arizona the statutory age of consent is 18. See ARIZ. REV. STAT. ANN. § 13-1405 (West 1989). However, in several states, including Alaska, Massachusetts, Nebraska, and New Hampshire, the age of consent is 16. See ALASKA STAT. §§ 11.41.434 (Michie 1995); MASS. ANN. LAWS ch. 265, § 22A (Law. Co-op. 1980); NEB. REV. STAT. § 28-319(1)(c) (1995); N.H. REV. STAT. ANN. § 632-A:3 (1996).

41. See 1 LEGAL RIGHTS OF CHILDREN 635 (Donald Kramer ed., 2d ed. 1994). See also, Michael M. v. Superior Court, 450 U.S. 464 (1981).

42. A person is guilty of rape in the third degree in violation of Penal Law section 130.25 when, "being twenty-one years old or more, he or she engages in sexual intercourse with another person . . . [who is] less than seventeen years old." Rape in the third degree is a class E felony.

Consent is not an element of any of the offenses because New York Penal Law considers people who are less than seventeen years of age to be incapable of consent.⁴³ Therefore, a minor can be prosecuted as a juvenile delinquent simply for having consensual sex with another youth. Additionally, although not in New York,⁴⁴ most states still make it a crime for adults to engage in consensual sodomy.⁴⁵ Therefore, two minors who do so engage can be prosecuted as juvenile delinquents for sodomy as well as statutory sodomy.⁴⁶

Although distinct possibilities, it is not known how often these situations actually manifest themselves in Family Court for a couple of reasons; the cases are seriously under-reported and almost never appealed, and the child welfare agencies do not keep statistics on these types of convictions. There is, however, an agency in California named G.L.A.S.S.⁴⁷ which has statistics on sex crimes involving juveniles.

Additionally, a person is guilty of rape in the second degree in violation of Penal Law section 130.30 when, "being eighteen years old or more, he or she engages in sexual intercourse with another person . . . [who is] less than fourteen years old. Rape in the second degree is a class D felony." Likewise, the sodomy statutes in New York are formed along the exact same lines. See N.Y. PENAL LAW §§ 130.40, .45 (McKinney 1987).

43. *Id.* § 130.05(3)(a).

44. See *People v. Onofre*, 415 N.E.2d 936 (1980), in which the New York Court of Appeals struck down section 130.38 of the Penal Law criminalizing consensual sodomy as violative of both the Due Process Clause and the Equal Protection Clause of the Federal Constitution. However, the crime of consensual sodomy remains on the books in the New York Penal Code because it has not been repealed by the Legislature.

45. The United States Supreme Court has held that consensual sodomy statutes do not violate the fundamental rights granted by the Constitution. See *Bowers v. Hardwick*, 478 U.S. 186 (1986). See generally, Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073 (1988); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905 (1993); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1511, 1519-53 (1989); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's SEX AND REASON: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (review essay).

46. For an in-depth analysis of the sodomy laws in various states and their possible application to lesbians, see RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 47 (1992).

47. G.L.A.S.S. is Gay and Lesbian Adolescent Social Services, an agency which operates five group homes for sexual minority youth, that is, for gay, lesbian, bisexual, transsexual, and transgender youth. All of the children in the agency are wards of the court. Approximately 25% come from the probation department with adjudications of juvenile delinquency, primarily for sex offenses. The other 75% come in as a result of being abused or neglected by their parents.

The agency was formed in response to a social worker's recognition of the special needs of youths who identified as gay, lesbian, or bisexual. She realized that these youths spent a prolonged time in the system, often with many different placements. She discovered that the foster families and group homes of the children who identified as sexual minorities were unable to cope appropriately with the children's sexuality. Therefore, the children were constantly shifted from

They run a program which is referred to as their “§ 288 program”—affectionately named for § 288 of the California Penal Code which criminalizes sexual intercourse with minors under fourteen years of age.⁴⁸ The youths in this particular program have been adjudicated juvenile sex offenders.⁴⁹ Since there is no statute criminalizing consensual sodomy in California, there are no juvenile prosecutions for it.

In February 1990, the Director of the Division for Youth in New York⁵⁰ told the Joint Legislative Fiscal Committee that about twenty-five percent of the youths in residential facilities, about 550 youths, were sex offenders.⁵¹ However, there are no reliable statistics regarding the sexual offenses these youths were prosecuted for, or the gender or sexual orientation of either the perpetrators or the victims. Nonetheless, it is not difficult to realize the possibilities and acknowledge the need for extensive study in this area.

Additionally, children may simply be entering the system as juvenile delinquents, not because of the commission of sex offenses, but because they act out as a result of their inability to deal with their sexuality and the lack of support and information available. Several scenarios could result in a child being adjudged delinquent. For instance, Anna, the youth in the first narrative, was involved in many fights because of peer ridicule. If she seriously injured another child in a fight, she could be prosecuted for assault.

place to place. The social worker determined that the causal link between the sexual identity of children and their inability to maintain longevity at placements was attributable primarily to the child welfare system's inability to deal with sexual minorities. Telephone Interview with Derrell Tidwell, Chief Operating Officer, Gay and Lesbian Adolescent Social Services (Jan. 2, 1996).

48. CAL. PENAL CODE § 288 (West 1985).

49. This program is designed to serve violent offenders and therefore does not cater to those who are prosecuted for consensual acts under statutory rape laws and statutory sodomy statues. In order to enroll in this program, the minor and the minor's probation officer must make an 18-month commitment. G.L.A.S.S. believes that this much time is necessary to effectively treat juveniles who have been convicted of nonconsensual sex offenses. These youths get specialized treatment. In addition to the therapy given to all of the children in the various group homes, these youths must also attend a two-hour session once a week. Their therapy includes attacking the various levels of the denial process; for instance, they might have to write a letter to their victim (which is not necessarily sent) or they might have to write a letter as a victim. Interview with Derrell Tidwell, *supra* note 47.

When asked about recidivism rates in the sex offender program, Mr. Tidwell posited that two years ago, the rate would not have risen above 25%. However, with budget cuts and probation officers preferring three or four month to 18 month commitments, he posited that the recidivism rates are now higher. *Id.*

50. The Honorable Leonard G. Dunston.

51. See N.Y. State Comptroller, Div. of Mgm't Audit, Div. for Youth, Counseling Efforts Should Be Improved 24 (1992).

Likewise, gay and lesbian youth are more likely to abuse drugs and alcohol.⁵² Therefore, drug possession convictions are distinct possibilities for these youths. Additionally, it is well known that a drug problem is frequently linked to other problems due to impaired judgment. A minor who steals to support a drug habit could likely be convicted of robbery, burglary or assault.

