

**IT’S ALL IN THE FAMILY:
LGBT YOUTH HOMELESSNESS AND FAMILY CONFLICT INTERVENTION**

Note

*Hannah Hicks*¹

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Ryan Peterson became homeless at seventeen.² When conflict with his mother led him to run away from home, Peterson supported himself by doing porn and dating a drug dealer.³ While on the street, Peterson went days without eating.⁴ Like countless other gay, homeless youth in his position, he frequented bathhouses, adult bookstores, and video booths to

1. The author would like to thank Matt Smith, Kerry Hicks, and Caleb Christian for their comments. The author is also grateful to the staff of Volume 7 of the ALABAMA CIVIL RIGHTS AND CIVIL LIBERTIES LAW REVIEW and Norvin Richards, who assisted with an earlier version of this note.

2. Betsy Kulman, *Rejected By Their Families, Gay Teens in the South Flock to Atlanta*, AL JAZEERA AMERICA (Sept. 26, 2014), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/9/25/atlanta-gay-homelessteens.html>.

3. *Id.*

4. *Id.*

meet people who would give him a place to stay in exchange for sex.⁵ Peterson eventually learned that he was HIV-positive.⁶ He developed a drug habit and began dealing crystal meth to support his addiction.⁷ In fear for his life, Peterson entered Lost-and-Found, a homeless shelter for gay youth in Atlanta.⁸ With the help of advocates at Lost-and-Found, Peterson obtained a steady job at a thrift store operated by the shelter.⁹

I. INTRODUCTION

When Peterson left home, he didn't believe that his mother loved him.¹⁰ He now understands that his family, though perhaps misguided at times, was primarily concerned about his well-being.¹¹ Peterson is now sober and has begun reconnecting with his mother.¹² Given the progress Peterson and his family have made, one cannot help but question whether Peterson's conflict with his mother could have been resolved before he fled to the street.

With this question in mind, this note considers legal mechanisms for reducing youth homelessness. More precisely, this note proceeds by framing the problem of lesbian, gay, bisexual, and transgender (LGBT) youth homelessness. This note argues that resolution of family conflict related to a child's gender or sexual identity—specifically, through pre-trial diversion programming—can help curb the current epidemic of LGBT youth homelessness.

Part II discusses the problem of LGBT youth homelessness in America. Parts III.A. and III.B. consider two existing mechanisms for dealing with family conflict—emotional abuse litigation and Children in Need of Services (CHINS) proceedings. Part IV presents one scholar's new proposal for addressing family disputes over a child's gender or sexual identity. This section further argues that this proposal, although laudable in its aim to resolve family conflict, is unworkable in its current form. In Part V, this note proposes that pre-trial diversion might be an effective alternative framework for dealing with family conflict resolution.

5. *Id.*

6. *Id.*

7. *Id.*

8. Kulman, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

II. THE PROBLEM OF HOMELESSNESS AMONG LGBT YOUTH

A. Homelessness is More Prevalent Among LGBT Youth

Compared to straight youth, LGBT youth experience homelessness at a disproportionate rate. The U.S. Department of Health and Human Services estimates that there are as many as 1.7 million homeless youth on the streets each year.¹³ Typically, and for the purposes of this note, homeless youth are defined as unaccompanied twelve to twenty-four year olds who either live in shelters or places not fit for habitation or experience housing instability.¹⁴ Between 20 and 40% of homeless young people identify as lesbian, gay, bisexual, or transgender,¹⁵ yet only 3-5% of the U.S. adult population identifies as LGBT.¹⁶ One study found that “approximately 25% of lesbian and gay adolescents, and 15% of bisexuals reported homelessness compared with just 3% of the exclusively heterosexual adolescents.”¹⁷ A survey of recent research on youth homelessness indicated that seventeen of twenty-two studies found that LGBT youth were over-represented among homeless adolescents.¹⁸

13. *Runaway and Homeless Youth Capacity Building for Lesbian, Gay, Bisexual, Transgender and/or Questioning Youth Populations Fact Sheet*, FAM. & YOUTH SERV. BUREAU (Aug. 12, 2014), <http://www.acf.hhs.gov/programs/fysb/resource/lgbtq-demonstration-project>.

