

Parental Rights as if Queer Youth Mattered

Valerie Lehr
Department of Government and
Gender Studies Program
St. Lawrence University
Canton, NY 13617
vllehr@stlawu.edu

Prepared for delivery at the 2002 Annual Meeting of the American Political science
Association, Boston
August 29 – September 1, 2002
Copyright by the American Political Science Association

Changes in adult lesbian/gay/bisexual/transgendered/queer (LGBTQ¹) life have had a clear, though mixed, impact on youth. The possibility of identifying oneself as having an alternative sexuality or gender identity is happening at earlier ages than in the past. Andersen suggests that compared to the past, young men and women begin to develop an awareness of same-sex attraction at twelve to fourteen years of age.² This most likely results from increased visibility of adults, as well as increased discourse about homosexuality and gender, even if that discourse is often negative. This same openness, however, makes it more likely that others will identify questioning or simply non-conforming youth as gay or queer. Again, this is most likely the case for youth who fail to enact stereotypical gender behavior, whether they are gay/lesbian/transgendered or not.³ Such labeling generally is done in ways that are highly negative, thus creating the need for many kids to deny what they are feeling, both at school and at home. Alternatively, they can build a sense of identity that includes both their emerging sense of identity and the negative constructions that surround them. In this case, they must negotiate identity construction and begin to imagine and plan for their futures in a context where both their peers and the adults around them suggest repeatedly, whether explicitly or as part of “normal” heterosexism, that a possible part of their developing identity is wrong or immoral.⁴

This task is made even more complex by the dominant understanding of young people in the United States. Legal decisions, as well as much social policy, makes it clear that youth are not considered full rights-bearing individuals in American society. They are understood, instead as “potential citizens” whose rights can and should be limited in order to allow adults to guide them to maturity. The understanding that informs their legal status sees youth as in need of protection and guidance because they are less reasonable than adults, driven by both their bodies and their peers. The challenge that parents and other adults face is to teach young people to become rational beings who may be entrusted with full citizenship rights. The balance between parents and other adults tips in the favor of parents unless parents have proven themselves to be unfit. Parents, therefore, have considerable power in relation to their children’s lives, including their emerging sense of sexual and gender identity. As I will discuss in greater detail, this power extends to being able to commit one’s child and to denying them exposure to ideas about sexuality that they find threatening.

¹ I will use LGBTQ as shorthand for lesbian, gay, bisexual, transgendered, and gender non-conforming youth. I intend the “Q” to stand for non-conformity to all hegemonic sex/gender norms.

² Dennis A. Andersen. 1995. "Lesbian and Gay Adolescents: Social and Developmental Considerations." In *The Gay Teen*, edited by Gerald Unks. New York: Routledge, p. 19.

³ *The New York Times Magazine* recently printed an essay this is a powerful example of how non-conformity leads to harassment and violence in a young man’s life. See Aaron Vays (as told to Dana Shapiro). 2002. “On Edge.” *New York Times Magazine*: 8/04:60.

⁴ Gilbert Herdt and Andrew Boxer. 1993. *Children of Horizons: How Gay and Lesbian Teens are Leading the Way Out of the Closet*. Boston: Beacon Press, p. 128.

The harms that result from the confluence of homosexuality or gender non-conformity and youth in America are both numerous and well-documented. These include: substantial peer harassment, often with little adult intervention,⁵ higher rates of dropping out of school,⁶ higher substance abuse rates,⁷ higher homelessness rates,⁸ inadequate care within the Child Services system,⁹ higher suicide rates,¹⁰ higher sexual assault rates for young lesbians,¹¹ higher pregnancy rates¹², and danger of exposure to HIV.¹³ ¹⁴Given these harms, as well as the substantial harms that result from the reinforcement of hegemonic norms of masculinity and femininity for all young people, I want to ask whether there are discourses of youth rights and empowerment that would help LGBTQ youth and that might help those who wish to create a more supportive environment for these young people to build connections between their struggles and those of other youth.

Legal scholars who are supportive of recognizing youth as more than inadequate adults have conceptualized a number of different ways of recognizing young people within the law. Although these authors explore a wide range of issues in relation to youth—the right to demand that the state protect them from parents or foster parents, the right to choose to either have an abortion or raise a child, the right to decide what school they will attend, the right a voice as parental rights and visitations are determined, the right to engage in free speech in schools, etc., none specifically consider how the proposals that they make might be important for LGBTQ youth. I will discuss and evaluate their proposals in light of the needs of these young people. In so doing, my intent is not to ignore the other needs of youth, but rather to suggest that the needs of young gender and sexual non-conformists

⁵ See Human Rights Watch. 2001. *Hatred in the Hallways*. New York: Human Rights Watch.

⁶ See *Ibid.*; Virginia Uribe. 1995. "Project 10: A School Based Outreach to Gay and Lesbian Youth." In *The Gay Teen*, edited by Gerald Unks. New York: Routledge; and Warren J. Blumenfeld. *Ibid.* "'Gay Straight' Alliances: Transforming Pain to Pride."

⁷ *Ibid.*, p. 217.

⁸ See Jenny Casciano, Colleen Sullivan, David Pumo and Cynthia Kern. 2000/2001. "Symposium Proceedings: Client-Centered Advocacy on Behalf of At-Risk LGBT Youth." *New York University Review of Law and Social Change*. 26: 221-43.

⁹ Gerald P. Mallon. 1998. *We Don't Exactly Get the Welcome Wagon: The Experiences of Gay and Lesbian Adolescents in Child Welfare Systems*. New York: Columbia University Press and Casciano et. al..

¹⁰ The most commonly cited study of gay youth suicide is Paul Gibson. 1989. "Gay and Lesbian Youth Suicide" in *Report to the Secretary's Task Force on Youth Suicide, Vol. 3*. Washington, DC: U.S. Department of Health and Human Services. For a more recent study, see "Youth At Risk." 1997. *The Advocate* 744:15.

¹¹ Human Rights Watch. *Hatred in the Hallways*, p. 71.

¹² *Ibid.*

¹³ See *Ibid.*, p. 71 and Casciano, et al.

¹⁴ It is important to note that many young gay/lesbian/queer people thrive despite the negative environment in which they develop, and often because they receive support from caring adults. For some, growing up with an alternative sexuality/gender identity prompts them to political analysis and activity (see Robert A. Rhoads. 1994. *Coming Out in College*. Westport, Connecticut: Bergin & Garvey, p. 94. It is important to point this out in part because the Right would like to use the socially constructed problems that queer youth often face as proof that as a society we should do everything possible to guarantee that gay youth do not exist. Robson cites Lynn D. Wardle. 1997. "The Potential Impact of Homosexual Parenting on Children." *U. of Illinois Law Review*.: p. as a proponent of this perspective. See Ruthann Robson. 2001. "Our Children: Kids of Queer Parents and Kids Who Are Queer: Looking at Sexual Minority Rights From a Different Perspective." *Albany Law Review*. 64: 915-48, p. 934.

be taken seriously within a larger framework of youth empowerment. Before I specifically address possible mechanisms by which to change the status and condition of young people, I will explore the current legal status of youth generally, and LGBTQ youth in particular, in more detail.

Full or Partial Citizens?