When faced with a grim future that includes parents who disown them, a school where they are harassed, a life with no friends and nowhere to turn, children may run away.⁵³ A homeless child could be arrested and charged with larceny for stealing groceries, clothes, or other necessities.⁵⁴ Additionally, with no place to live, criminal trespass convictions are probable for children who live in abandoned buildings. It is also not uncommon for these children to become prostitutes in order to feed or house themselves. If caught, they become members of the child welfare system as juvenile delinquents.⁵⁵ Thus, gay and lesbian youths are more likely to enter the juvenile justice system through the commission of and subsequent conviction for such crimes. The situations that gay youth face because of exclusion from their homes make them likely participants, albeit out of necessity, in a life of crime.

D. *Gay Males and Lesbians as P.I.N.S.*

A person in need of supervision, or P.I.N.S., is defined as a male less than sixteen years of age and a female less than eighteen years of age who is habitually truant, incorrigible, ungovernable, or habitually disobedient and beyond the lawful control of the parents.⁵⁶ Gay and lesbian youths are more likely to enter the foster care system through the filing of P.I.N.S. petitions because of the nature of the problems they face within the family unit. For example, in 1985 there was a New York Family Court case brought on a petition alleging that "Lori M." was a person in need of supervision.⁵⁷ The sole allegation in the petition brought by Lori's mother was that her daughter was associating with a

52. See GIBSON, *supra* note 36, at 110.

53. See Heron, *supra* note 1, at 26, 28, 81, 157.

54. See N.Y. PENAL LAW § 155.05 (McKinney 1988) (defining larceny).

55. See N.Y. PENAL LAW § 230.00 (McKinney 1983) (defining prostitution); N.Y. FAM. CT. ACT § 301.2 (defining delinquency).

56. See N.Y. FAM. CT. ACT § 712(a). It is also possible to be adjudged a person in need of supervision if a child violates the provisions of section 221.05 of the Penal Law (unlawful possession of marihuana).

57. In the Matter of Lori M., 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985).

twenty-one year old lesbian named Ellen.⁵⁸ At the hearing, there was evidence that Lori was an obedient, respectful child who regularly adhered to her curfew⁵⁹ and maintained excellent grades at school.⁶⁰ In fact, Lori's mother testified that the only time Lori refused to listen to her was when she told her to stop seeing Ellen.⁶¹

The court held that, while habitual disobedience by a child would permit state intervention, not every parental direction could be enforced by state action.⁶² Ultimately, the court held that, in light of Lori's maturity, her choices regarding sexual orientation were constitutionally protected.⁶³ However, the court also admonished Lori that section 130.40 of the New York Penal Code prohibits "deviate sexual intercourse" between someone who is twenty-one years of age and someone who is less than seventeen.⁶⁴ Although Lori admitted to being "intimate" with Ellen on two occasions,⁶⁵ the court noted that it could not use this as a basis for a P.I.N.S. finding against Lori because it was not set forth in the pleading.⁶⁶ However, the court noted in dicta that "Lori is sufficiently mature to realize that a repetition of such conduct would jeopardize Ellen's freedom."⁶⁷

Although the outcome of this case is for the most part reasonable, it is not indicative of the standard in New York Family Courts.⁶⁸ In fact, Judge Leddy references several factors which appear to have had great influence on his decision.⁶⁹ Significantly, Lori was a fifteen year old minor who appeared to be extremely articulate, rational, and collected, perhaps even more so than her mother. If one of those factors were

58. "The petitioner conceded that her complaint is based on the fact that the relationship is lesbian in nature and not the fact that Ellen is twenty-one. The mother admitted that she would not be so upset if Lori was with a twenty-one year old male." *Id.* at 941.

59. *See id.* at 940.

60. *See id.* at 941.

61. *See id.* at 940.

62. *See id.* at 942.

63. *See id.*

64. *See id.* at 942, 943.

65. *See id.* at 943.

66. *See id.*

67. *Id.* at 943 n.4. The implication was that Ellen violated state law by engaging in "deviate sexual intercourse" with Lori, thereby subjecting herself to prosecution.

68. This decision is, for all intents and purposes, an aberration.

69. *Lori M.*, 496 N.Y.S.2d at 941. He notes that Lori "[t]estified on her own behalf at the hearing and [that] the [c]ourt was most impressed with her maturity." *Id.* She was able to articulate that there was "no coercion involved" in her relationship with Ellen, that she was undecided about her sexual preference, that she was in love with Ellen and was going to continue their relationship, that she was "very comfortable with her sexual feelings," and that she did not believe she had any need for counseling. *See id.*

changed or removed, the decision might not have been the same.⁷⁰ Furthermore, it is unlikely that the same result would have followed if Lori came before a different judge.⁷¹

Gay and lesbian youth stand a good chance of “qualifying” as P.I.N.S. due to the obstacles they must overcome at school.⁷² Many gay students characterize school as torturous because they are ridiculed, harassed, and often physically assaulted by their classmates. As a result of their fear, they stop going to school, which can result in habitual truancy. For instance, M. Mario Doe, encountered in a previous narrative,⁷³ endured countless physical and verbal attacks from other students due to his perceived sexual orientation. As a result, he was ultimately forced to transfer schools.⁷⁴ Mario’s parents were supportive of him and he therefore had avenues available to help him to stay in school.⁷⁵ However, many juveniles do not have such resources at their disposal.⁷⁶

Likewise, while it may be considered an option for a gay youth to come out to his parent(s) and explain his truancy as being a result of intimidation by other students and a lack of protection from teachers and administration, it may not be advisable. There is a great likelihood that the parent will not be receptive to their child’s proclamation of sexual difference.⁷⁷ The parent could simply deny to the youth that he is correct in his determination of his sexuality. For instance, a parent might say “it’s just a phase,” or “you’re too young to know.”⁷⁸ If, in fact, the parent believes these things, it is unlikely that she will be sympathetic to the minor’s problems at school. The gay youth then effectively loses one more ally and is further alienated and stigmatized.

70. For instance, if Lori were less than 15 years old, if she expressed hostility toward her mother for bringing this proceeding, if she was unable to testify in such a productive manner, or if she stated conclusively that she was a lesbian, the decision might not have been made in her favor.

71. Judges in the Family Courts have an extreme amount of discretion granted to them by statute. Therefore, a different judge might have viewed Lori’s situation as one that warranted state intervention.

72. See discussion *infra* Part III.A.

73. See *Doe v. Riverside-Brookfield Township High Sch. Dist. 208, No. 95-C-2437*, 1995 WL 680749, at *1 (N.D. Ill. Nov. 14, 1995).

74. See *id.* at *2.

75. See *id.*

76. See Heron, *supra* note 1, at 81, 115, 161.

77. See RUTHANN ROBSON, *GAY MEN, LESBIANS, AND THE LAW* 65 (1997). Indeed, Robson points out that “in accordance with their constitutional right to direct and control the upbringing of their children, some parents have sought to have their children ‘educated’ into a traditional model of heterosexuality.” In extreme cases of “reorientation therapy,” Robson notes that some youths are forced to submit to sexual encounters with a person of the opposite sex. *Id.* at 66.

