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PARENTAL DUTIES AND THE RIGHT OF HOMOSEXUAL MINORS TO REFUSE “REPARATIVE” THERAPY

BY JOHN ALAN COHAN, ESQ.

This paper challenges the fundamental assumption that adolescents should not control their rights, particularly in the context of sexual development and sexual activity. Knowledge of and engagement in sexual activity by children has always been socially and morally problematic and bound up with questions of innocence and evil. Underlying the conflict is a deep social and cultural unease about childhood sexuality. The unease can be identified not only in debates concerning sex education, but in a wide range of recent controversies: the explicit nature of young girls' magazines, the sensational journalistic coverage of sex abuse charges against priests, child rapists, children who abuse other children, the regulation of pornographic images of children, and the concern about teenage pregnancies. What is noticeable about approaches to these issues is the enduring nature and, simultaneously, the instability of innocence as an essential defining characteristic of childhood.

The tension surrounding child sexuality is reflected in an ongoing redefinition of childhood in which the boundary between adult and child is destabilized and repositioned. Childhood has its own ways of feeling, thinking and seeing, as Rousseau and his philosophical successors claim. In *The Philosophy of Childhood*,¹ G.B. Matthews claims that children are far from being immature pre-philosophical creatures, but contribute a distinctive perspective on moral, metaphysical and aesthetic issues. Relying upon evidence drawn from older children, child liberationists claim that children do not lack various capacities possessed by adults, suggesting that the line between childhood innocence and mature sexual development is peculiarly elusive.

There is arbitrariness to any line that might be drawn between those who do and those who do not possess rights. We

¹ Gareth.B. Matthews, *The Philosophy of Childhood* (Cambridge, MA, Harvard University Press, 1994).

have seen in many public policy contexts that age alone is insufficient to warrant the denial or granting of a right; rather it is the acquisition of certain qualifying capacities that does the justificatory work. Many states lowered the drinking age from twenty-one to eighteen after the 26th Amendment lowered the voting age. People felt that it seemed unacceptable and unfair to draft eighteen-year-olds to fight in an unpopular war without granting them the right to vote.² Then, in a reversal, the drinking age in all states went back up to twenty-one as a result of federal legislation requiring that they do so in order to qualify for highway construction funds.³

Sexual consent law varies dramatically. Louisiana permits adolescents between 11 and 17 to engage in some forms of sexual activity, such as sexual intercourse, as long as the male partner is not more than two years older than the girl, and is less than 17.⁴ Four states--Delaware, Kentucky, West Virginia, and Wyoming--allow for sexual activity at the age of 12.⁵ Ten states permit 13-year-olds to consent to sexual activity.⁶ Fourteen is the general age of consent for some forms of sexual activity in 20 states,⁷ and five

² See Wendell W. Cutliffe, *Youth's Battle for the Ballot: A History of Voting Age in America* 234 (1992).

³ See *Legal Rights of Children* §14.09, at 620 (Donald T. Kramer ed., 2d ed. 1994).

⁴ LA. REV. STAT. ANN. §§ 14:80-:81 (West 1986 & Supp. 1998).

⁵ DEL. CODE ANN. tit. 11, §§ 768, 770, 762 (Michie 1995 & Supp. 1996); KY. REV. STAT. ANN. §§ 510-040, 510.050 (Michie/Bobbs-Merrill 1990 & Supp. 1996); W. VA. CODE §§ 61-8B-3 (Michie 1996 & Supp. 1997); WYO. STAT. ANN. §6-2-303 (Michie 1997).

⁶ They are Alaska, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, and Tennessee. See Roger J.R. Levesque, *Adolescents, Sex, and the Law* (2000, Washington, D.C., American Psychological Assn.), p. 73.

⁷ They are Arizona, Arkansas, California, Georgia, Hawaii, Indiana, Iowa, Maine, Mississippi, Maryland, Nebraska, Nevada, Oklahoma, New York, Pennsylvania, Texas, Utah, South Carolina, Virginia, and Washington. See Roger J.R. Levesque, *Adolescents, Sex, and the Law* (2000, Washington, D.C., American Psychological Assn.), p. 73.

states place the age of consent at 15.⁸ Twelve states put the age of consent at 16.⁹ California and Oregon set the age of consent at 18.¹⁰ Some states have more than one age of consent, depending on the type of sexual activity.