Since the 1960s, there has been discussion of youth and rights in the United States. Despite this, young people continue to have limited rights based on what William Geimer¹⁵ refers to as the assumption of “juvenileness.” Essential to this concept is the idea that young people, because they need guidance to grow into well-functioning adults, can be deprived of what would otherwise be basic rights. In his discussion, Geimer makes an important point: juvenileness is both contextual and ideological. It is contextual in that that young people lack the property and other resources that would allow for greater independence, a phenomenon closely linked to the increasing educational demands of industrial and post-industrial society. As Levesque notes, with industrialization adolescence came to be a defined time period in the life cycle, one that was seen not as early adulthood, but rather as an extension of childhood.¹⁶ It is also contextual in the sense that social and economic rights have little meaning in the United States for all citizens. Ideologically, in Geimer’s words, young people are seen as “immature and incapable of responsible decision-making.”¹⁷ This ideology serves to reinforce legal decisions and public policy that help to construct the context, while the real material limits placed on youth, including lack of access to jobs that pay enough to support oneself, serves to reinforce the ideology that young people are dependent, and therefore not deserving of equal civil rights. At the same time, parents and teachers¹⁸ have less time to give to young people, thus leaving them dependent, but largely dependent on consumer culture and peers to meet many needs. This, in turn, reinforces the “moral panic” of adults in relation to young people and leads to greater repression.

To view youth as dependent is, within the American framework, a particularly limiting definition since, as Nancy Fraser and Linda Gordon argue, the interdependence of people is hidden behind the independent citizen and social actor.¹⁹ Yet the tendency within American society to define the good independent citizen in opposition to the inadequate dependent quasi-citizen makes the naturalization and maintenance of youth dependence particularly important within our overall social philosophy. Satsie Veith notes that it is, “precisely because we know that complete autonomy is not attainable in the real world,

¹⁵ William Geimer. 1998. "Juvenileness: A Single-Edged Sword." *Georgia Law Review*. 22: 949-73.

¹⁶ Roger J. R. Levesque. 1994. "The Internationalization of Children's Human Rights: Too Radical for American Adolescents." *Connecticut Journal of International Law*. 9: 236-93.

¹⁷ Geimer. "Juvenileness: A Single-Edged Sword," p. 951.

¹⁸ For example, in a discussion of the difficulty of finding teachers to sponsor gay-straight alliances in schools, Andino quotes Susan Wilkinson, chair of the Duval County School Board: “it’s difficult to get teachers to sponsor after-school activities. Teachers, who receive supplements only for sponsoring athletic teams and bands, already struggle with large classes, more papers to grade and more pressure to prepare students for standardized tests.” See Alliniece T. Andino. 2001. "Gay Students Say Schools Should Help Fight Prejudice Educators, Peers Seem Closed to Forming Clubs." *The Florida Times-Union*. January 11, 2001, A1.

¹⁹ Nancy Fraser and Linda Gordon. 1994. "Genealogy of Dependency: Tracing a Keyword of the US Welfare State." *Signs*. 19 (2): 309-36.

the concept of the autonomous person calls into being and relies on the opposite concept: the dependent, subordinate person.”²⁰ In fact, although young people were originally part of a list of those who were constructed as naturally dependent, today they stand alone as bearers of natural, and therefore sometimes forgivable, dependence. Frazer and Gordon explain that, whereas independence was once seen to be characteristic not of individuals, but of communities, as natural status hierarchies broke down, the “independence” of an individual became key to granting him (and eventually her) citizenship rights.²¹ For some time status remained legally defining for women, people of color, and the young. As excluded groups, such as blacks and women, fought to be defined as fully human, potentially independent, and deserving of citizenship, youth remained a group that could be used to signify “naturally” dependent. Lesko notes, “Being teenage locates a young person in a liminal state, but the hormonal and peer-oriented descriptors provide the action and problems of the naturalized story of adolescence.”²² To denaturalize youth dependence, then, is to call into question adult independence. Interestingly, this is what something feminists have argued is necessary to gain gender and racial equality.²³ Recognizing interdependence would enable US citizens to demand greater support for parenting and other family activities because it would challenge the concept of the independent adult worker. To recognize adolescence as having rights, despite their contextual dependence, then, has potentially radical implications, ones that have been denied in part through the continued construction of young people in law as naturally and properly dependent.

In recent years, courts have moved away from more expansive definitions of youth rights that came out of the 1960s to limit first and fourth amendment rights, generally in the name of creating safe and educational environments by allowing adults to judge what is or is not appropriate. Geimer argues that “[w]ith the exception of those cases where adult interests are directly at stake,”²⁴ Supreme Court decisions in the past two decades following *Tinker* have left the Constitution as no shield for juveniles, but rather as a sword for custodians and protectors of juveniles to combat deviations from adult-imposed norms.”²⁵ That is, youth are regulated in ways that keep them from questioning orthodoxy and that reinforce either parental power or the *in loco parentis* power of school and other institutions. Even in the area of abortion, as Rhonda Hartman argues, the Supreme Court came no closer to finding that adolescence have decisional competence. “This failure by the Court,” she notes, “perpetuates a legal presumption that adolescents lack competency in decision-making.”²⁶ As in a number of other areas of law that she

²⁰ Satsie Veith. 1994. "Note: The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the 'Maturity' Standard." *Hofstra Law Review*. 23: 453-81, p. 469.

²¹ Fraser and Gordon. "Genealogy of Dependency: Tracing a Keyword of the US Welfare State," pp. 313-15.

²² Nancy Lesko. 1996. "Denaturalizing Adolescence: The Politics of Contemporary Adolescence." *Youth and Society*. 28 (2): 139-61, p. 150.

²³ See, for example, *Ibid.*; Eva Feder Kittay. 1999. "Welfare, Dependency, and a Public Ethic of Care." In *Whose Welfare*, edited by Gwendolyn Mink. Ithaca, NY: Cornell UP .

²⁴ Specifically, the exceptions are abortion and the death penalty. As I discuss, even abortion decisions are very limited.

²⁵ Geimer. "Juvenileness: A Single-Edged Sword," p. 951.

²⁶ Rhonda Gay Hartman. 2000. "Adolescent Autonomy: Clarifying an Ageless Conundrum." *Hastings Law Journal*. 51: 1265-362, p. 1351.

discusses, Hartman points out that there are scientific studies that indicate that young people (generally over 14) are quite capable of making such decisions, in part because they consult with supportive adults and peers, an idea that is suggestive of the need to recognize youth as interdependent, rather than dependent. The law, however, is used not to encourage young people to recognize their interdependence by engaging in discussion with adults and peers whom they believe to be helpful as they make an important decisions, but rather as a mechanism that reinforces the inability of young people to act without jumping through hurdles imposed by adults. Such hurdles, she argues, are historical relics, ones not supported by any scientific research on the decision-making capacity of young people. Veith agrees, noting that where teenagers do appear to make decisions differently, this “seems not to derive from lack of ability, but from their social role as dependents.”²⁷ The end result of judicial bypass procedures that allow minors to get abortions without their parent’s permission, she argues, is “the exercise of adult control of children, and particularly adult manipulation of children-made possible by children’s political and legal vulnerability—to make political points, in this case, to take the brunt of political efforts to block abortion rights”²⁸

Whereas one might have assumed that *Tinker v. Des Moines Independent School District* had at least carved out free speech rights for youth²⁹, the Supreme Court limited the scope of such rights in the 1986 *Bethel School District No. 403 v. Fraser*,³⁰ a limitation reaffirmed in the 1988 *Hazelwood School District v. Kuhlmeier*³¹. In *Bethel*, the court, in an effort to ensure that students learn “civility,” upheld the punishment of a student for an election speech with sexual innuendo.³² In *Hazelwood*, the Court accepted that school administrators need only have “reasonable” reason for censoring student speech, with reasonableness again connected to preparing students to behave with civility.³³ What is perhaps most astounding about *Hazelwood* was that the decision provided affirmation for a school principal’s decision to censor articles from the school newspaper about the experiences of students at the school with teen pregnancy and divorce, two issues that one might think it would be important to encourage young people to talk about and consider. Although the Court’s rationale was based in part on protecting privacy, Geimer reports that this only became an argument after the censorship had occurred.³⁴ In analyzing the messages and impact of *Hazelwood*, as well as *Acton*, in which the Court ruled that students lack Fourth Amendment, First Amendment, and Fourteenth Amendment rights in the context of schools,³⁵ Rochelle Jackson writes:

²⁷ Veith. "Note: The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the 'Maturity' Standard." p. 459.