78. See Heron, *supra* note 1, at 26, 37, 51, 75, 101, 112, 167, 172.

If the minor has actively dated or made other gay friends, a hostile parent will often demand that the minor stop seeing these friends. These acquaintances are usually the youth's only source of stability and chance to develop a positive self-image. If the youth refuses to stop seeing these friends the parent can argue that the child is ungovernable and habitually disobedient. This supplies the parent with the rationale necessary to file a P.I.N.S. petition.

Of course, if the parent approves of the minor's sexuality and supports the minor, the parent might not necessarily be able to improve the child's life at school. In the *Doe* case, Mario's parents spoke to administrators several times regarding the harassment of their son, but to no avail.⁷⁹ Currently, there exists no policy on protecting children from peer harassment at school.⁸⁰

The Court of Appeals for the Seventh Circuit recently held that Jamie Nabozny could sue his school district which violated his right to equal protection under the Fourteenth Amendment "by discriminating against him based on his gender or sexual orientation."⁸¹ However, lower courts have consistently denied relief to students against their respective school districts on both § 1983 claims and equal protection grounds.⁸²

Often children in these situations attempt suicide.⁸³ Children who attempt suicide are considered ungovernable and therefore in need of supervision.⁸⁴ They spend time in psychiatric hospitals, usually more than once, they are moved between their own home and group homes, and they often attend several different high schools. This lack of stability compounds their problems.

E. Gay and Lesbian Youth in Abuse and Neglect Proceedings

Gay and lesbian youths also enter the child welfare system because abuse or neglect proceedings have been brought against their

79. *Riverside-Brookfield Township High Sch.*, 1995 WL 680749, at *2.

80. *But see* Kirsten M. Eriksson, Note, *What Our Children are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799 (1995) (suggesting solutions to protect children from peer harassment).

81. *See Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996). Nabozny accepted a \$900,000 settlement from the school district after a jury found the school administrators had violated his rights by failing to protect him during years of anti-gay violence. *See Gay Man Wins \$900,000 in School-district Case*, WALL ST. J., Nov. 21, 1996, at B14.

82. *See id.*; *Riverside-Brookfield Township High Sch.*, 1995 WL 680749, at *4,7.

83. *See* discussion *supra* Part I.

84. *See* N.Y. FAM. CT. ACT § 712 (McKinney 1983).

parents. Children often are physically abused by their parents upon revealing their homosexuality. It may be impossible to surmise how often this happens because of poorly kept records, unreported opinions, and the lack of appeals undertaken. However, the personal accounts of the youths who contributed to *Two in Twenty* suggest that violence within the family unit is not an uncommon response to a child who reveals a sexual orientation other than heterosexuality.⁸⁵ Likewise, the statistics of the G.L.A.S.S. program in California suggest that seventy-five percent of gay and lesbian children who enter the child welfare system are abused or neglected by their parents.⁸⁶

This is not the only way a child may be deemed abused or neglected. In the cases of Jamie Nabozny⁸⁷ and Mario Doe,⁸⁸ the parents both unsuccessfully attempted to reconcile their son's problems at school. Consider what could happen if, as a result of the lack of cooperation they received from school administrators, the parents allowed their sons to stay home from school rather than send them to an unsafe environment. The state could file a neglect petition, thereby resulting in a finding of educational neglect against the parents.⁸⁹

Likewise, if school administrators learned of a child's sexual orientation through a guidance counselor or some other official, the school might suggest or require counseling. If the school recommended counseling for a child whose sexuality was seen as a disease or affliction requiring treatment a parent's failure to consent to counseling might be considered neglect. Thus, there are many instances in which the state has the ability to intervene in a gay or lesbian child's life. State interference may create rather than solve problems.

85. Heron, *supra* note 1, at 26, 89, 145, 162.

86. See interview with Derrell Tidwell, *supra* note 47. Although he did not give an exact percentage, Mr. Tidwell, of G.L.A.S.S., noted that the abuse and neglect was, in most cases, directly related to the sexuality of the child. *Id.*

87. See Nabozny v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).

88. See Doe v. Riverside-Brookfield Township High Sch., Dist. 208, No. 95-C-2437, 1995 WL 680749, at *2 (N.D. Ill. Nov. 14, 1995).

89. New York Family Court Act section 1012(f)(i)(A) defines a neglected child as someone 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 person legally responsible for his care to exercise a minimum degree of care in supplying the child with adequate . . . education in accordance with the provisions of Part 1 of Article 65 of the Education Law." According to the Compulsory Education Law, parents must send their children who are between the ages of six and 16 to school on a regular basis. See N.Y. EDUC. LAW § 3205 (McKinney 1995).

F. Gay and Lesbian Youth at the Dispositional Phase of Hearings

Once a child is adjudicated a juvenile delinquent, a P.I.N.S., or an abused or neglected child, there must be a disposition wherein the judge effectively sentences the child.⁹⁰ The New York Family Court judge has a number of options at this point. She can suspend sentence, she can place the child with the Division for Youth, or she can place the child in a non-restrictive group home setting or with the child welfare administration.⁹¹ The question is whether or not a child's sexuality, when known, is taken into consideration when deciding their placement, and if so, to what degree and to what end.

Generally, children in the juvenile justice and foster care systems are not getting the services they need to adjust to the problems and changes in their lives. The State Comptroller's Audit of Division For Youth Services found in pertinent part:

[t]hat the Division's programs for treating sex offenders and substance abusers are not effective. Specifically, capacity to provide treatment is far below that which is needed, staff training is inadequate, little treatment is provided to sex offenders once they are released to the community, and substance abuse treatment programs often do not last long enough to be effective. We also found that the Division has publicly misrepresented the treatment capacity of its sex offender program in that far fewer youths are treated by this program than claimed.⁹²

Due to the lack of services available to the general population of youths in the juvenile justice system, the probability is slight that gay and lesbian youths are getting the services they need.

"There are two things you don't want to be in this system—gay and an arsonist; they can't protect them."⁹³ As one juvenile rights attorney suggests, even if a child's sexuality is known at the dispositional phase of the hearing the court's decision is very difficult because there is no place to put "gay kids."⁹⁴ G.L.A.S.S. is, in fact, one of the only

90. See e.g., N.Y. FAM. CT. ACT §§ 350-355, 751-760, and 1051-1054 (McKinney 1983).

91. See *supra* notes 31, 32 and accompanying text.

92. N.Y. State Comptroller Div. of Mgm't Audit, *supra* note 51, at 23.

93. Telephone interview with Samuel Dulberg, Deputy Attorney in Charge at the Juvenile Rights Division of The Legal Aid Society in Bronx, New York (Dec. 28, 1995).

94. Mr. Dulberg knows of no placements in New York which provide programming specifically to gay or lesbian youths involved in the Family Court system.

programs in the country which specifically deals with gay and lesbian youth involved in the Family Court System.⁹⁵

In addition to the legal ramifications of being a gay adolescent and the impact sexuality has on familial and other social relationships of gay youth, there is the connected problem of the unmet educational needs of gay students. Certain children are denied the benefit of an education which is free from violence, abuse, and fear.