These inconsistent and arbitrary consent laws seem to fly in the face of social science that views sexual development as an early phenomenon that is influenced by forces beyond parental or caretaker control. The rate of sexual activity among adolescents has increased dramatically in recent years.¹¹ Adolescents feel sexual urges much earlier than the general public once thought, and they increasingly act on those urges, so that by the age of 15, more than half of both boys and girls will have engaged in sexual intercourse.¹² Children today often recognize sexual attractions by the fourth or fifth grade. According to a study by researchers at the University of Minnesota Adolescent Health Center, half of all mothers of sexually active teenagers mistakenly think that their children are still virgins.¹³

Interactions with peers and other socio-cultural forces influence adolescents' sexual maturation. Popular media also is a potent influence on the incidence of teenage sexual practices. Confusion about sexual orientation is not unusual during adolescence. Young people may be ambivalent about sexual identity, with youth being a period of experimentation, with roles and identities being questioned in relation to a range of issues. Many young people experience homosexual feelings, but

⁸ They are Connecticut, Colorado, North Dakota, Rhode Island and Wisconsin. See Roger J.R. Levesque, *Adolescents, Sex, and the Law* (2000, Washington, D.C., American Psychological Assn.), p. 73.

⁹ See Roger J.R. Levesque, *Adolescents, Sex, and the Law* (2000, Washington, D.C., American Psychological Assn.), p. 73.

¹⁰ See *id.*

¹¹ Sandra Hofferth, Joan R. Kahn, and Wend Baldwin, "Premarital Sexual Activity Among U.S. Teenagers Over the Past Three Decades," 19 *Family Planning Perspectives* at 46-53 (1987).

¹² Roger J.R. Levesque, *Adolescents, Sex, and the Law* (2000, Washington, D.C., American Psychological Assn.), p. 2.

¹³ See Diana Jean Schemo, *Study Finds Mothers Unaware of Children's Sexual Activity*, N.Y. TIMES, Sept. 5, 2002, at A14.

homosexual youths face tremendous social pressures to deny or reject their feelings, actions and thoughts.¹⁴ This can cause turmoil for young people who may try to force themselves to have heterosexual relationships and become confused about why this doesn't feel "right" to them. Their level of heterosexual activity may be increased, or their homosexual activity may take place anonymously at inappropriate places such as public rest rooms, or they may go to gay bars with faked ID. Being forced into the adult "scene" can increase a young person's sense of isolation, and also exposes them to the risks of access to alcohol and other drugs, and the chance to engage in opportunistic sex work.¹⁵

Research concerned with the problems facing lesbian and gay youth indicates two recurring problems. The first is an alarming suicide rate among gay adolescents.¹⁶ Isolation has become intrinsic to the existence of a large number of lesbian and gay adolescents, and this feeling of isolation is often accompanied by self-loathing and confusion as to their future.¹⁷ The second problem is a "second wave" of HIV/AIDS transmission among young gay men between the ages of 14 and 19.¹⁸ In addition, about 10,000 teenagers a day contract a venereal disease, according to the Center for Disease Control and Prevention.¹⁹

¹⁴ See Mary Jane Rotheram-Borus & M. Isabel Fernandez, *Sexual Orientation and Development Challenges Experienced by Gay and Lesbian Youth*, 25 SUICIDE AND LIFE THREATENING BEHAV. 26 (Supp. 1995) (finding that the "coming out" process consists of four states: (1) recognizing one's self as lesbian or gay; (2) exploring sexual orientation by gaining information about the gay and lesbian community; (3) disclosing to others; and (4) accepting one's sexual orientation).

¹⁵ See Massachusetts Commission on Gay and Lesbian Youth, *Making Schools Safe for Gay and Lesbian Youth: Breaking the Silence in Schools and In Families* (1993).

¹⁶ See Christopher Kendall and Sonia Walker, *Teen Suicide, Sexuality and Silence*, 23 No. 5 Alternative Law Jnl. 216 (Oct. 1998).

¹⁷ See *id.* at 217.

¹⁸ See *id.*

¹⁹ See Diana Jean Schemo, *supra* note 13.

Psychological problems in homosexual adolescents are primarily caused by social stigma, hostility, hatred, and isolation.²⁰ What makes gay and lesbian youth different from other minorities is that they do not, for the most part, grow up with people like themselves. Their isolation becomes more encompassing if they live in a homophobic social environment. Lesbian and gay youths are predominately the product of heterosexual families, and come from communities where lesbian and gay adults are rarely visible. They also attend schools with no openly gay staff, and belong to peer groups where “fag” is the favored insult, and they may feel unable to escape from or defend themselves against verbal and physical abuse. Research shows that teenagers abuse their gay and lesbian peers more than any other group. A survey by the National Gay and Lesbian Task Force found that 45% of gay men and 25% of lesbians reported being harassed or attacked in high school because they were perceived to be lesbian or gay.²¹ According to the U.S. Department of Justice, homosexuals are probably the most frequent victims of hate crimes, which are crimes directed against people because they belong to a certain group.²² Few teachers feel able to intervene to stop harassment of gay youngsters for, as one teacher put it, “Most teachers, gay or straight, are afraid to speak up when they hear homophobic remarks. They’re afraid people might say, ‘What are you, gay?’, which remains a frightening question in today’s climate.”²³

According to Professor James Sears of the University of South Carolina, the average student realizes his or her sexual orientation at the age of thirteen.²⁴ Gay students rarely feel able to ask their families, friends, schools, or communities to help them out, fearing the possible negative response they might receive. Thus, adolescent gays lack positive role models and information

²⁰ See policy statement from the American Academy of Pediatrics entitled “Homosexuality and Adolescence,” published in the 92 No. 4 PEDIATRICS (Oct. 1993).