²⁸ *Ibid.*, p. 474.

²⁹ In this 1969 case, the Court ruled that John Tinker and Mary Beth Tinker had the right to wear black armbands to school in protest of the Vietnam War. See *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969).

³⁰ 478 U.S. 675 (1986)

³¹ 108 S. Ct. 562 (1988)

³² The lesson that students learned clearly did not have the intended effect, since they elected the young man as their graduation speaker, thus suggesting that teaching through authoritarianism is not particularly successful as a pedagogical strategy.

³³ Geimer. "Juvenileness: A Single-Edged Sword," p. 959.

³⁴ *Ibid.*, p. 959.

³⁵ *Veronica School District v. Acton* 515 U.S. 646 (1995).

The Acton and Hazelwood decisions are significant for several reasons. First, they confirm the basic fact that in the United States children are almost invariably denied civil and political rights based on the idea that it is the adult who knows best, despite the fact that such deprivation would be deemed unconstitutional were it to happen to an adult. Second, the Supreme Court established the standard for lower courts that may address these issues. Such decisions will undoubtedly have a disastrous impact on the rights of children across America.³⁶

Geimer's argument that these decisions are about teaching orthodoxy is given further credence if we consider the extent to which school administrators seem unwilling to use their power to limit student speech when it involves challenging the sexism and homophobia, each of which needs to be linked to more general bullying, that runs rampant in their buildings. Human Rights Watch, in their report *Hatred in the Hallways*, cites a study done by students in Des Moines indicating that "[t]he average student in the Des Moines, Iowa public schools hears an antigay comment every seven minutes; teachers intervene only 3 percent of the time."³⁷ As Human Rights Watch documents in great detail, speech such as this in much of the country is neither subject to challenge through pedagogy nor censorship. Instead it often creates a hostile environment that is allowed to grow into physical violence (which is itself often unchallenged) and to drive LGBTQ kids out of school. To the extent that discourse around sexuality is censored, it is the alternative discourse that queer kids attempt to create in these hostile environments. Human Rights Watch notes that, "It is the student being harassed because of his or her actual or perceived sexual orientation or gender identity who is blamed for the situation. If a concerned parent repeatedly complains to the administration about the harassment, the official response is often to transfer the student, rather than address the problem and punish the perpetrators."³⁸ This may, in part, stem from the fact that only eight states "have laws that explicitly protect gay and lesbian students from harassment."³⁹ Moreover, gay rights laws do not apply to minors.⁴⁰ Thus school administrators who are themselves not supportive of gay/lesbian youth feel little external pressure to guarantee that these students are not harassed. Additionally, school administrators often try to block gay youth from exercising the desire to try to transform the climate by creating gay-straight alliances.⁴¹

³⁶ Rochelle D. Jackson. 1999. "The War Over Children's Rights." *Buffalo Human Rights Law Review*. 5: 223-51, p. 246.

³⁷ Kelley Carter. 1997. "Gay Slurs Abound." *Des Moines Register*. March 7, 1. cited in Human Rights Watch. 2001. "Hatred in the Hallways," p. 31.

³⁸ *Ibid.*, p. 83.

³⁹ Shauna Curphey. 2001. "Teens Urge States to Protect Gay, Lesbian Students." *Women's ENews*. 4/15, available at <http://www.womensenews.org/article.cfm/dyn/aid/878/context/archive>.

⁴⁰ Authur Lipkin. 1995. "The Case for a Gay and Lesbian Curriculum." In *The Gay Teen*, edited by Gerald Unks. New York: Routledge, p. 48.

⁴¹ See Human Rights Watch. "Hatred in the Hallways." ; Andino. "Gay Students Say Schools Should Help Fight Prejudice Educators, Peers Seem Closed to Forming Clubs." Henigan argues that although schools may be hesitant to provide services for gay and lesbian youth because they are afraid of being sued by parents, the voluntary nature of these services should provide them with protection, as long as they address issues such as self-esteem, academic performance, violence, or suicide. See Patrick Henigan. 1996. "Note: Is Parental Authority Absolute?" *Brooklyn Law Review*. 62: 1261-91.

Of course many youth do not have supportive parents who attempt to intervene with schools on their behalf, which means that many of these young people face harassment, and often violence, both at school and at home. Parents retain the legal right to determine where their children will go to school, including religious schools that often teach the homosexuality can lead to eternal damnation, and where they will live. Such rights have been developed through legal rulings throughout the twentieth century, but have surely received confirmation in the Supreme Court's recent school voucher ruling.⁴² Since it is the parent who makes a decision about where to use the voucher, the Court reasoned, the state is not supporting religion. Young people themselves remain absent, as they have since the majority decided in *Yoder*⁴³ that Amish parents could decide not to send their children to school after eighth grade. In essence, as Henigan writes, the Court presumes, "that parents always act in the best interests of their child because a parent presumably 'possesses what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.'"⁴⁴ For LGBTQ young people, the lack of rights creates a particularly challenging reality. Although it may technically no longer be possible to have a child institutionalized for being homosexual, it is certainly possible to send them to facilities that will attempt to convert them to heterosexuality through "reparative therapy,"⁴⁵ make them attend religious schools that condemn their desires as part of official policy,⁴⁶ throw them out of one's house⁴⁷ and/or have them institutionalized and treated for "gender identity disorder."⁴⁸ Not coincidentally, as both Eve Sedgwick⁴⁹ and Feder⁵⁰ discuss, GID arrived in the American Psychiatric Association's Diagnostic and Statistical Manual at about the same time that homosexuality disappeared. Feder notes that in the intervening years the diagnostic criteria have broadened, making it increasingly possible for the diagnosis to be used to attempt to keep kids from establishing and acting on both homosexual desires and non-standard gender identities. As a result, "Recent articles appearing in both gay and straight publications report the continuation of disturbing abuse of gay and lesbian youth in mental hospitals

⁴² See Katha Pollitt. 2002. "Schools Out." *The Nation*. 275 (4): 10.

⁴³ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁴⁴ Henigan. "Note: Is Parental Authority Absolute?" p. 1279., quoting from *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

⁴⁵ Karolyn Ann Hicks. 1999. "'Reparative' Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse." *The American University Law Review*. 49: 505-47.

⁴⁶ Dwyer discusses the impact of religious schools teaching sexism to youth. Parallel harms would come from schools teaching homophobic values. See James G. Dwyer. 1998. *Religious Schools v. Children's Rights*. Ithaca, NY: Cornell UP.

⁴⁷ Robson cites a study indicating that approximately 25% of homeless young people are gay/lesbian/transsexual. See also Mallon for a discussion of the problems that young gay men and lesbians face once they enter into the child welfare system. Mallon. *We Don't Exactly Get the Welcome Wagon: The Experiences of Gay and Lesbian Adolescents in Child Welfare Systems*.

⁴⁸ See Ellen K. Feder. 1999. "Regulating Sexuality: Gender Identity Disorder, Children's Rights, and the State." In *Having and Raising Children*, edited by Julia T. Bartkowiak and Uma Narayan. State College, PA: Penn State University Press.

⁴⁹ Eve Kosofsky Sedgwick. 1993. "How to Bring Your Kids Up Gay." In *Fear of a Queer Planet*, edited by Michael Warner. Minneapolis: University of Minnesota Press.

⁵⁰ Feder. "Regulating Sexuality: Gender Identity Disorder, Children's Rights, and the State."

and residential treatment centers.”⁵¹ ⁵² “Reparative therapy” is another a mechanism that parents use to try to “cure” their children, and although as Hicks argues this should be illegal given that homosexuality is not a psychological disorder, young people are often technically institutionalized for some other DSM-classifiable disorder, such as anxiety disorders. Such institutionalization is possible because the Supreme Court’s 1979 Parham v. J.R. decision⁵³ granted significant powers to parents to have their children treated for mental illness. In commenting on this case, Hartman writes, “While the Supreme Court in Parham sought to prevent the erection of barriers to the treatment process, important safeguards, such as an administrative hearing could meaningfully involve the adolescent in a way that would both enhance the adolescent’s understanding and participation in treatment.”⁵⁴ For young people who have offended their parents understanding of appropriate gender or sexuality, the need for such a hearing is particularly great.