III. SCHOOL GAYS: LESBIAN AND GAY TEENAGERS AT SCHOOL

I'll be honest. I live in a small town. In Kansas, coming out is like committing suicide. So I tried to go out with guys. It didn't seem to work, though. People still thought I was gay. I got beaten up at school, and they trashed my locker. There was nothing I could do.

—Elizabeth, 16.⁹⁶

The U.S. Justice Department issued a report in 1987 on bias crimes.⁹⁷ It stated, in pertinent part, “homosexuals are probably the most frequent victims of hate violence today.”⁹⁸ As a result of ever-increasing violence directed at gays and lesbians in society at large, gay and lesbian youths are likely to be subjected to increased amounts of violence at their schools.

A series of legal obstacles constructed over the past ten years in the educational setting have contributed to the problems gay youth face in their daily lives at school. Gay students are being harassed by other students and even by faculty; however, teachers and administrators have refused to discipline attackers. Courts have compounded the problem by consistently denying relief to students against their respective school districts on both § 1983 claims and equal protection grounds.⁹⁹ Additionally, openly gay teachers and guidance counselors continue to be penalized and, again, their claims are not recognized by the courts. Courts consistently find no violations of First Amendment rights to free speech and no violations of equal protection when teachers and guidance

95. See Interview with Darrell Tidwell, *supra* note 47.

96. Heron, *supra* note 1, at 146. Elizabeth succeeded in killing herself within one year of writing her story for the book. After her release from the hospital subsequent to a failed suicide attempt, she took an overdose of her own prescription medication. *Id.*

97. P. FINN & T. MCNEIL, U.S. DEP'T OF JUSTICE, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME: AN EXPLORATORY VIEW (1987).

98. *Id.*

99. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *Doe v. Riverside-Brookfield High Sch. Dist.* 208, No. 95-C-2437, 1995 WL 680749 (N.D. Ill. Nov. 14, 1995).

counselors are prohibited from being open about their sexual orientation.¹⁰⁰ Minors are therefore not likely to have any adult allies at school.

A. *Students and Peer Violence*

As a result of the continued violence directed at gay and lesbian students and the lack of cooperation from school officials to protect gay students from harm, actions have been brought by students against school districts alleging a failure to protect and violations of equal protection. One such case was on appeal before the Seventh Circuit and involved the issue of a school district's responsibility to protect children from harm.¹⁰¹ The plaintiff, Jamie Nabozny, was a student in the Ashland Public School District in Wisconsin from 1987 to 1993.¹⁰² During that time, he endured countless verbal and physical attacks from other students, a number of which caused him serious physical and emotional harm.¹⁰³ Among other things, Jamie was attacked by three male students in the school bathroom, when he was punched, pushed to the ground and urinated on; he was also beaten and kicked so severely in the hallway one day that he required surgery.¹⁰⁴ Despite several attempts by him, by his parents, and even by some of his guidance counselors to have the administration¹⁰⁵ discipline his attackers, school officials did nothing to remedy the situation, thereby exacerbating the problem.

In the lawsuit, in which Jamie named as defendants the principals and assistant principals of both his middle and high schools, along with the school district, Jamie alleged that his rights to equal protection of the laws were denied because he is gay and because of his gender,¹⁰⁶ that his rights to due process were violated because the school officials enhanced his risk of harm from abuse by failing to protect him,¹⁰⁷ and that his due process rights were violated because the defendants' inaction amounted to encouragement of the abusive students to harm Jamie.¹⁰⁸

100. See *infra* Part III.B.

101. See *Gay Man Wins \$900,000*, *supra* note 81.

102. See *Nabozny*, 92 F.3d at 451-52; Appellant's Opening Brief at 1, *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (No. 95-3634).

103. See *Nabozny*, 92 F.3d at 451-53.

104. See *id.* at 452.

105. See *id.* at 451-53. Counselors sought administrative intervention first at the middle school and later at the high school.

106. See *Nabozny*, 92 F.3d at 453-58; Appellant's Brief at 22 (No. 95-3634).

107. See *Nabozny*, 92 F.3d at 458-59; Appellant's Brief at 23 (No. 95-3634).

108. See *Nabozny*, 92 F.3d at 459-60; Appellant's Brief at 23 (No. 95-3634). Only the equal protection claim was remanded to the district court. *Nabozny*, 92 F.3d at 460-61.

The District Court for the Western District of Wisconsin granted the defendants summary judgment on all counts.¹⁰⁹ Judge Shabaz reasoned that there was “nothing in the record . . . to indicate that the defendants created or exacerbated the danger by either their actions or inactions,”¹¹⁰ thereby releasing them from liability under a state-created danger theory.¹¹¹ The judge made this finding despite evidence showing that two administrators told Jamie and his parents that if he was going to be gay, then he would have to expect such things to happen to him.¹¹²

Furthermore, Judge Shabaz found that no liability existed under § 1983 where the alleged perpetrators were students, not teachers.¹¹³ He relied on *Stoneking*, a Third Circuit case¹¹⁴ interpreting the Supreme Court’s decision in *DeShaney*.¹¹⁵ In *Stoneking*, the court held that after *DeShaney*, a school district may be liable under the Fourteenth Amendment Due Process clause if, with deliberate indifference to the consequences, it established and maintained a policy, practice, or custom which directly caused a student constitutional harm by a school employee.¹¹⁶ Judge Shabaz additionally noted that Jamie presented no cases supporting his theory that school officials were liable for actions of other students.¹¹⁷ He continued by saying that even if defendants were liable for a custom, policy, or practice which might have caused actions by private actors, such liability was not clearly established at the time defendant’s conduct occurred, and they would therefore be entitled to qualified immunity.¹¹⁸

On the equal protection grounds, Judge Shabaz did not address Jamie’s contentions that he was denied equal protection of the laws because he was gay. However, he did address Jamie’s gender argument,

109. See *Nabozny*, 92 F.3d at 446; Order at 10, Honorable Judge John C. Shabaz, *Nabozny v. Podlesny* (W.D. Wis. 1995) (No. 95-C-086-S).

110. Order at 7, *Nabozny* (No. 95-C-086-S).

111. A state can be held liable for constitutional violations perpetrated by third parties under a state-created danger theory. Liability under this theory arises if the state’s affirmative acts work to an individual’s detriment by exposing him to danger. See Order at 6-7, *Nabozny* (No. 95-C-086-S).

112. See Appellant’s Brief at 17, *Nabozny* (95-3634). There is a question as to whether one of the administrators actually said this in a meeting with three of the alleged perpetrators. See *id.* at 8.

113. See Order at 8, *Nabozny* (No. 95-C-086-S).

114. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989).

115. *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189 (1989).

116. *Stoneking*, 882 F.2d at 725. See also *Doe v. Board of Educ. of Hononegah Sch. Dist.* 207, 833 F. Supp. 1366, 1379 (N.D. Ill. 1993) (finding school district liable under Fourteenth Amendment Due Process clause where it had a policy, practice, or custom which fostered a climate facilitating sexual abuse of minor students by a school employee).