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.* at 216.

about homosexuality. The existence of gay or lesbian children is often denied, ignored or treated with contempt by society, and there is little opportunity for such youths to recognize, take pride in or act on their sexual identity. This can seriously affect the self-esteem of young people, leaving them isolated and vulnerable. They may react by maintaining a secret life away from family and friends, by internalizing self-hatred or denying their sexuality.

Parental rejection. Gay and lesbian teens have significant difficulty obtaining support from their families. Evidence indicates that discovery of a teenager's homosexual orientation often leads to parental rejection and verbal abuse. Nearly half of teens encounter strong negative attitudes from their parents when they disclose their sexual orientation, which places them at higher risk for psychological dysfunction.²⁵ There is a strong correlation between experiences of stigma from peers and parents who are highly critical, abusive and homophobic on the phenomenon called internalized homophobia.²⁶ Richard C. Friedman and Jennifer I. Downey describe internalized homophobia in their book, *Sexual Orientation and Psychoanalysis*.²⁷ This is a common and often serious psychological problem in gay men and women that lies at the root of many self-destructive behaviors, including risky sex.²⁸ The authors say:

Many gay and lesbian individuals who are raised in a society like ours that disapproves of homosexuality will internalize those negative attitudes and values. Every time such a person feels sexual desire for someone of the same sex, he will experience shame, guilt and self-hatred without

²⁵ Roger J.R. Levesque, *Adolescents, Sex, and the Law* (2000, Washington, D.C., American Psychological Assn.), p. 65.

²⁶ Richard A. Friedman, *A Clue to Why Gays Play Russian Roulette With H.I.V.*, N.Y. TIMES, Sept. 24, 2002, at F5 (Health & Fitness).

²⁷ *Id.*

²⁸ *Id.*

necessarily understanding why, because these feelings often operate on an unconscious level.²⁹

Negative consequences would abate if parents provided warmer emotional environments. Parents need to take more seriously their responsibilities as guides to their children's sexual development and values. Parents need to discuss sexual matters more with their children, however difficult and embarrassing the topic might be. It is important for parents to foster a healthy relationship with their children, and if parents do not understand the essence of a healthy relationship, this will impede transforming the underlying abusive relationship with their children.

The question over whether gay, lesbian, bisexual, and transgender people are born into their sexual orientation remains inconclusive. I believe that sexual orientation is at least partially determined genetically. Some, like Simon LeVay, claim there is evidence of a biological origin for sexual orientation,³⁰ while studies of gays who have identical male twins show that only fifty-two percent are both homosexual.³¹ Gay rights activists argue that sexual orientation is substantially or completely an immutable characteristic, that changing it would require great difficulty, and that in any case it is an exercise of free will that needs to be accorded equal rights. Others, largely opponents to gay rights, argue that sexual orientation is immoral and chosen, not biological.

Overview of parental authority. According to Thomas Hobbes, children are in "absolute subjection" to parents who may "alienate them... may pawn them for hostages, kill them for rebellion, or sacrifice them for peace."³² Under Roman law, a father had *patria potestas*, the absolute power of life and death over his son, who was released from this state only by the father's death or manumission. Legal developments have remained

²⁹ *Id.*

³⁰ See Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 *SCIENCE* 1034, 1035 (1991).

³¹ See J. Michael Bailey & Richard Pillard, *A Genetic Study of Male Sexual Orientation*, 48 *ARCHIVES OF GEN. PSYCHIATRY* 1089, 1090 (1991).

³² Thomas Hobbes, *The Elements of Law, Natural and Politics*, 132 (Oxford University Press 1994) (1650).

relatively static so that parents still have plenary rights to determine their children's routines. As Justice Antonin Scalia mentioned in a recent case addressing the limits of adolescents' rights:

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination--including the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.³³

The law presumes that parents behave in their children's best interests; the law does not require that parents be "good" parents, but simply that they not be abusive. The Supreme Court has said that "the fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents...."³⁴

Parents and guardians have the legal right to exert near dictatorial control over their children's lives. Children have the legal duty to comply with their parent's legal control in a wide range of decision-making, and they have a limited spectrum of rights. Parents can decide how their children look, what they wear, what they eat, where they sleep, what toys they play with, who they will see, what religious training to give them, what they will read and what movies they can see, what ideas to expose them to and what people to expose them to, when they can start dating, require maintaining of grades and attendance at the school chosen by parents, and impose curfews, chores, and other rules. Children are subject to these rules of control of parents until the age of emancipation, which is usually 18. Parents make decisions according to their own principles and standards, whims, predilections, herd instinct, or for purely selfish reasons, without running afoul of the law or raising many moral eyebrows. As a

³³ *Veronia School Dist. v. Acton*, 515 U.S. 646, 654 (1995).