14. Richard A. Hooks Wayman, *Homeless Queer Youth: National Perspectives on Research Best Practices, and Evidence-Based Interventions*, 7 SEATTLE J. FOR SOC. JUST. 587, 590 (2009).

15. *LGBTQ Youth Homelessness in Focus*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, http://usich.gov/issue/lgbt_youth/lgbtq_youth_homelessness_in_focus/ (last visited Nov. 13, 2015).

16. Gary J. Gates, *How many People are Lesbian, Gay, Bisexual, or Transgender?*, THE WILLIAMS INST. (Apr. 2011), <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-transgender/>.

17. Heather L. Corliss et al., *High Burden of Homelessness Among Sexual-Minority Adolescents: Findings From a Representative Massachusetts High School Sample*, 101 AM. J. PUB. HEALTH 1683, 1686 (2011).

18. *Incidence and Vulnerability of LGBTQ Homeless Youth*, NAT'L ALLIANCE TO END HOMELESSNESS (Dec. 8, 2008), http://www.endhomelessness.org/page/-/files/2141_file_LGBTQ_Brief_2007.pdf.

B. LGBT Homeless Youth Experience Negative Outcomes From Homelessness More Intensely Than Their Heterosexual Peers

The prospects for homeless LGBT youth are dire. Compared to straight homeless youth, queer¹⁹ homeless teens and young adults are more likely to be victims of crime.²⁰ Les Whitbeck *et al.* reported that gay, lesbian, and bisexual adolescents are two times more likely to be sexually assaulted and exploited than heterosexual homeless young people.²¹ Other scholars have noted that LGBT youth on average reported 7.4 more instances of sexual victimization than their heterosexual counterparts.²² Gay, lesbian, and bisexual youth are more likely to turn to survival sex—trading sex for food, shelter, and other necessities—than heterosexual youth.²³ James Van Leeuwen *et al.* determined that 19% of lesbian, gay, and bisexual homeless youth practice survival sex, compared to 8% of heterosexual homeless youth.²⁴ Other researchers have found that homeless LGBT youth reported more lifetime sexual partners than heterosexual homeless youth, and over twice as many LGBT youth as heterosexual youth reported that they never used protection during sex.²⁵

Additionally, homeless queer youth experience mental health problems more frequently than heterosexual homeless youth.²⁶ One study found that 41% of gay, lesbian, and bisexual homeless young people met the criteria for major depressive episode, compared to 28% of heterosexual homeless adolescents.²⁷ Moreover, rates of post-traumatic stress disorder are

19. The author of this essay uses the term “queer” to refer generally to lesbian, gay, bisexual, and transgender youth.

20. Nusrat Ventimiglia, *LGBT Selective Victimization: Unprotected Youth on the Streets*, 13 J.L. SOC’Y 439, 441 (2012); Wayman, *supra* note 14, at 602.

21. Les B. Whitbeck *et al.*, *Mental Disorder, Subsistence Strategies, and Victimization Among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents*, 41 J. SEX RES. 329, 336 (2004).

22. Bryan N. Cochran *et al.*, *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 AM. J. OF PUB. HEALTH 773, 774 (2002).

23. Kimberly Tyler, *A Comparison of Risk Factors for Sexual Victimization Among Gay, Lesbian, Bisexual, and Heterosexual Homeless Young Adults*, 23 VIOLENCE & VICTIMS 586, 596 (2008).

24. James M. Van Leeuwen *et al.*, *Lesbian, Gay, and Bisexual Homeless Youth: An Eight City Public Health Perspective*, 85 CHILD WELFARE 151, 160 (2006).