117. See Order at 8, *Nabozny* (No. 95-C-086-S).

118. See *id.* at 8, 9.

and dismissed it in a paragraph.¹¹⁹ The judge stated, “there is absolutely nothing in the record to indicate that plaintiff was treated differently by the defendants because of his gender.”¹²⁰ However, the evidence in the record shows that Jamie was sexually harassed at school more than once¹²¹ and that the administrators did not investigate the allegations or take any substantive action to rectify the problem.¹²² There is also evidence in the record that whenever the administration was faced with a claim of sexual harassment from a female student against a male student, they immediately conducted a thorough investigation and, if they found that the harassment had occurred, they took immediate action.¹²³ Judge Shabaz noted that even if defendant’s behavior rose to the level of an equal protection violation, the defendants were entitled to qualified immunity because the right was not clearly established.¹²⁴

119. *See id.* at 9.

120. *Id.*

121. Jamie was actually held down on the floor in front of his science class by one male student while another male student performed a mock rape on him. *See Nabozny v. Podlesny*, 92 F.3d 446, 451 (7th Cir. 1996); Appellant’s Opening Brief at 6, *Nabozny* (No. 95-3634). The teacher had stepped out of the room and the twenty students in the class watched and laughed as the two boys physically assaulted Jamie and verbally degraded and humiliated him. *See Nabozny*, 92 F.3d at 451; Appellant’s Brief at 6 (No. 95-3634). Defendant Podlesny responded to Jamie’s recitation of this event to her by saying, among other things, that, “boys will be boys,” an answer that is no longer acceptable as a defense to claims of sexual harassment by females against males. *See Nabozny*, 92 F.3d at 451.

Jamie was constantly subjected to verbal abuse in the form of name-calling including “faggot,” “queer,” and “fudge-packer,” by a particular group of students who had all been identified to the defendant, Podlesny, on several occasions. *See Nabozny*, 92 F.3d at 451, 452; Appellant’s Brief at 9 (No. 95-3634). Jamie was also assaulted in the bathroom one day by two boys who, after beating him, urinated on him. *See Nabozny*, 92 F.3d at 452; Appellant’s Brief at 10 (No. 95-3634).

122. In one meeting between the high school principal, Davis, the assistant principal, Blauert, and Jamie and his parents, the ongoing harassment was discussed. Although Davis knew about the urination incident, which occurred only a few weeks prior to the meeting, no investigation had been conducted and no action was ever taken. *See Nabozny*, 92 F.3d at 452; Appellant’s Brief at 11 (No. 95-3634).

At another meeting that was held with Jamie, his parents, three of the alleged perpetrators, and at least one of their parents, the boys denied any involvement. No investigation was conducted and no discipline was imposed. *See Appellant’s Brief* at 8 (No. 95-3634).

123. *See Nabozny*, 92 F.3d at 454-55. In one instance, a boy hit his girlfriend at school, and he was immediately expelled. *See Appellant’s Brief* at 34 (No. 95-3634).

In several other instances, boys who made sexually harassing comments to girls would be reprimanded and disciplined. *See id.* Additionally, all defendants admitted that they “took . . . immediate action through discipline if and when it was brought to their attention that female students were discriminated against on the basis of their gender.” *Id.* (quoting defendant’s answer papers).

124. *See Order* at 9 (No. 95-C-086-S) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

The case was, however, appealed to the Seventh Circuit and was remanded to the trial court on the equal protection issue.¹²⁵ After a two-day federal trial, the unanimous view of seven jurors was that Jamie's school principals had failed him by closing their eyes to the four years of brutal anti-gay abuse Jamie suffered from his classmates.¹²⁶

In a comparable case, the District Court for the Northern District of Illinois issued an opinion on November 14, 1995, dismissing student Doe's due process, equal protection, and § 1983 claims.¹²⁷ As in *Nabozny*, Doe asserted that his due process rights were violated when the high school employees failed to take action to end physical and verbal attacks that he encountered.¹²⁸ The district court held, on Doe's due process claim, that the school could not be held liable for the actions of other students, particularly when there is no recognized special relationship in existence between a public school and its students.¹²⁹

Doe also alleged violations of his equal protection rights based on the school's selective enforcement of a policy designed to protect students against a risk of injury and to create a safe environment.¹³⁰ In support of his claim, Doe alleged that when racial and anti-Semitic graffiti appeared at the school, the defendants held educational seminars and gave special instructions to the faculty to eradicate this behavior.¹³¹ However, when a gay group approached the Dean and a counselor offering to come and do the same, their offer was rejected.¹³² The district court held that such an allegation alone would not meet the standard set forth in *Muckway*.¹³³ In a confused explanation, the court held that in order to meet the *Muckway* standard, Doe would have had to allege facts sufficient to prove that (1) the educational seminars were held in response

125. Patricia M. Lague, *Near \$1 Million Settlement Raises Standard for Protection of Gay Youth*, NEWSL. LAMBDA LEGAL DEF. & EDUC. FUND, Winter 1997, at 14.

126. *Id.*

127. Doe v. Riverside-Brookfield Township High Sch. Dist. 208, No. 95-C-2437, 1995 WL 680749 (N.D. Ill. Nov. 14, 1995).

128. See *Riverside-Brookfield Township High Sch.*, 1995 WL 680749, at *2-3.

129. See *id.* at *4-5. See also *Elliot v. New Miami Bd. of Educ.*, 799 F. Supp. 818 (S.D. Ohio 1992); *D.R. by L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364 (3d Cir. 1992); *Doe v. Bd. of Educ. of Hononegah Sch. Dist.* 207, 833 F. Supp. 1366 (N.D. Ill. 1993).

130. See *Riverside-Brookfield Township High Sch.*, 1995 WL 680749, at *6.

131. See *id.* at *15.

132. See *id.* at *7.

133. *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986), held that in order to prevail on an equal protection claim that facially neutral statutes were applied in a discriminatory manner, a "plaintiff must set forth: (1) a classification of similarly situated persons caused by intentional or purposeful discrimination on the part of the statute's administrators; and (2) an allegation that the State's failure to enforce its law constituted a denial of a right, privilege or immunity secured by the federal constitution." *Id.* at 523.

to student complaints and (2) that only those students critical of Doe's alleged homosexuality had gone unpunished for abusing their fellow students.¹³⁴ The court stated "[i]ndeed, all that Doe has alleged is that the High School maintains a low level of discipline."¹³⁵

Finally, on Doe's allegations of § 1983 violations, the court held that Doe did not allege that the teachers, counselors, and Deans, in failing to provide necessary counseling, protection, and institutional discipline, were acting according to any express Board policy or that their response was "so permanent and well-settled as to constitute a custom with force of law."¹³⁶ The district court noted that "[t]he only examples Doe offers involve himself. He offers no instances involving other students alleged to be or suspected to be homosexual."¹³⁷

Thus, courts are reluctant to find school districts responsible for failing to protect their students from peer violence. As a result, gay and lesbian students who are ostracized at school, physically assaulted, or forced to quit school to escape abuse have no legally recognized recourse against their respective school districts. This is true even though schools have knowledge of the harassment and violence these youths undergo and consciously disregard it.