³⁴ *Santosky v. Kramer*, 455 U.S. 753 (1982).

society we tolerate or even endorse the choices parents make which, at times, are clearly instrumental in nature.

At the same time, children and teens are denied the right to drink alcohol and they are prohibited from smoking. They are prohibited from watching certain adult movies or reading certain adult books. They are not allowed to work in the job market until they are teens and then they are subject to wage and hours rules. Exceptions to the right to work are allowed by special guardianship proceedings in which parents must petition a court to obtain permission for a child to work, for instance, as a child actor. They are denied certain privacy rights. They are not allowed to live on their own or obtain their own apartment. They do not have the right (or obligation) to serve their country in the armed services or to vote.

“Reparative” therapy. There is an apparent disjuncture between the reality of adolescent sexual activity and the scope of adolescent legal rights. The law recognizes some areas of adolescent autonomy, with a corresponding curtailment of parental authority, in such areas as adolescents’ decisions and actions regarding access to contraceptives, testing for sexually transmitted diseases, and abortions.³⁵ But the question remains whether parents have the right to force their minor children to undergo “reparative” therapy against their will in an attempt to change the child’s perceived homosexual orientation. “Reparative” therapy is a program of psychotherapy that attempts to “cure” homosexuals by turning them into heterosexuals. The American Psychoanalytic Association and that American Psychiatric Association have expressed their opposition to “reparative” therapy.³⁶ The American Academy of Pediatrics believes that therapy “directed at specifically changing sexual orientation... can provoke guilt and

³⁵ See, e.g., *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (regarding contraceptives); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (regarding abortions).

³⁶ See Barry Yeoman, *Gay No More?*, *PSYCHOL. TODAY*, Mar.-Apr. 1999, at 29 (indicating that in December 1998, the American Psychiatric Association’s board voted unanimously to oppose “reparative” therapy or conversion therapy).

anxiety while having little or no potential for achieving changes in orientation."³⁷

Techniques of "reparative" therapy include such medically unsound practices as behavioral therapy, electrical shock therapy, chemical aversive therapy, drug and hormone therapy, subliminal therapies designed to inculcate "feminine" or "masculine" behavior, and "covert desensitization" therapies that teach a young person to associate homosexual feelings with disgusting images.³⁸ Juveniles who have undergone "reparative" therapy against their will have had nervous breakdowns, experienced excessive feelings of guilt, and have committed acts of genital mutilation, and suicide.³⁹

Parental authority over their children is not absolute. There are several arguments against parental authority to force minor children into this form of therapy. To begin with, a young person who enters into therapy to deal with issues of sexual orientation should be able to have the expectation that such therapy will take place in a professionally neutral environment absent any societal bias, rather than being confronted with psychologists or medical professionals who may attempt to persuade them that they need to change their sexual orientation.⁴⁰

I believe that "reparative" therapy is a form of child abuse or neglect because of its damaging effects. Whenever there is an instance of child abuse, whether physical or mental, the state has an interest in overriding parental autonomy. The courts focus on protecting children who are not only at danger of being physically

³⁷ Kim I. Mills, *Mission Impossible: Why Reparative Therapy and Ex-Gay Ministries Fail* HRC Newsletter (Human Rights Campaign, Washington, D.C.), Aug. 1998, available at http://www.hrc.org/publications/exgay_ministries/change.asp (1999 revision citing a policy statement from the American Academy of Pediatrics entitled "Homosexuality and Adolescence," published in the JOURNAL OF PEDIATRICS (Oct. 1993).

³⁸ Karolyn Ann Hicks, "Reparative" Therapy: Whether Parental Attempts to Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 505, 515 (1999).