25. Cochran *et al.*, *supra* note 22, at 775.

26. Van Leeuwen *et al.*, *supra* note 24, at 155; Whitbeck *et al.*, *supra* note 21, at 334.

27. Whitbeck *et al.*, *supra* note 21, at 334.

exceptionally high among young, homeless lesbians.²⁸ Whitbeck *et al.* noted that homeless lesbian youth are the most at-risk among all homeless youth.²⁹ These young women experience higher rates of mental health problems, as well as frequent caretaker and street victimization.³⁰

According to Whitbeck *et al.*, approximately three-fourths of gay, lesbian, and bisexual homeless adolescents report suicidal ideation, compared to one half of heterosexual homeless youth.³¹ Moreover, 57% of gay, lesbian, and bisexual homeless youth made at least one suicide attempt, compared to 33% of heterosexual homeless youth.³² Consistent with these results, Van Leeuwen *et al.* report that 62% of gay, lesbian, and bisexual homeless young people attempted suicide, compared to 29% of straight homeless youth.³³ LGBT homeless youth might also be more likely to use illegal drugs than their heterosexual counterparts.³⁴ One study found that lesbian homeless youth were more likely to abuse drugs and alcohol compared to their heterosexual counterparts.³⁵ Other researchers have noted that queer homeless youth abuse drugs more frequently and use a wider variety of drugs than heterosexual homeless young people.³⁶

Social scientists have theorized that once LGBT teens and young adults become homeless, it is particularly difficult for them to break the cycle of negative behaviors that lead to chronic homelessness.³⁷ The United States severely lacks housing and crisis intervention programs to meet the needs of homeless youth.³⁸ As a result, most homeless young people do not receive family reunification services.³⁹ In the absence of effective intervention mechanisms, especially those geared specifically toward queer youth, homeless LGBT youth are often unable to overcome the cumulative effects of homelessness, and many ultimately succumb to crushing health and social outcomes.⁴⁰

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Whitbeck *et al.*, *supra* note 21, at 334.

33. Van Leeuwen *et al.*, *supra* note 24, at 160.

34. John W. Noell & Linda M. Ochs, *Relationship of Sexual Orientation to Substance Use, Suicidal Ideation, Suicidal Attempts, and Other Factors in a Population of Homeless Adolescents*, 29 J. ADOLESCENT HEALTH 31, 34-35 (2001).

35. Whitbeck *et al.*, *supra* note 21, at 334.

36. Cochran *et al.*, *supra* note 22.

37. Whitbeck *et al.*, *supra* note 21, at 340.

38. Wayman, *supra* note 14, at 593.

39. *Id.*

40. Whitbeck *et al.*, *supra* note 21, at 340-41.

C. Family Conflict is a Contributor to LGBT Youth Homelessness

The high prevalence of victimization, harassment, discrimination, mental health problems, suicidal ideation, and family conflict among LGBT youth likely contributes to the over-representation of LGBT youth among homeless and runaway adolescents.⁴¹ This note is primarily focused on the causal relationship between familial conflict over a child's gender or sexual identity and LGBT youth homelessness.⁴² Reports of the impact of family conflict on the prevalence of LGBT youth homelessness vary widely. In one study, family conflict was cited as the most common reason LGBT young people reported leaving home.⁴³ However, only 14% of adolescents in this study reported that they left home specifically because of conflicts related to their sexual orientation.⁴⁴ In contrast, another study has shown that approximately 50% of gay teens experienced a "negative reaction" from their parents when they "came out" and 26% of gay teens were subsequently forced to leave their homes.⁴⁵ According to the Gay and Lesbian Task Force, "family conflict is the primary cause of homelessness for all youth, LGBT or straight. Specifically, familial conflict over a youth's sexual orientation or gender identity is a significant factor that leads to homelessness or the need for out-of-home care."⁴⁶

III. CURBING LGBT YOUTH HOMELESSNESS
BY RESOLVING FAMILY CONFLICT

Homeless adolescents who reunite with their families have more positive health and employment outcomes than those who remain separated

41. *Id.* at 330.

42. The author of this note recognizes that the intersections of the aforementioned risk factors contributing to LGBT youth homelessness are innumerable, and proceeds with the understanding that a focus on any one of the listed factors is necessarily imperfect.