In addition to administrators who are unsupportive of the struggles faced by gay and lesbian youth and who refuse to discipline attackers, there is an absence of teachers and other faculty who can function as role models to gay and lesbian students in their schools. Due to legislation restricting the First Amendment rights of teachers and to court opinions which tend also to narrow teacher's rights regarding speech and conduct in the classroom, students are not apt to find even quiet support from gay and lesbian faculty or staff any time soon.

B. Faculty: The Absence of Role Models

Gay youth often do not have the option of seeking advice from guidance counselors on such sensitive issues as the student's sexuality. One problem is that gay and lesbian youths believe that they must keep their sexuality secret and, therefore, simply will not tell a guidance counselor. However, in the rare instances that they might choose to

134. *Riverside-Brookfield Township High Sch.*, 1995 WL 680749, at *7.

135. *Id.*

136. *Id.* at *3 (citing *Baxter v. Bigo County Sch. Corp.*, 26 F.3d 728 (7th Cir. 1994)).

137. *Id.*

speak with a member of the faculty, they are unlikely to find supportive people.¹³⁸

Additionally, even if the guidance counselor is gay or lesbian, he or she is not likely to come out to the student or even to show too much interest in helping the student. To do so could jeopardize the counselor's job security. For example, in the Sixth Circuit case *Rowland v. Mad River Local School District*,¹³⁹ the court held there was no violation of a guidance counselor's First Amendment right to free speech when she was fired after she had told her secretary and some fellow teachers that she was bisexual.¹⁴⁰ The Sixth Circuit additionally held no Fourteenth Amendment violation of equal protection of the law when Ms. Rowland was suspended and transferred by the defendants, the school principal and superintendent, even though the jury found that she was treated differently from similarly situated employees "because she was homosexual/bisexual."¹⁴¹

What is curiously not addressed in the case is the suspect nature of the transfer itself after Rowland won injunctive relief in a federal district court invalidating her suspension.¹⁴² Subsequent to prevailing in that case, she was transferred to a position involving development of a career education curriculum. This was a position with *no student contact*, the inference being, of course, that she was somehow not fit to work with students. It is unclear whether she was moved to a position with no student contact because she told her secretary that two of the youths she was working with were gay, thereby exhibiting questionable ethical conduct, or whether that was simply a pretextual reason. It could be inferred from the facts that the administration feared that Ms. Rowland's identification of herself as bisexual would encourage the children she was counseling to continue in their "homosexual pursuits." In other words, the principal and the superintendent might have feared that Ms. Rowland

138. The responses of 289 members of the American School Counselor Association to a questionnaire in 1991 concerning their own perceptions of adolescent homosexuality are revealing. Almost two-thirds of the respondents estimated that one to five percent of students in their high schools were gay or lesbian, however, approximately one in six believed there were no gay students at all. Only one in five of the respondents found counseling gay or lesbian students "gratifying," while almost the same number said that counseling a homosexual student about gay issues would not be "professionally gratifying." Seven percent reported that homosexuality was offensive to them, while 16% believed that a gay lifestyle is not a healthy lifestyle. See *SCHOOL'S OUT: THE IMPACT OF GAY AND LESBIAN ISSUES ON AMERICA'S SCHOOLS* 103, 104 (Dan Woog ed., 1995).

139. 730 F.2d 444 (6th Cir. 1984).

140. *Id.* at 460 (Special Verdict VIII). The jury made an unchallenged finding that the teacher was suspended solely because she was bisexual.

141. *Id.* at 458 (Special Verdict V).

142. See *id.* at 446.

was self-affirming to the youths, thereby condoning and encouraging their homosexual behavior.¹⁴³

It is unlikely that a student could go to a teacher with a problem regarding her sexuality and find someone who would be supportive. A 1989 study by Professor James Sears of the University of South Carolina¹⁴⁴ showed that eight out of ten teachers in training harbored anti-gay attitudes, with one third of them rated as “high-grade homophobes.”¹⁴⁵ Additionally, the likelihood that a gay or lesbian teacher could be “out” and, therefore, a source of self-affirmation for a gay or lesbian student is low. Sears’s study also found that the majority of school administrators surveyed said they would fire a teacher whom they knew to be gay or lesbian.¹⁴⁶

The courts are not likely to be a resource for teachers aggrieved by homophobic attitudes in light of precedent which tends to narrow the First Amendment rights of teachers in secondary education. The justification for limiting teachers’ rights hinges upon the existence of consensual sodomy statutes and the perceived effect that exposure to homosexuality will have on young people. For instance, the Court of Appeals for the Tenth Circuit, in *National Gay Task Force v. The Board of Education of the City of Oklahoma City*,¹⁴⁷ held a statute constitutional where a teacher could be fired for engaging in “public homosexual activity.”¹⁴⁸ However, the circuit court severed that part of the statute which proscribed participation by teachers in “public homosexual conduct” as unconstitutionally overbroad and therefore violative of teachers’ First Amendment rights to free speech.¹⁴⁹

143. The Supreme Court denied certiorari in the case without opinion and Justice Powell took no part in the decision. *See* 470 U.S. 1009 (1985).

144. James Sears, *Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs?* 23 J. HOMOSEXUALITY 22 (1991).

145. *Id.* at 40. Sears defines homophobia as an irrational fear of homosexual persons. This fear provokes feelings of disgust, anxiety, and anger toward homosexuals or perceived homosexual behavior. A high grade homophobe, therefore, is one who exhibits the extremes of these emotions and behaves accordingly.

146. *Id.* at 48.

147. *National Gay Task Force v. Board of Educ. of the City of Oklahoma City*, 729 F.2d 1270 (10th Cir. 1984).

148. “Public homosexual activity” is defined as the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, if such act is: (a) committed with a person of the same sex, and (b) indiscreet and not practiced in private. Section 886 is the consensual sodomy statute criminalizing “oral and anal copulation.” OKLA. STAT. tit. 21, § 886 (West 1996).

149. “Public homosexual conduct” is defined as “advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.” OKLA. STAT. tit. 70, § 6-103.15 (West 1996).