The complexity that young people face because they lack meaningful civil rights is compounded by the fact that they are assumed to be financially dependent on their parents. Wendy Anton Fitzgerald connects the problems faced by both institutionalized youth and “throwaway” youth, commonly seen as runaways, to the obligation that parents support their children, but that this support be on the parents’ terms:

Modern family law codifies the parental support obligation unqualified by any obligation in the child to serve or obey the parents. Nonetheless, parents’ constitutional right to chastise, declare delinquent, or commit their children sustains the historical model of a support-for-services exchange. Responding to parents’ rights, the juvenile delinquency and mental health systems provide parents an effective and frequently utilized system for banishing disobedient children from their homes and subverting their parental support obligations. Even the most obedient children, moreover, cannot enforce a parental support obligation.⁵⁵

As Fitzgerald goes on to point out, the state’s interest in enforcing child support has generally come as a mechanism to either prevent reliance on the state or to decrease the

⁵¹ Ibid., p. 170.

⁵² Anne Fausto-Sterling provides an interesting discussion of gender identity disorder in her review of *Gender Identity Disorder and Psychosexual Problems in Children and Adolescence*. She suggests that many of the children treated under this classification do have significant problems, though she suggests that they are not primarily ones of gender non-conformity: “it does appear that some young children who express their emotional distress within their developing sex/gender and that these children and their families can benefit from some form of therapeutic assistance. The difficulty lies with the fact that psychiatric establishment, via the DSM has defined the problem in of a gender disorder, instead of an anxiety disorder in which gender is merely a symptom” (153). This can only be she done, she suggests in the review, if “fixing” the cross-gendered behavior is not considered a goal because the cross-gendered behavior is simply not understood as a problem. See Anne Fausto-Sterling. 1999. "Book Review." *Journal of Homosexuality*. 37 (3): 150-53.

⁵³ Parham v. J.R., 442 U.S. 584 (1979).

⁵⁴ Hartman. "Adolescent Autonomy: Clarifying an Ageless Conundrum," p. 1334.

⁵⁵ Wendy Anton Fitzgerald. 1994. "Maturity, Difference, and Mystery: Children's Perspectives and the Law." *Arizona Law Review*. 36: 11-111, p. 40.

child and the custodial mother's reliance on the state.⁵⁶ It does not come from a positive attempt to guarantee that no child lives in poverty; to do this would, again, be to challenge notions of dependence and independence in ways that threaten hegemonic ideology: "Adult society," Fitzgerald observes, "now refuses to concede our likeness to children in their economic dependency. If economic dependency established children's claims to state economic support, then likewise economic dependency would establish adult claims."⁵⁷ It would also suggest that the State has an obligation to help LGBTQ youth who have been thrown out of their families to have some degree of economic security.

This is a significant issue, as Jenny Casciano, site director of a drop-in center for LGBTQ youth describes: "Those young people who are not living at home, have been kicked out of home face a whole other slew of issues, especially if they when they are under eighteen. A lot of problems they are dealing with relate to access to personal benefits, which they no longer receive because they are not living at home. This lack of access stops them from doing things like living on their own or getting into a long-term transitional living facility, especially if they are over the age of sixteen and cannot have a case opened for them by New York City's child welfare and services agency, the Administration for Child Services."⁵⁸ She goes on to note that these youth also have difficulty getting resources for education, since they are still technically dependents of their parents.

Finally, the issue of financial support needs to be linked to the question of the obligation that the State has to protect children and adolescents from abuse, since some LGBTQ youth are thrown out of their homes, while others are abused within them.⁵⁹ Woodhouse connects these issues, while indicating the inadequacies of US systems in both cases of poverty and cases of abuse: "Too many children, especially children of color, are being removed from their homes because of poverty and its associated ills. At the same time, the system is failing those who need it most. Half of the 1000 children who die each year at the hands of caregivers are already known to child welfare authorities."⁶⁰ The role of the state in securing a safe and secure residence for young people is quite narrow in US law. The limits of this responsibility were set out by the Supreme Court in *Santosky v. Kramer*⁶¹ and *Deshaney v. Winnebago County Department of Social Services*⁶². In each case, the Court upheld the "fundamental liberty interest of natural parents in the care,

⁵⁶ The combination of limits on benefits as a result of the PWRA and new measures intended to make adoption easier suggest that the state now sees terminating parental rights as perhaps an even better method to save the state money.

⁵⁷ Fitzgerald. "Maturity, Difference, and Mystery: Children's Perspectives and the Law," p. 96.

⁵⁸ Casciano, Sullivan, Pumo and Kern. "Symposium Proceedings: Client-Centered Advocacy on Behalf of At-Risk LGBT Youth," p. 223..

⁵⁹ Due cites a study done by Joyce Hunter of the Hetrick-Martin Institute that indicated that "40% of gay and lesbian youth had been subjected to physical violence, half of it gay related, and 60% of that gay-related violence occurred in the family." See Due, *Joining the Tribe*, pp. xxx-xxxi.

⁶⁰ Barbara Bennett Woodhouse. 2001. "Colloquium: Child Abuse, the Constitution, and the Legacy of *Pierce v. Society of Sisters*." *University of Detroit Mercy Law Review*. 78: 479-89, p. 480.

⁶¹ 455 U.S. 745 (1982).

⁶² 489 U.S. 189 (1989).

custody, and management of their children.”⁶³ In *Deshaney*, the Court declined to hold the State responsible for protecting Joshua Deshaney from the abuse of his father, despite the fact that social services had every reason to believe that the boy was endangered prior to his father beating him and inflicting permanent brain damage. “The Court reasoned that the state’s right to intervene, to investigate, and monitor the situation did not implicate a duty to protect a child who remained in his father’s care....The right of control had been left exclusively to the father and the child could not make out a liberty claim for denial to protect based on the father’s ‘private violence.’”⁶⁴ In other words, the presumption that as long as children are in the custody of a parent or parents the State does not have a duty to protect a child is embedded in American law.

The harms to both poor children, who receive relatively little aid from the State since their parents are responsible for them, and abused children are general harms that numerous children in the United States confront every year. With children having no affirmative right to support from the parents or the state, all that remains for those who can no longer live with parents is reliance on adoption, foster care, or group homes. Adoption of older children is unlikely in any case, but even less so for LGBTQ youth. And, although foster care and group homes may be problematic for many young people, both are notoriously inadequate for meeting the needs of LGBTQ young people. David Pumo, director of the Lesbian and Gay Youth Project at the Urban Justice Center, comments:

Of the nearly 20,000 kids who are living on the streets of New York, who sleep on the bridges and under the piers and on the subways every night, between forty and fifty percent of them self-identify as lesbian, gay, or bisexual⁶⁵. That is a statistic, by the way, which is not by any means exclusive to New York...Six of the ten kids who are gay, who are living on the street currently, have already been in foster care and have chosen to run from foster care because of the situation my colleague spoke about earlier⁶⁶—because of the horrendous treatment they received in foster care.⁶⁷

Remaining within the Child Services system has limited benefits for those approaching eighteen, even if they happen to receive services in a non-homophobic environment. Mangold suggests that the way young people “age out” of the system fails to provide adequate support or education, resulting in many becoming homeless adults or incarcerated adults.⁶⁸ The unwillingness of most States to try to connect young LGBTQ

⁶³ 455 US 745 (1989) quoted by Susan Vivian Mangold. 2000. "Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children." *Buffalo Law Review*. 48: 835-79, p. 849.