³⁹ *Id.*

⁴⁰ *See id.* at 514-515.

harmed, but emotionally harmed as well. Today most states recognize that mental and emotional abuse fall under child abuse and neglect statutes.⁴¹ Emotional abuse of children has become an increasingly serious concern for policies aimed at protecting and supporting adolescent development.⁴² The law generally limits the scope of emotional abuse to cases of severely abusive (or “emotionally battering”) behavior, such as that which degrades, torments, corrupts, ignores, isolates, or induces fear.⁴³ Emotional abuse can come from within the family but peers are also a source of maltreatment. Often enough emotional abuse is accompanied by physical or sexual abuse.⁴⁴ Society’s concern about emotional abuse is justified because of the fundamental role emotional development plays in child development, especially in child psychopathology.⁴⁵

Statutes on emotional abuse usually limit a judge’s authority to intervene to cases where impairment is a direct result of physical injury or neglect.⁴⁶ In other cases where no physical injury need accompany emotional abuse, the statutes fail to advise courts on how to ascertain when a child has been emotionally abused.⁴⁷ For example, some statutes make subjective terms like “mental injury” or “harm to mental health” impermissible. Another difficulty facing courts in considering emotional abuse is causation--since the statutes pertain to behavior beyond physical injury and neglect. Depression, antisocial behavior, and other behaviors may be evidence of emotional maltreatment, but they

⁴¹ *Id.* at 519. One typical child abuse statute defines “neglected child” as any child under 18 years of age “whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care.” N.Y. FAM. CT. ACT §1012(f)(i).

⁴² See Rogert J.R. Levesque, *Emotional Maltreatment in Adolescents’ Everyday Lives: Furthering Socio-legal Reforms and Social Service Provisions*, 16 BEHAV. SCI. & LAW 237-263 (1998).

⁴³ *Id.* at 238.

⁴⁴ *Id.* at 239.

⁴⁵ *Id.*

⁴⁶ *Id.* at 247.

⁴⁷ *Id.*

could just as well be attributed to other causes. Even a focus on actual parental behavior may not be helpful, since behavior emotionally adequate for one adolescent may be devastatingly inappropriate for another, further complicating an assessment of emotional harm. While it would be difficult if not inappropriate for courts to assume that specific parental behaviors will have detrimental effects on every child, at the same time certain abusive behavior, and the apparent antisocial behavior of a child, count as a red flag for some sort of intervention.

The inherent problem with statutes that do not clarify what is meant by emotional maltreatment is that judges are free to disregard emotional abuse in their wide discretionary powers. Likewise, judges can hold parents liable for emotional abuse in a way that goes beyond their judicial powers.

The trouble with existing child intervention programs, such as Child Protective Services, is that the law limits the ability of social workers and law enforcement to intervene in dealing with the problems of emotional maltreatment. The law does not allow for meaningful intervention until substantial damage has already been done.⁴⁸ If a child is forced into "reparative" therapy, for example, the damage to the child will already be done. Meaningful intervention needs to be vigilant enough to prevent abuse, not just clean up the mess afterwards.

Perhaps an inherent problem of the plight of youth is the difficulty of the identifying emotional abuse when it is happening because it might be somewhat invisible from public view. Many children try to cope with emotional abuse, so that the effects it may have on a person's mental health may not be apparent until the child is well into adolescence.⁴⁹ Adolescents may be prone to interpret sexual assaults or physical abuse in the family, or intense feelings, such as compulsions of different sorts, as a normal way to be, or that violent relationships are normative, and this results in "normative confusion."⁵⁰ They often experience these abusive

⁴⁸ *Id.* at 248.

⁴⁹ *Id.*

⁵⁰ *Id.* at 240.

relationships as neither problematic nor intolerable.⁵¹ Adolescents, too, may not choose to avail themselves of critical services such as domestic violence shelters and non-residential programs that provide referrals, medical assistance, and counseling, because they simply feel too helpless or ashamed.⁵² Another difficulty is that minors cannot initiate a lawsuit to protect themselves from abusive care-takes on their own, because they are generally considered legally incompetent, so that they must have an adult representative, a guardian *ad litem*, to represent them in court proceedings. Small changes could dramatically enhance opportunities to prevent and intervene in emergent situations of emotional maltreatment of children. Easier access to court intervention, such as eliminating the need for a guardian *ad litem* in cases alleging emotional or physical abuse, and in formulating special forms for such petitions, as presently is the case for adults seeking relief for domestic violence, would be helpful. Many courts have a domestic violence office with counselors to help adults complete legal forms; there should likewise be such an office for the filing of petitions of juveniles.

It is important for state officials to become more aware of adolescent abuse so that they can appropriately respond to it. Without awareness, state officials may fail to understand how family and friends may pressure young victims to drop cases against their family.⁵³ Justice system personnel need to be more sensitive to occasions of emotional abuse of children and juveniles. On the other hand, emancipation is a problematic alternative for most adolescents. It usually requires them to have independent sources of income, does not address the young person's need for parental emotional supports, and does not address holding the parents responsible for abusive behavior.⁵⁴

Schools officials and students should be educated about the symptoms of antisocial behavior that may be associated with emotional maltreatment. Given increasing concerns about school

⁵¹ *Id.*

⁵² *Id.* at 253.

⁵³ *Id.* at 249.