The circuit court did, however, note the circumstances under which a teacher's First Amendment rights could be overridden. For instance, a teacher's First Amendment rights may be outweighed by the state's interest when the teacher's otherwise protected expression results in a material or substantial interference or disruption in the normal activities of the school.¹⁵⁰ The court referred back to the statute in its discussion of overbreadth and noted that the statute did not require that the teacher's "public utterance" occur in the classroom.¹⁵¹ In other words, the statute controlled teachers' speech outside of the school and outside their official capacity as teachers. However, the court inferred that a statute which restricts a teacher's expression on homosexuality *inside* the classroom would be justified for attempting to prevent a material or substantial interference with the normal activities of the school. Such normal activities would not include advocating for immoral behavior or illegal acts. Additionally, the court noted that in a previous decision it held that a teacher's First Amendment rights could be restricted only if "the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee."¹⁵²

The Supreme Court affirmed the lower court's decision, per curiam, without identifying the positions of the eight voting justices.¹⁵³ However, the Court ordered reargument that day for three other cases in which the eight participating justices could not reach a majority decision.¹⁵⁴ Without explanation the Court did not follow that course of action in the present case.¹⁵⁵

The Court's apparent reluctance to hear and decide gay-related issues is problematic for the obvious reason that per curiam affirmances, denials of certiorari, and dismissals do not establish a body of law with

150. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

151. See *National Gay Task Force*, 729 F.2d at 1275.

152. *Id.* at 1274 (quoting *Childers v. Independent Sch. Dist. No. 1*, 676 F.2d 1338, 1341 (10th Cir. 1982)).

153. Under Supreme Court rules, a tie vote automatically affirms the lower court's judgment in the case under review but does *not* serve as a precedent for other cases.

154. See Linda Greenhouse, *4-to-4 Vote Upholds Teachers on Homosexual Rights Issue*, N.Y. TIMES, Mar. 27, 1985, at A23. Justice Powell declined to participate in the decision on the grounds of ill health. He was absent from oral arguments on January 14, 1985 due to surgery. See *id.*

155. This was the second time that year "that the Court failed to issue a definitive opinion in a case involving homosexual rights in which it heard arguments." *Id.* The Court decided by a 5-to-4 vote to dismiss the case of *New York v. Uplinger*, 467 U.S. 246 (1984), after having heard arguments. *Id.* The Court decided that "its decision to grant review in the case had been 'improvident.'" *Id.*

precedential value. As a result, gays and lesbians do not have the tools necessary to win a legal battle over rights.

However, the Court's inactive role is not the only problem. In fact, state legislatures have most recently been aggravating the plight of gay and lesbian students and faculty. There has been a recent wave of conservative legislation pending in a number of states which attempts to inordinately restrict the First Amendment freedoms of teachers and students. In Utah, for example, legislators have reconstructed¹⁵⁶ a state statute which grants school boards the authority to deny access to student clubs in order to "protect the physical, emotional, psychological, or moral well-being of students and faculty" and *requires* school boards to ban student clubs that "encourage criminal conduct, promote bigotry, or involve human sexuality."¹⁵⁷ In addition, local school boards have begun to take action. In August 1995, a New Hampshire school board adopted Policy 6540 which prevents the school district from "implement[ing o]r carry[ing] out any program or activity that has either the purpose or effect of encouraging or supporting homosexuality as a positive lifestyle alternative."¹⁵⁸

As long as teachers are prevented from exercising their First Amendment rights with regard to teaching about sexuality or advocating for or against certain viewpoints and are placed in fear of losing their jobs for being out or for being supportive of out students, the gay and lesbian students will suffer the consequences.

IV. GAYS INTO THE FUTURE: MAKING LESBIAN AND GAY YOUTH A PRIORITY

The fight remains. After coming out and establishing a life where we feel comfortable with ourselves, we tend to forget about the isolation and loneliness. We forget about those who aren't as lucky. I made it through, but what about all the other kids who fall between the cracks? Gay

156. The statute was reconstructed because Utah Governor Mike Leavitt vetoed the initial draft due to its overbreadth and the fear that it would bring about costly litigation. See Kat Snow, *Class Act: Utah's New Law Against Gay Clubs in Schools is Being Examined by Gay and Antigay Activists Across the Nation*, ADVOCATE, May 28, 1996, at 23.

157. UTAH CODE ANN. § 53A-3-419(1)—(2) (1996).

158. Jill Smolowe, *The Unmarrying Kind: Focusing on Local Targets, Religious Conservatives Wage a Fervent Campaign to Stomp out Gay Rights*, TIME, Apr. 29, 1996, at 68, 69. As a result of the new policy, a video on Walt Whitman was dropped from the 11th grade English curriculum because it mentions his homosexuality and Shakespeare's, *Twelfth Night* was dropped because it has a character in it who cross-dresses. *Id.*

kids need access to housing, jobs, education, health care, counseling, and legal support. We need the help of the adult gay community to provide these services. We can't do this on our own. I was lucky to have someone to turn to. Most kids aren't so lucky.

—Troix-Reginald Bettencourt, 18.¹⁵⁹

Gay youth are two to three times more likely to commit suicide than other young people; they may comprise up to thirty percent of completed youth suicides annually.¹⁶⁰ Gay male, lesbian, bisexual, and transsexual youth comprise as many as twenty-five percent of all youth living on the streets in this country.¹⁶¹ An estimated twenty-eight percent of gay and lesbian youth drop out of school because of discomfort in the school environment and an estimated twenty-six percent of young gays and lesbians are forced to leave home because of conflicts over their sexual identity.¹⁶²

As the problems faced by lesbian and gay youth are multifaceted, so must be the solutions. There must be changes made within the legal system, changes with regards to education, and finally, broad societal changes. Minors should not be able to be prosecuted for consensual sexual acts with other minors.¹⁶³ The age of consent can be drawn in such a way as to prevent sexual activity between minors whose ages differ drastically. Statutes which criminalize sexual activity between adults and minors should, of course, remain in effect.

There must be changes in the services offered to youths both before they enter the system and once they are in it. Once a minor has initial contact with the juvenile justice or the child welfare system, the state should inquire into the minor's sexuality, not for punitive purposes but for the purpose of reaching nonheterosexual youths and helping them to develop in healthy and productive ways.

Foster homes, group homes, and detention centers should have programming for gay and lesbian youth. They must protect such youths

159. Heron, *supra* note 1, at 161.

160. See GIBSON, *supra* note 36, at 110. Statistics are based on existing data about the prevalence of homosexuality and the relative risk of attempted suicide.

161. See *id.* at 114.

162. See *id.* at 113.

163. Criminalizing sexual activity does not answer youth problems including sexually transmitted diseases and teen pregnancies. It also does not work as a deterrent. Minors should not simply be allowed to engage in sexual activities; however, they should not be prosecuted for engaging in them. Education, not punishment, better addresses the problems presented by juvenile sexual behavior.

from harassment and violence. Furthermore, they must offer counseling which affirms sexual identity without degradation or reformist agendas.