⁶⁴ *Ibid.*

⁶⁵ Compared to about 6% of youth.

⁶⁶ In the discussion, Colleen Sullivan, staff attorney at Lambda Legal Defense and Education Fund, had noted that “LGBT youth who are either out or gender non-conforming often end being ostracized in foster care.” Casciano, Sullivan, Pumo and Kern. "Symposium Proceedings: Client-Centered Advocacy on Behalf of At-Risk LGBT Youth," p. 226.

⁶⁷ *Ibid.*, p. 232.

⁶⁸ Mangold. "Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children," p. 835-79.

youth in their custody with LGBTQ adults compounds an already destructive situation. Sullivan notes, “Massachusetts is the only state that I know of where they actively recruit gay and lesbian foster parents with the specific goal of placing at-risk LGBT youth in a gay home.”⁶⁹ This unwillingness stems from the belief that gay adults simply want to recruit and that gay young people are too young to define a sex/gender identity.

Youth: Rights and Relationships

One obvious alternative to the regime of parental control and rights that I have discussed is to grant equal citizenship rights to young people, thus trying to enact the children’s liberation goals that emerged with other social movements in the 1960s. Yet, a number of authors who take seriously the current lack of power that young people have argue that liberating youth by extending full civil rights to them is not likely to be successful. Martha Minow, for example, points out that the tendency to read rights as indicating autonomy and complete competence would be even less effective for young people than it is for adults, and uses this fact to highlight the need to rethink rights generally:

[R]ights could be part of legal arrangements that permit, not to mention promote, relationships for adults—while also combating hierarchy and fixed assignments of status. This conception remains problematic given a regime of rights that emphasizes individual autonomy to the exclusion of duty and interpersonal connection. These problems with traditional rights for adults mirror, but also compound the difficulties of devising rights for children that can promote relationships while protecting autonomy.⁷⁰

The role that relationships should play in limiting the autonomy of young people, Laura Purdy argues, requires that we consider the social context in which we live, including what we know about psychological development at this point in history and what we know from the practical experience of working with young people. If we combine these considerations with philosophical ones, she argues, it makes little sense to agree with liberationists that youth simply need to be treated like adults. To do so fails to prepare them for their responsibilities as democratic citizens and fails to meet their need for protection. In essence, she asserts, it is important to limit the freedom of young people so that they develop self-control, which she identifies as the core virtue that enables democracy.⁷¹ In making this argument, Purdy echoes a number of authors who warn that the central problem that young people face today is not too much control by adults, but rather inconsistent control and too much permissiveness,⁷² each of which leads young people to turn not to adults for guidance and development, but rather to one another while both trends combine to produce low self-esteem and insecurity. Her goal, then, is to foster relationships, generally between parents and children, where adults have authority,

⁶⁹ Casciano, Sullivan, Pumo and Kern. "Symposium Proceedings: Client-Centered Advocacy on Behalf of At-Risk LGBT Youth," p. 236.

⁷⁰ Martha Minow. 1986. "A Feminist Approach to Children's Rights." *Harvard Women's Law Journal*. 9: 14-24, p. 18..

⁷¹ Laura M. Purdy. 1992. *In Their Best Interest? The Case Against Equal Rights for Children*. Ithaca, NY: Cornell UP, p. 48.

⁷² James Cote. 2000. *Arrested Development*. New York: NYU Press.

but do not abuse their power.⁷³ Finally, Purdy argues, to see young people as equal rights bearing individuals is to extend liberalism in a way that makes even families nothing more than collectivities of competing, rights-bearing individuals. That is, it is to complete the liberal project at the cost of young people's development and, therefore, of democracy by extending the concept of the "independent" individual, rather than trying to create the social and economic conditions that would allow people to earn high enough wages to support themselves and those who depend on them, while also allowing them the time and energy that they need to sustain relationships.⁷⁴

It is clear in the discussions of youth and rights from which I am drawing that the critical issue as we attempt to reconceptualize the abilities and opportunities of young people is how to draw the lines between youth, parents, and the State. Minow points out that one of the difficulties in even discussing "children's rights" is that this concept has three different meanings. It can, she explains, mean protecting young people from abuse or neglect by having the state enter into the parent-child relationship, or it can mean protecting a child from the interference of the state by preserving parental authority, or it can mean guaranteeing that children have a voice, with the state suspending reinforcement of parental power.⁷⁵ Each of these forms of "rights," I believe, can be helpful for queer kids, yet it is only if the third vision of youth rights is taken seriously that the other two become more than a mechanism of control. Yet in the United States, as I have shown, parental power has primacy over either state intervention or enhancing voice for youth. Even Purdy, who positions herself as an opponent of youth liberation, agrees that young people possess an increasing ability to voice their needs, one which deserves recognition.⁷⁶ I want to begin my discussion of how and why we should reconceptualize parental roles in ways more compatible with both state intervention and prioritizing the voice of youth by first discussing Purdy's alternative to "children's liberation." Her rejection of liberation reminds us of the importance of parental rights, but also sees the state as having a legitimate interest in teaching young people skills necessary for democracy.

As Purdy sees the parent, child, state relationship, parents should retain a primary voice in how their children are raised, but this would be tempered more than at the present time by: 1) requiring that young people receive a public, as opposed to private, education in order to ensure that there is some counter to parental attempts to indoctrinate; 2) improving education so that it is designed to teach critical thinking; 3) providing those young people whose interests are in conflict with their parents with both an alternative space in which to talk about the conflict, and if the interests are irreconcilable, an alternative place to live where they would have responsibilities; 4) giving young people greater rights within schools; and 5) perhaps requiring young people to work. Her goal is to better balance the societal interest in helping young people to develop the skills necessary to function constructively in a multicultural society with encouraging parents to exercise authority in relation to their children, even if this means that in private they

⁷³ Purdy. *In Their Best Interest? The Case Against Equal Rights for Children*. p. 138.

⁷⁴ *Ibid.*, p. 233.

⁷⁵ Minow. "A Feminist Approach to Children's Rights," pp. 18-20.

⁷⁶ *Ibid.*

attempt to persuade them that their beliefs are superior. If this produces a clash of interests, then outside intervention is necessary. She is careful, however, to argue that “interest” should not be confused with desire. In cases where the parent and child do have conflicting interests, and one can easily see that this is the situation for many LGBTQ young people who are rejected by their parents, an alternative, including an alternative residential system, would be necessary to afford protection to the young person, while also providing structure. Thus, the role of the state is primarily to guarantee that children and youth are exposed to ideas outside of those of parents, to intervene in situations where the child is in danger, and to help parents to have the time and money that they need to raise their children well. Education would be sufficient interference for most families. Others who consider how democratic education that fosters autonomy can be made compatible with home schooling and religious schools reach similar, though perhaps more tempered, conclusions, suggesting that the state needs to regulate these schools even more carefully than they regulate public schools so that they foster autonomous thinking.⁷⁷

In suggesting the argument that religious schools need to be more highly regulated than they are currently, James Dwyer specifically argues that attributing to parents the right to control their children violates all other notions of rights. Thus, although he would not necessarily make all education public, as Purdy suggests, his argument provides a rhetoric for moving away from parental rights in a way that Purdy does not attempt, and in the process makes a case for shifting the balance away from parental rights. He suggests that parents be understood as having responsibilities in relation to their children, rather than rights, in essence shifting the rights to the child. Although for those parents and children who currently share supportive and nurturing relationships, this might make little difference, he sees such a shift as potentially positive in a number of ways. First, removing the notion that parents have the right to try to raise their child to be whom they wish would encourage adults to see children not as projects, but as people. It would also provide courts with clearer grounds for child abuse or neglect than currently exist. Overall, Dwyer writes:

In addition to these legal consequences of adopting the proposed approach, I think eradicating the notion of parental entitlement and substituting the notion of parenting as a privilege would have profound and unqualifiedly beneficial social consequences. The change in attitudes would make parents think about why they should enjoy the opportunity to raise a child and whether they are good parents, and this in turn should lead them to improve their parenting, to seek out information and training,⁷⁸ and to engage in dialogue with other parents, as the better parents do today.