⁵⁴ *Id.* at 253.

violence, schools should enhance awareness among students, teachers and school officials, and by providing students with an adequate complaint or reporting mechanism so that they can take appropriate steps to react to concerns about parental abuse. School programs designed to help students increase non-violent management of interpersonal conflict, develop means of coping with anger, jealousy and possessiveness, and alter attitudes that regard verbal and physical violence as acceptable means of conflict resolution can and should be implemented.⁵⁵

Parents have the legal duty to recognize a child's specific situation, and to understand the specific emotional needs of their children. The state has an interest in ensuring that parents are responsive to the individual child's specific circumstances. It is important for parents to foster a healthy relationship with their children, and if parents do not understand the essence of a healthy relationship, this will impede transforming the underlying abusive relationship with their child. Parents are required to know and understand their children's special needs and to make strong efforts to address them, or they may be found to be unfit.⁵⁶ A parent's indifference to, and lack of understanding of a child's special needs puts the child at risk of being impaired. Examples include cases in which parents fail to notice their child's anti-social behavior, emotional disturbances, or medical needs. I think that parents have the responsibility to recognize the delicate mental and emotional states of gay children. Parents who learn that they have a child who is gay have the moral obligation if not the legal duty to be aware of the hardships their child faces as a result of societal homophobia. Instead of forcing a child into "reparative" therapy, a reasonably prudent parent may need to get involved in supporting the child's sexual identity, promoting his or her healthy well-being, helping to educate the child about the facts of homosexuality, and perhaps joining a parent support group, or helping the child find an affirming support group. Parents also have the duty to make progress in their understanding and acceptance of their lesbian, gay, bisexual or transgender children.

⁵⁵ *Id.* at 257.

⁵⁶ Karolyn Ann Hicks, *supra* note 38 at 522.

The question of consent to treatment. There is a long established common law principle that competent adults have the right to refuse medical treatment. A medical practitioner who performs medical treatment without the patient's consent commits an assault and battery because it involves intentional touching during medical care without consent. Generally, parents hold authority to decide whether or not their minor children will receive medical treatment.⁵⁷ Until a person reaches the age of majority, only a parent or legal guardian can give effective consent to medical treatment unless an emergency exists and the parent is unavailable. Another exception involves pregnant minors, who are permitted to consent to their own medical care.

On the other hand, under the *parens patriae* doctrine the state may override parental decisions concerning medical care when a child's welfare and best interests warrant it. Moreover, every state permits minors to consent to some medical procedures in specific circumstances without parental permission, generally involving an age range from 14 to 17 years old. All states allow minors to consent to the treatment of sexually transmitted diseases, and most states allow minors to consent to treatment for alcohol or drug abuse without parental consent.⁵⁸

In some states there is a mature minor doctrine, which permits children who are mature enough to understand the treatment to consent to it, as long as it does not create a serious risk to life or health.⁵⁹ This doctrine makes it necessary for a physician to consult directly with a mature minor regardless of the existence of the parents' informed consent, in order to ascertain whether the minor's wishes are in conflict with the parents' wishes.⁶⁰

Parents who are motivated to place their homosexual adolescent into "reparative" therapy may use threats and intimidation to coerce the child into submission. In such cases a minor would need to be strong willed and resourceful enough to

⁵⁷ See Thomas A. Jacobs, *Children and the Law: Rights and Obligations*, §10:02 (Clark Boardman Callaghan, 1995).

⁵⁸ See *id.* at § 10:03.

⁵⁹ See *id.* at § 10:03.

⁶⁰ See *id.* at § 10:06.

get legal help or to otherwise attempt to countermand parental domination and authority. The laws in many states support a minor's right to refuse extreme treatments such as electroconvulsive therapy, psychosurgery, and behavior modification programs utilizing deprivation or aversive techniques.⁶¹ Even if state law does not provide the minor with the right to refuse treatment, the Supreme Court has recognized a minor's right to participate in the decision to refuse therapeutic treatment in *Parham v. J.R.*⁶² There the Court held that a child has a substantial liberty interest in not being confined unnecessarily for medical treatment, including confinement in a mental institution.

In *Parham* a teenage boy sought release from a mental institution, where he had been confined at his parents' request. The Court indicated that there needs to be a "neutral fact-finder" to evaluate a parent's decision regarding institutionalization to protect the child's due process rights.⁶³ The *Parham* case dictates that a mental health professional has an ethical duty to respect the fundamental civil rights of the minor even when the child's parents do not.⁶⁴ A reasonable refusal on the minor's part should always be considered, although that would not necessarily trump the parents' desire. The neutral fact-finder must use medical standards in evaluating whether the child should be committed.⁶⁵ With respect to "reparative" therapy, medical standards rule against the advisability of this non-mainstream therapy, and a neutral fact-finder would need to discover the potential dangers of the therapy, and learn about the substantial criticisms from the established medical community, which have been well reported in national magazines such as *Newsweek* and on national television programs such as NBC's *Dateline*.⁶⁶ Because the American Psychiatric

⁶¹ See *id.* at § 10:20.