California, New York, and Massachusetts each have individual programs that are beginning to serve the needs of gay and lesbian youth. These should be used as models to create programs throughout the country. For example, G.L.A.S.S.¹⁶⁴ in California is a licensed foster care agency. The youths in the program are referred by social workers who know them from cases inside the California Child Welfare System. In other words, once children express their sexuality to their social worker, they can be referred to this program. Although no affirmative question is necessarily asked of a minor once they enter the system, it appears that the existence of the program makes social workers more aware of sexuality issues in general and, therefore, more likely to consider it in each individual case. G.L.A.S.S. is the only agency in California targeted for serving sexual minority youth and it is the only agency nationwide which runs group homes for gay youth who are products of the Family Court system.¹⁶⁵

G.L.A.S.S., in addition to its group home programs, provides foster care to needy children. It recruits, licenses, and certifies gay adults as foster parents for the children in its group homes and foster care program. G.L.A.S.S. currently has 109 children in its foster care program, ten of adolescent age and the rest twelve years old and under. G.L.A.S.S. also places children who have HIV¹⁶⁶ in foster homes.¹⁶⁷

Additionally, G.L.A.S.S. has what is called an "in-house emancipation program" in which all of its residents over sixteen must participate. The agency discovered the need for this type of program because once the youths in its programs turned eighteen years of age, they were no longer minors, no longer members of the child welfare system and, therefore, no longer eligible for state funds to stay in their placements.¹⁶⁸ This program prepares youths to do things such as cook meals and balance a checkbook in independent living schools.¹⁶⁹

G.L.A.S.S. is also in the process of developing a transitional living program for youths aged seventeen to twenty-three. The program will consist of two apartment buildings with approximately ten to twelve

164. See Interview with Derrell Tidwell, *supra* note 47.

165. See *id.*

166. HIV is the human immunodeficiency virus, the virus which causes AIDS.

167. See Interview with Derrell Tidwell, *supra* note 47.

168. See *id.*

169. See *id.*

units per building to house eligible minority youths. It will be run like a group home; however, it will accommodate youths who are transitioning into adult independent living. A staff member will have an apartment in the building and will function as a supervisor, much like a Resident Assistant in college dormitories.¹⁷⁰

In New York, preliminary research has been done and there is some programming available to gay and lesbian youth.¹⁷¹ In March 1988, approximately one year prior to the release of the federal report on youth suicide, New York's "Governor's Task Force on Bias-Related Violence"¹⁷² issued its final report. The Task Force made findings and recommendations based on what its research yielded. In summarizing the findings from its "Youth Survey"¹⁷³ the Task Force stated "one of the most alarming findings . . . is the openness with which the respondents expressed their aversion and hostility toward gays and lesbians . . . and frequently made violent, threatening statements about them."¹⁷⁴ It was further noted in the report that "these attitudes draw strength from the examples set by all the major social institutions which continue to deny homosexuals the status of equals."¹⁷⁵ It was clear from the Final Report of the Task Force that continuing to teach our youth, through precedent, that it is acceptable to alienate and degrade certain classes of people will continue to fuel the problems of our gay and lesbian youth.¹⁷⁶

As a direct result of the findings in the federal *Report of the Secretary's Task Force on Youth Suicide*,¹⁷⁷ Massachusetts established in 1992 "The Commission on Gay and Lesbian Youth," with one of its express purposes being to "investigate the utilization of resources from both the public and private sectors to enhance and improve the ability of state agencies to provide services to gay and lesbian youth."¹⁷⁸ It is the

170. *See id.*

171. Primarily through the Hetrick Martin Institute; *see supra* note 2.

172. The Task Force was established by then Governor Mario Cuomo. Governor's Task Force on Bias Related Violence, Final Report, Mar. 1988.

173. This survey was conducted of 2,823 junior and senior-high students.

174. GOVERNOR'S TASK FORCE, FINAL REPORT at 97.

175. *Id.* The report also stated that, "the idea that any group is so beyond the pale of human society that hatred is seen as a natural response, and attack a legitimate reaction, rips at the very fabric of social life. It simply cannot be allowed that any group, no matter how it is constituted, should occupy such a position." *Id.*

176. Despite the astonishing findings made by the Task Force, it is not clear that New York implemented any changes to improve life for lesbians or gays.

177. *See* GIBSON, *supra* note 36.

178. Exec. Order No. 325, Mass. (1992).

first commission of its kind in the United States.¹⁷⁹ Governor Weld, at the swearing-in of the commission members, noted:

We feel strongly that there is a tremendous need to address the difficult issues facing gay and lesbian youth. . . . Half a million young people attempt suicide every year. Nearly 30% of youth suicides are committed by gays and lesbians. . . . We must abolish the prejudice and isolation faced by gay and lesbian youth. We need to help them stay at home and in school so they can have healthy and productive lives.¹⁸⁰

This Commission effectively serves as a proactive measure to keep gay and lesbian youth out of the legal sphere, by making resources available to them and providing for their safe education. Additionally, it made recommendations regarding the families of gay and lesbian youth, suggesting that reference materials be made available to them, that support groups be formed, and that special trainings be given.¹⁸¹

The Commission's first annual report, entitled "*Making Schools Safe for Gay and Lesbian Youth*,"¹⁸² outlined the problems faced by gay and lesbian youth in school and made a series of recommendations that seek to "guarantee safety and end abuse."¹⁸³ The Commission recognized that "school, along with family, forms the life of the teenager."¹⁸⁴ Intervening at school was therefore paramount.

Furthermore, in 1995 Massachusetts began a pilot program to seek out, train, and certify lesbian and gay adults to be foster parents for gay, lesbian, transsexual, and transgender youths.¹⁸⁵ Program organizers planned to place youths with their new foster parents by 1996. Finally, Massachusetts also enacted the Hate Crimes Reporting Act in 1990, which provides for the training of police and the collection of statistics about hate crimes directed at several groups of people, including gays and lesbians.¹⁸⁶

179. The Massachusetts Governor's Commission on Gay and Lesbian Youth, *supra* note 14, at 4.

180. *Id.*

181. *Id.* at 39.

182. *Id.* at 7.

183. *Id.*

184. *Id.*

185. *See* MASS. GEN. LAWS ANN. ch.22c, §§ 32-35 (West 1993).

186. The Massachusetts Governor's Commission on Gay and Lesbian Youth, *supra* note 14, at 9. The Commission notes, however, that the protection afforded adults by this law has yet to be extended to the schools.

Using California, New York, and Massachusetts as models, these various types of programs can and should be implemented in other states. In addition to those programs which currently exist, there is a need to develop and implement procedures in all public schools to protect gay and lesbian students from harassment and violence. Courts must recognize causes of action against administrators who selectively choose not to enforce anti-harassment policies. Children should receive a relatively harm-free education.

Moreover, there must be provisions made to have gay and lesbian role models in the schools and there must be causes of action for teachers, guidance counselors, and administrators who lose their jobs for being “out.” The staff and faculty in our schools should receive training in gay and lesbian issues so as to be able to identify problems and assist these children through school.

In addition, services should be offered to the families of gay and lesbian youth to help them to deal with the problems they face and the feelings they have. For instance, families could be referred to support groups like P-FLAG.¹⁸⁷ Public libraries could have information readily available and easily accessible for people to reference and read about homosexuality and youths who may be lesbian or gay.

Above all, states must both repeal their consensual sodomy statutes and enact legislation which protects gays and lesbians from discrimination based on sexual orientation. As long as it is legal to discriminate against and oppress gays and lesbians, there can be no substantial steps forward—for adults or for children.

187. “P-FLAG” stands for “Parents, Families, and Friends of Lesbians and Gays.”