⁷⁷ See Rob Reich, “Testing the Boundaries of Parental Authority Over Education: The Case of Homeschooling,” Presented at the 2001 Annual Meeting of the American Political Science Association, San Francisco, CA. and James Dwyer. 1998. *Religious Schools v. Children's Rights*, Ithaca, NY: Cornell UP. Dwyer writes about religious schools, while Reich argues that homeschooling has become an even more important tool for parents who wish to indoctrinate their children into their own beliefs.

⁷⁸ *Ibid.*, p. 101.

The danger of seeing parenting as a privilege is that parenting can come to be seen as legitimate only for those who have the resources to provide for their child(ren). Minow's analysis helps to move away from this possibility by suggesting that if we promote care and connection societally, we must have expectations in relation to both adults and juveniles and "[j]uvenile courts and other institutions must be able to focus on the preconditions for relationships." This requires that, "the juvenile court be authorized to commandeer resources, such public support benefits, homemaker assistance, day-care volunteers, and job training for both juveniles and their care-takers."⁷⁹ In other words, the interdependence of society, adults, and children would need to be recognized and built into judicial and social service systems. Of course if the state is to make greater demands on parents, it has to be possible to provide alternatives for young people whose parents cannot or will not live up to these demands. As I have noted, this may be particularly important for queer youth.

In an essay concerning the unwillingness of courts to recognize the importance of actual, as opposed to legal, relationships between adults and children, Barbara Bennett Woodhouse also rejects the notion that parental rights should dominate legal thinking about the status of young people. "Parental power," she notes, "is still exercised, like rights in property, as a right of possession and control."⁸⁰ Central to the property right that adults exercise is the "power to give and withhold the child's love from others."⁸¹ This power means that even when children forms relationships with adults who might provide them with nurturance, as in the case of non-married and non-biological parents, the legal parent can terminate access between the adult and the child. Certainly this is a clear pattern in lesbian parenting cases, where the non-biological parent is not protected by second parent adoption laws. Parents are able to exert this level of control because the voices of children are simply not considered important in legal proceeding concerning their care: "Law adopts and advances views of children's nature that tend to justify adult domination and silence children. Thus, children are not denied the right to testify by inhospitable rules of evidence, they are simply characterized as incompetent or unreliable witnesses. Children are not denied due process in foster care, custody, or commitment proceedings. Their interests are simply subsumed in the unity of family life and are presumptively one with those of their parents."⁸²

Rather than allowing legal parents to have their interests subsume those of their children, Woodhouse argues, we need to focus on "intergenerational responsibility," or a "generist perspective." The generist perspective that she theorizes is connected to the insights of both Dwyer and Minow in that it attempts to articulate how we might reconceptualize child-parent relationships in a way that reinforces neither the idea of parental rights nor is reliant, as Purdy warns against, on simply extending rights to children and youth. Generism, she suggests, would respect the evolving capacities of children, rather than simply focus on their incapacity. Specifically, generism would, "value most highly

⁷⁹ Minow. "A Feminist Approach to Children's Rights," p. 23.

⁸⁰ Barbara Bennett Woodhouse. 1993. "Hatching the Egg: A Child-Centered Perspective on Parents' Rights." *Cardozo Law Review*. 14: 1747-865, p. 1810.

⁸¹ *Ibid.*

⁸² *Ibid.*, p. 1838.

concrete service to the needs of the next generation, in public and in private spheres, and encourage adult partnership and mutuality in the work of family, as well as collective community responsibility for the well-being of children.”⁸³ She later expands on the latter point, suggesting that the language of parent’s rights plays an important role in keeping non-legal parents from being involved in children’s lives: “It [rights talk] keeps neighbors and even family at arms length, excuses the community from accepting real responsibility for the plight of ‘other people’s children,’ and, as Mary Ann Glendon asserts, robs us of a political language for expressing our collective stake in children’s welfare.”⁸⁴ A generist perspective would focus on actual relationships, rather than idealized, ideological relationships. Multiple adults could have the right to participate in nurturing a child, with the child or young person having a significant voice in determining who does in fact have responsibilities. The state would also clearly have significant responsibilities for ensuring that all children are nurtured by someone.

Woodhouse, sees the need to involve children in decision-making about relationships primarily in situations where someone who has played a caring role when the child is young in suddenly denied access to the child by her/his legal guardians. In making these decisions, they suggest, there should be no presumption that a child should have no more than two parents or that the child’s desires are not important because the adult does not have legal standing. In situations where a child is in foster care, Mangold argues, the ability to provide foster parents with guarantees that they can maintain contact with a child without terminating parental rights might well yield more successful resolutions for many young people.⁸⁵ Clearly acknowledging that those who build a strong enough relationship with a child or adolescent so that the child or adolescent believes it to be worth preserving should have some right to maintain the relationship, regardless of the relationship between that adult and the child’s legal parent. But to move social policy in this direction is to both pay greater attention to the voice of the child or adolescent and to be willing to have the State guarantee that that voice is heard. That is, it requires that the third element in Minow’s typology be taken seriously by a state that is willing to demand that parent’s enforce reasonable desires.

Despite differences in their positions, Minow, Purdy, and Woodhouse each agree that young people must have publicly acknowledged rights and duties, and their needs for development and education must be met by both their parents and the larger society. They also would agree, that the presumption that children are too immature to speak needs be reversed if young people are to gain the status they need to enjoy rights and be held responsible. Clearly queer youth would benefit from such a perspective. Yet to the extent that the United States is moving on these issues, we are moving to a position where young people have fewer rights and where transgressions that do not reinforce hegemonic power result in harsher punishment. It is not surprising, therefore, that the United States is one of only two countries in the world to have failed to ratify the United Nations Convention on the Rights of Children. Given the serious and far-reaching needs of gay youth, as well as the clear benefits that ratification might provide for other young

⁸³ Ibid., p. 1815.

⁸⁴ Ibid., pp. 1841-42.

⁸⁵ Mangold. "Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children."

people, I want to ask whether those concerned about LGBTQ youth should support those who make ratification a central part of their youth agendas.

Prioritizing the International Convention on the Rights of the Child

In commenting on the Convention on the Rights of the Child, Roger Levesque notes that, in general, it would maintain the importance of the parent-child relationship in ways consistent with United States law. He continues: “ The Convention, however, goes one step further. The Convention calls for States to take on the revolutionary obligation to ensure that parent’s recognize and ensure their children’s rights. Thus, taking the Convention’s approach seriously would call for a radical transformation of how we view children, parents, and families.”⁸⁶ Central to this change, is view that the “child is human being, not the germ of a human being.”⁸⁷ The Convention would require: 1) that the State play a role in guaranteeing that parents recognize a child’s developing capacities⁸⁸; 2) that the State consider the judgment of a child or adolescent in making a determination of her/his best interests⁸⁹; 3) that “the state provide the child with adequate care when parents or others charged with that responsibility fail to do so”⁹⁰; that the State protect children from violence, whether that violence is enacted by the State or by private individuals⁹¹; and that the State take the action necessary to prevent the abuse of children.⁹² In other words, while the Convention sees the family as the ideal location for raising children, it ensures that the child’s voice be heard, while also demanding that the State work to ensure that the best interests of the child are provided, even by the family. By way of comparison, my discussion of Minow, Purdy, Dwyer, and Woodhouse indicates that within the United States achieving a better situation for all youth requires seeing parents as having responsibilities, perhaps as well as rights, recognizing the developing capacities of youth and building their voice into legal proceedings, and doing more to ensure that children and youth be recognized not simply as the responsibility of their parents, but also as a social responsibility. In a variety of ways, the Convention does all of these things.