⁶² *Parham v. J.R.*, 442 U.S. 584 (1979).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 604.

⁶⁶ See *Dateline Interview with Jane Pauley* (NBC television broadcast, Nov. 28, 1997). This broadcast reported that gay men who went through "aversion therapy" were shocked with electrodes as they looked at photos of nude men,

Association, the APA, the American Psychoanalytic Association, and the American Academy of Pediatrics all reject the notion of “reparative” therapy, and because of the landmark decision by the American Psychiatric Association to declassify homosexuality as a mental illness in 1973, a neutral fact-finder relying on “traditional medical techniques” would be compelled to find that a parent’s commitment of a homosexual child for “reparative” therapy violates the child’s due process rights.⁶⁷ Thus, a child who is forced into a “reparative” therapy center could well qualify as an abused and neglected child.

The impact of “reparative” therapy on individuality. John Stuart Mill said that because of the need for self-expression that follows upon the capacity for thought and reflection, human beings simply *cannot* be made happier by external restrictions on their development and spontaneity, however benevolent these external constraints might be.⁶⁸ If children’s sexual orientation will be subjected to “reparative” therapy, children might be “wholly subject to parental will.”⁶⁹ These children may encounter a loss of a normal sense of individuality and self, or the freedom to create their own identity. Some children might feel “inauthentic”—that there is no real “self” for him or her to be because his or her sexuality was interfered with. Fundamental notions of liberty, as expressed by Mill, involve the principle that

the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent

were given injections of testosterone when they were shown pictures of nude women, and in the most extreme cases were given lobotomies.

⁶⁷ Karolyn Ann Hicks, *supra* note 38 at 538.

⁶⁸ See, John Stuart Mill, *On Liberty*, in *The Utilitarians* 483-84 (Doubleday Books 1973).

⁶⁹ See, J.L.A. Garcia, *Human Cloning: Never and Why Not*, in *Human Cloning: Science, Ethics, and Public Policy* (Barbara MacKinnon, ed., 1999).

harm to others. His own good, either physical or moral, is not a sufficient warrant.⁷⁰

The impact on human dignity. In the annals of child psychology, people often disagree about what constitutes the best interests of children. Many people have children for less than ideal reasons, including instrumental purposes such as to live vicariously through them, to provide companionship in old age, to create an heir who will carry on the family name and give one a sense of immortality, or to produce a being who will love you unconditionally. Many children are brought into the world to serve as an instrument of the parent's will. If parents can force children into "reparative" therapy, children will be treated as mere means to parental ends, instead of unique individuals worthy of being ends in themselves.

The impact on free will. What is to be said of the status of free will if a child programmed to desire a particular sexual orientation? Parents might think that "reparative" therapy is nothing more than a technological means of developing or inculcating traits of behavior. If parents have the right to inculcate various character traits in their children, if parents already control nearly every aspect of their children's lives from the time they are born until they attain majority --they may want to argue that this therapy falls within the realm of parental choice. On the other hand, it is a fundamental notion of liberty that human beings make their own decisions about their lives. This theory is expressed in the Constitution,⁷¹ and it is a principle found in Locke's proposition that everyone has the "*equal right...to his natural freedom*, without being subjected to the will or authority of any other man."⁷² This underscores the importance of liberty in our

⁷⁰ See, John Stuart Mill, *On Liberty*, in *The Utilitarians* 483-84 (Doubleday Books 1973).

⁷¹ See, David A.J. Richards, *The Individual, The Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U.L.REV. 1, 6, 8 (1980).

⁷² John Locke, *Second Treatise on Government* §54, at 3 (C.B. Macpherson, ed. 1980).

capacity for self-expression.⁷³ If children are programmed to feel and think certain ways as a result of “reparative” therapy, this could undermine the conception that individual choice has real meaning.

Childhood autonomy is acknowledged to be commensurate with the maturity of a child’s faculties. Article 12(1) of the UN Convention on the Rights of the Child (1989) recognizes children’s autonomy according to age and maturity:

State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age or maturity of the child.⁷⁴

The Convention requires attention to be paid to the child’s way of expressing himself or herself, not merely by words, but in all relevant aspects of the child’s behavior. Article 18.1 of the Convention says that while parents have the primary capacity for the upbringing and development of the child, “the best interests of the child will be their basic concern.” The evolving capacities of the child must also be considered with “the views of the child being given due weight in accordance with the age and maturity of the child” (Article 12.1). Any child that seeks information on sex demonstrates *ipso facto* a certain degree of maturity and competency to deal with the subject matter (with information tailored to his or her level of understanding and needs). Failure to recognize this fact can result in the ironic situation where the child engages in a “mature” sexual relationship without the “mature” knowledge of how to protect him or herself. Moreover, when a child expresses interest in homosexual activity, because of the AIDS epidemic and other sexually transmitted diseases, it would

⁷³ See, John Stuart Mill, *On Liberty*, in *The Utilitarians* 484 (Doubleday Books 1973).