These provisions would, I believe, address many of the needs of LGBTQ young people that I discussed above. In part, as Rochelle Jackson discusses, this is the case because the Convention attempts to articulate both the civil and political rights of children and youth and the social and economic rights of young people. It is exactly this combination that young LGBTQ youth need: civil and political rights mean that their definition of their evolving sexual/gender identity must be taken seriously by the adults and institutions that are so central to their lives, while guaranteeing social and economic rights means that those whose parents are unwilling to accept their gender/sexual identity must be provided

⁸⁶ Ibid., p. 243.

⁸⁷ Jackson. "The War Over Children's Rights," p. 236.

⁸⁸ Levesque. "The Internationalization of Children's Human Rights: Too Radical for American Adolescents," p. 288.

⁸⁹ Ibid., p. 289.

⁹⁰ Jackson. "The War Over Children's Rights," p. 238.

⁹¹ Human Rights Watch. "Hatred in the Hallways."

⁹² Barbara Bennett Woodhouse. 1998. "From Property to Personhood: A Child-Centered Perspective on Parents' Rights." *Georgetown Journal on Fighting Poverty*. 5: 313-19, p. 317.

with alternatives. Under the Convention, the State will have a meaningful obligation, enforceable by law, to provide resources for them. Jackson quotes Cohen, who summarizes the transformation mandated by the Convention: “ ‘These established civil and political rights along with [the] newly formulated individual personality rights, have expanded the post-Convention child rights equation from ‘child rights = care and protection’ to ‘child rights = care+ protection+individual personality rights.’”⁹³ For those young people who are regularly subject to violence in schools, the Convention would also demand that the State protect their individual personality rights by addressing the violence and mandating that the state make an effort to continue to provide educational opportunity.⁹⁴ In general, a broad reading of the Convention, in combination with social scientific research, might suggest the following: since sexual identity is defined by young people around the age of 14 and there is significant evidence that 14 year-olds are generally approaching maturity as decision-makers, recognizing the “evolving capacities” of youth means that parents and the state must begin recognize the sexual choices that young people make and create conditions that allow them to express these choices safely. Although I’ve suggested a fairly liberal interpretation of what the Convention might be read to require, there are a number of realities that would limit this optimistic picture. In considering whether supporting ratification of the treaty for those concerned with LGBTQ youth, one must ask if there is there evidence that international human rights law can be an effective mechanism for increasing the rights of gays/lesbians/transgendered people. Further, one must ask what impact the Convention would really have on United States law, for certainly, as some of its supporters recognize, the impact could be minimal.

Evidence on the question of whether international human rights agreements are an effective mechanism for pro-LGBTQ activists is mixed. There is, however, some hope for thinking that the International Human Rights Bodies are taking issues of anti-gay/lesbian/transgendered actions seriously, even if their support has been sporadic. Such action is important since the Convention on the Rights of Children is, in important ways, an expansion of the guarantees in the International Covenant on Civil and Political Rights to children. In relation to the Human Rights Committee’s⁹⁵ actions, Eric Heinze reports, “In its more recent comment on individual State reports, the Committee has cited ill-treatment of homosexuals as raising concerns about violations of the Covenant. In view of its expansive interpretation of the scope of protected categories, there is good reason to believe that the Committee will be generally willing to include sexual orientation as a protected category.”⁹⁶ Although the Committee’s decisions are “highly persuasive,” they “are not binding in international law.”⁹⁷ Nevertheless, they at least move forward the discussion of how gay men and lesbians might be protected within international human

⁹³ [Cohen] quoted by Jackson. "The War Over Children's Rights," p. 8.

⁹⁴ Human Rights Watch. "Hatred in the Hallways."

⁹⁵ The Human Rights Committee is the enforcement mechanism for the International Covenant on Civil and Political Rights.

⁹⁶ Eric Heinze. 2001. "Sexual Orientation and International Law." *Michigan Journal of International Law*. 22: 283-309, p. 293.

⁹⁷ Ibid

rights. The United Nations Human Rights Commission⁹⁸ has also given attention to anti-homosexual discrimination: “The treatment of sexual minorities in India was denounced today at the United Nations Commission on Human Rights. This is only the third time ever that direct testimonies of abuse based on sexual orientation have been heard by this high-level body.”⁹⁹ Additionally, IGLHRC reports that the UN is recognizing the issues facing transgendered people: “In a historic first, United Nations Special Rapporteur on Freedom of Expression, Dr. Abid Hussain, met June 26 with transgender activists in Argentina, to hear their stories of persecution. The Buenos Aires gathering follows a series of meetings with UN officials in Geneva sponsored by the International Gay and Lesbian Human Rights Commission (IGLHRC) this past April. As a result of these meetings, six United Nations Experts issued a joint statement, urging lesbian, gay, bisexual, and transgender (LGBT) activists worldwide to contact them about human rights violations. The UN experts are high level officials appointed by the UN to investigate patterns of human rights abuse. They report annually to the UN on their findings, and have wide power to address governments about suspected abuses.”¹⁰⁰

Despite these positive responses, Heinze is not optimistic about the potential of international organizations to force member states to see anti-gay/lesbian discrimination as a violation of human rights, suggesting that gay rights has come to be defined as a Western imposition on other countries, and thus not something that should be imposed.¹⁰¹ As evidence he cites the Fourth World Conference in Beijing’s Declaration and Platform for Action, which does not include sexual orientation, as evidence that lesbian and gay rights will not win human rights protections. Ara Wilson, however, is much more hopeful, suggesting that although activists may not have won all that they desired at Beijing, what they achieved is an improvement over past meetings and provides fertile ground from which to build. She summarizes what was achieved officially: “The most successful grounds for which to argue for lesbian rights were anti-discrimination terms, since government delegates could agree that discrimination against lesbians was wrong while not agreeing to rights concerning sexuality. In the end, the term *sexual orientation* was not included in the Program for Action. However paragraph 96 addresses women’s right to make sexual decisions free from coercion, discrimination, and violence and presents a strong point for future organizing around the UN.”¹⁰² Finally, it is important to note that the European Court of Human Rights has begun to take discrimination against gay men and lesbians seriously, thus suggesting that there is an international movement to more fully recognize that lesbians and gay men deserve the protection of human rights agreements.

⁹⁸ As Heinze explains, there are a number of different United Nations bodies responsible for promoting human rights. The Human Rights Commission is separate from the Human Rights Committee. See *Ibid.*, 293.

⁹⁹ International Gay and Lesbian Human Rights Commission. 2001a. "UN Human Rights Commission Opens Doors to Sexual Minorities." [cited August 3, 2002] Available at http://www.iglhrc.org/news/press/pr_020411.html

¹⁰⁰ International Gay and Lesbian Human Rights Commission. 2001b. "UN Rep Meets with Transgender Activists." [cited August 3, 2002]. Available at http://www.iglhrc.org/news/press/pr_010629.html.

¹⁰¹ Heinze, "Sexual Orientation and International Law," pp. 305-309.

¹⁰² Ara Wilson. 1996. "Lesbian Visibility and Sexual Rights at Beijing." *Signs* 22: 214-18, pp. 216-217.

Even with the understanding that there is increasing pressure from human rights organizations, both non-governmental and governmental, to define meaningful human rights as including freedom to sexual self-determination, there is debate among legal scholars about the impact the Convention would have on United States' law. This stems from both the Convention itself, which lacks any mechanism either for states to bring complaints against other states or for "children to claim violations."¹⁰³ Second, enforcing much of what the treaty would demand would conflict with federalism, since most laws affecting young people are reserved for the states. Finally, the Convention would not be passed without reservations that could limit its impact, though these reservations, in theory, could not seriously undermine the goals and intent of the Convention. David Stewart, for example, suggests that one of the areas like to be most contentious is the impact that the Convention might have on parents' rights. As I've suggested above, this is an area that I see as particularly important for LGBTQ youth, since having a voice in decisions about such matters as institutionalization, where they will attend school, and whether they wish to remain in their parent's custody are critical. The Committee on the Rights of the Child has already read these rights in ways that indicate the seriousness with which they take them:

While it is therefore difficult to argue that the Convention ignores or was intended to undermine parental authority, it is also true that one major purpose of the treaty is to "empower" children, to overcome the idea that children are parental property or family chattels, and to recognize them as "rights bearing" individuals. This is the crux of the "right to be heard" of Article 12, and is also apparent in the areas of freedom of expression, freedom to thought, conscience, and religion, and freedom of association and peaceful assembly. Failure to comply with the "right to be heard" is the basis of the Committee's frequent criticisms of national laws and practices that exclude children from participating in decisions affecting their interests, including their participation in compulsory religious instruction and sex education.¹⁰⁴

As he suggests, such positions are likely to conflict with the various "parent's rights" laws now being proposed and passed, and means that advocates of these laws are likely to continue opposing ratification, unless reservations are attached on this matter. Attaching reservations may be difficult, however, since Stewart also indicates that the Committee is unwilling to accept reservations on freedom of expression.¹⁰⁵

Despite the possible ways that the Convention could be limited, many believe that it is still worth fighting for. They agree that as a mechanism for challenging the current devaluation of youth rights in the law, the Convention would, at least, have a significant symbolic effect, forcing us to confront the denial of basic rights and demanding that the

¹⁰³ Levesque. "The Internationalization of Children's Human Rights: Too Radical for American Adolescents," p. 273.

¹⁰⁴ David P. Stewart. 1998. "Ratification of the Convention on the Rights of the Child." *Georgetown Journal on Fighting Poverty*. 5: 161-84, p. 174.

¹⁰⁵ *Ibid.*, p. 164, n37.

State, rather than parents, “ensure that adolescents rights are respected.”¹⁰⁶ Russ argues that the Convention is important for giving young people a voice in the court system: “Clearly the American judicial and social systems need change, and the United Nations Convention on the Rights of the Child is an important step in the right direction. The convention would shift our focus to the best interests of our children, guarantee children the right to be heard in court, require courts to give appropriate weight to children’s viewpoints, and end secrecy in the justice system.”¹⁰⁷ Of course it is gains such as these that threaten many in our society. Yet it is also gains such these that LGBTQ youth need to thrive. Finally, it is worth noting that the Committee on the Rights of the Child does in fact have a unique power that makes its monitoring of State’s more powerful than that of other human rights treaties. Cynthia Cohen explains:

While in some respects the Convention’s monitoring process replicates that of other United Nations human rights treaties, it is unique in that article 45 provides a special role for nongovernmental organizations. As a result of article 45, the Committee on the Rights of the Child has access to a broad range of information with which to evaluate the State Parties’ reports. The reporting process has already enabled many countries to discover and remedy flaws in their national children’s policies.¹⁰⁸

Thus, organizations such as Human Rights Watch or International Gay and Lesbian Human Rights Commission, as well as national gay rights organizations, would have the ability to provide information to the Committee.

Conclusion

It is clear that many individuals and organizations are trying to provide LGBTQ youth with the services that they need to develop a positive sense of self. Thus, one can look at the eight states with anti-harassment laws, the presence of gay/straight alliances in schools where adults have been willing to work with young people to create change, Project 10 in California, the Harvey Milk School in New York, and the many organizations that provide services to runaway (or “throwaway”) young people. All of these efforts are important, yet all are also limited because they exist as correctives that try to limit harm. The dominant assumptions of parental rights and youth ignorance make creating programs and strategies that would encourage young people to define their sex and gender options broadly extremely difficult at best. For example, when Focus on Family organizes parents to oppose any programming that suggests that homosexuality is not immoral, they suggest that their members appeal to parental rights: “Remember that ‘parent’s rights’ is a powerful rallying cry to many liberal parents who consider themselves ‘pro-gay.’”¹⁰⁹ It is for this reason that I believe that lesbian and gay

¹⁰⁶ Levesque. "The Internationalization of Children's Human Rights: Too Radical for American Adolescents," p. 288.

¹⁰⁷ George H. Russ. 1998. "The Child's Right to be Heard." *Georgetown Journal on Fighting Poverty*. 5: 304-11, p. 309.

¹⁰⁸ Cynthia Price Cohen. 1997. "An Introduction to the Developing Jurisprudence of the Rights of the Child." *ILSA Journal of International and Comparative Law* 3: 659-664, p. 662.

¹⁰⁹ 2001. *How to Protect Your Children from Pro-Homosexuality Propaganda in Schools* Family Research Council, 1999 [cited March 1 2001]. Available from www.frc.org/infocus/i99jlhs.html.

organizations and individuals concerned about LGBTQ youth need to challenge not only the homophobia that plagues young people, but also the assumption of “juvenileness.” Vocally supporting the Convention on the Rights of the Child is, as I have argued, one method of challenging the ideology, though also to some extent, the context that makes juveniles dependent.

It is, though, hard to find grounds for disagreeing with the pessimistic evaluation of Martha Minow: “I have no plan or even hope for mobilizing public support for children, especially poor children, at this point in American history. Each of the four rhetorics—child protection, children’s liberation, children’s rights as potential adults, and redistribution—has failed to find a strong constituency. Instead political figures win strong support by invoking conventional authority structures, family privacy, and self-reliance and by attacking a social welfare state.”¹¹⁰ Of course, the situation has only gotten worse for children and youth since she wrote this in 1997, with the impact of welfare reform and the election of a Republican administration beholden to the Right. Not surprisingly, the most significant opposition to both ratification of the Convention on the Rights of the Child and to enacting any policy or law that might make the lives of LGBTQ youth or any young person who would like to act based on their judgment, rather than that of their parents, comes from the religious Right. Since much of the legal foundation of parental rights has come from cases where parents have been particularly concerned with the religious upbringing of their children, this should not be a surprise. The current administration is likely to never upset its core base of support by advocating the Convention, or any policies that encourage young people to challenge convention.

Hicks argues that if gay and lesbian political organizations are going to be successful in defending youth from “reparative therapy” and other harms, they must take on the challenge of constructing gay life as moral. “Because the role of the courts is to interpret laws, which were created based on a shared social vision of morality,” she writes, “the gay liberation movement may not achieve true success until the discourse of gay liberation shifts from a rights-based theory to a moral-based argument. If right wing, Christian, political organizations are permitted to have the only say on what is and is not moral, then gay, lesbian, bisexual, transgender people are not going to receive the protection they need and deserve from the legal system. I believe that she is, in many ways correct, but that her argument could be extended to youth in general. Young people need to be seen as capable of exercising free will in relation to sexuality (and many other important decisions), and we, as a society, need to understand that dependence does not make one immoral before the morality of adult gay lives would be translatable to GLBTQ youth.

In taking on the challenge of arguing that young people deserve to be seen as human beings, there are many allies with which gay and lesbian organizations and people might work, including UNICEF, the Children’s Defense Fund, Human Rights Watch, etc. Despite the pessimism that I share with Minow, I believe that the only way to fight the Right and combat both homophobia and juvenileness is to find broad-based concerns that

¹¹⁰ Martha Minow. 1997. “Whatever Happened to Children's Rights?” In *Reassessing the Sixties*, edited by Stephen Macedo. New York: Norton, p. 118.

have the potential to bring together various interests. Recognizing the shared concerns of those fighting for LGBTQ youth and those fighting for other young people, whether those who are impoverished, in the foster care system, abused in their homes, being bullied for other reasons in school, or simply denied the right to say what they believe in school or refuse a drug test, creates the potential for building the constituency that, as Minow notes, has been missing for so long.