⁷⁴ GA res. 44/22, annex 44 UN GAOR Supp. (No. 49) at 167, UN Doc. A/44/49 (1989) (*entered into force*, 2 Sept. 1990).

be important to protect the health interests of the child seeking sex education on the subject.

Idea of childhood as a social construct. It is uncontroversial that there is little precision over when childhood ends. Childhood is not a concrete or objectively defined status, but in fact is a complex social construct. Neil Postman argues that

[C]hildhood is a social artifact, not a biological category. Our genes contain no clear instructions about who is and is not a child and the laws of survival do not require that a distinction be made between the world of an adult and the world of a child.⁷⁵

How a culture regards children depends upon relativistic norms. Historians have shown that the construction of children as a social group is a modern phenomenon, and that childhood as a separate social group did not exist until the seventeenth century.⁷⁶ During the years before the Civil War, both middle- and lower-class ten-year-olds left their homes to apprentice with a craftsman in order to learn an adult vocational skill. Ezra Gannett, grandson of a Yale president, left home at eight to live and study with a minister. Today, the American child who commits an adult crime loses his or her childhood status and may be tried, convicted and sentenced as an adult. Some might argue, similarly, that children who, by their actions, proclaim that they are capable of giving consent to sex, lose their status as children.

Conclusion. Society goes through whims of what is relevant discourse in the public arena. It has been argued that children lose their innocence at a very early age, in large part due to media influences. With an increasingly sexually active population of children, it becomes not merely fashionable, but politically obligatory for legislatures to evaluate the validity of

⁷⁵ Neil Postman, *The Disappearance of Childhood* (London, Vintage, 1994), p. xi.

⁷⁶ P. Aries, *Centuries of Childhood*, trans. R. Baldick (London, Jonathan Cape, 1962).

assumptions that determine the basis for age-based regulation of sexual activity, and related issues of children's autonomy and parental control. I am not saying that the age of consent return to that of Victorian era, where in 1861 England the age of consent for girls was 12, and for boys it was 14.⁷⁷ The extent to which empirical findings of teenage sex may contribute to legal and policy movements remains to be seen. Laws only slowly adapt to changing realities.

The rights of parents with regard to the upbringing of their children is not without limits. The ultimate considerations to bear in mind are the child's best interests and evolving capacities. The law is clear that society must be vigilant in its protection of children more than adults. These legal principles reflect the core view that adolescents need protection from themselves and from others. State child abuse laws include emotional or mental abuse. The mainstream medical community has warned that "reparative" therapy is dangerous and results in emotional and mental abuse. Therefore, a reasonably prudent parent would not subject his or her child to this treatment. Even if a parent wishes to place his or her child in "reparative" therapy for religious reasons, there is precedent holding that the state's interest in the well-being of its young citizens trumps a parent's First Amendment claim to the free exercise of religion, as seen in cases where parents refused traditional medical treatment based on religious beliefs.⁷⁸

Legal systems need to encourage parents to foster healthy development of homosexual children in a more affirmative manner. The time may have arrived where parental consent for children to attend sex education classes might be dispensed with because often enough parents' wishes may be in direct opposition to the ordinary desires and indeed the right of the child to learn facts that can provide direction and guidance that parents may be unwilling to provide. Being sensitive to and knowledgeable about some of the issues and problems these young people face will

⁷⁷ See Christine Piper, "Historical Constructions of Childhood Innocence: Removing Sexuality" in *Of Innocence and Autonomy*, Eric Heinze, ed. (2000, Ashgate Dartmouth Publishing Co).38.

⁷⁸ Karolyn Ann Hicks, *supra* note 38 at 544.

greatly improve the level and type of support educators are able to offer them. Teachers should challenge *all* anti-homosexual language and behavior. They should create a safe and acceptable environment in which the young person can discuss issues of sexuality. Whenever possible, they should encourage the use of gay, lesbian and bisexual counseling services and support groups.

Caring for one's children is an essential feature of the duties of being a parent. The noble goal of parenthood, according to Aristotle, is to shape the character of children, to provide moral education so that when they are older they will be able to make decisions when faced with a range of difficult and new situations in life. When parents interact with their children, do things with them, share in activities, this makes a difference in how children turn out. Parents should always keep in mind that love is the glue that builds morally stable children. Without loving families, no society can expect to survive because only a loving family can generate children who will flourish.