43. Cochran et al., *supra* note 22.

44. *Id.*

45. Gary Remafedi et al., *Male Homosexuality: The Adolescent's Perspective*, 79 PEDIATRICS 326, 327 (1987).

46. Nicholas Ray, *Lesbian, Gay, Bisexual and Transgender Youth: An Epidemic of Homelessness*, NAT'L GAY & LESBIAN TASK FORCE 1, 2 (2006), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/HomelessYouth_ExecutiveSummary.pdf.

from their families.⁴⁷ Given the crisis-level statistics on LGBT youth homelessness and the dire circumstances queer homeless teens and young adults face, policymakers should strive to implement workable intervention mechanisms as early as possible. To this point, courts and commentators have made significant contributions to the law and policy surrounding LGBT children in public schools, the juvenile justice system, and the foster care system,⁴⁸ yet commentary on the wellness of families that include sexual minority youth remains markedly absent.⁴⁹

Recognizing this, commentators have begun to turn their attention to methods for resolving family conflict related to a child's gender or sexual identity. Orly Rachmilovitz⁵⁰ argues that the law should be concerned with "assimilation demands," or parental behaviors that coerce LGBT children to conform to the dominant, straight culture.⁵¹ According to Rachmilovitz, assimilation demands can be subtle (for example, a parent's unwillingness to use a transgender child's preferred gender pronoun), or extreme (e.g., a parent's resort to physical abuse or conversion therapy).⁵² Regardless of the severity, assimilation demands threaten a child's ability to develop an authentic identity.⁵³ Before proposing an innovative new framework for handling familial conflict over a child's gender or sexual identity, Rachmilovitz persuasively argues that two existing approaches to this problem—emotional abuse litigation and Children in Need of Services (CHINS) proceedings—are, for the most part, ineffective. The following

47. Sanna J. Thompson et al., *Differences and Predictors of Family Reunification among Subgroups of Runaway Youths Using Shelter Services*, 25 SOC. WORK. RES. 163, 164 (2001); Wayman, *supra* note 14, at 613.

48. Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1392 (2014).

49. *Id.*

50. Orly Rachmilovitz is a Visiting Assistant Professor of Health Law at Boston University. Rachmilovitz's publications and works in progress include: *Achieving Due Process through Comprehensive Care for Mentally Disabled Parents: A Less restrictive Alternative to Family Separation*, 12 U. PA. J. CONST. L. 785 (2010); *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 WM. & MARY J. OF WOMEN & L. 495 (2008); *Masters of Their Own Destiny: Children's Identities, Parents' Assimilation Demands and State Intervention* (work in progress); *Assimilation Demands and Third Parties: The Ripple Effect of Parents' Restrictions on Comprehensive Sex Education* (work in progress). Orly Rachmilovitz, SSRN, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2078353 (last visited Apr. 15, 2016).

51. Rachmilovitz, *supra* note 48.

52. *Id.* at 1380.

53. *Id.* at 1386-87.

subsections will summarize these arguments and provide supporting examples.

A. Emotional Abuse Litigation

More than forty states and the District of Columbia recognize emotional abuse as a form of child abuse.⁵⁴ Some courts have even deemed verbal “gay-bashing” to be abusive. For example, in *In the Matter of Shane T.*, the New York Family Court held that the state’s emotional abuse statutes bar parents from verbally berating their children on the basis of gender or sexual identity.⁵⁵ The court determined that a fourteen year old who had been repeatedly called “fag,” “faggot,” and “queer” by his father was an abused child.⁵⁶ The court further stated, “[t]he behavior of this respondent father is as serious a form of abuse as if he had plunged a knife into the stomach of this child.”⁵⁷

Despite the near national consensus on recognizing emotional abuse as a form of child abuse and cases like *In the Matter of Shane T.* that prohibit parents from berating their children on the basis of their sexual minority status, Rachmilovitz argues that emotional abuse litigation often is not the most effective avenue for resolving family conflicts related to a child’s gender or sexual identity.⁵⁸ Rachmilovitz’s primary concern is that emotional abuse litigation often leads to separation of the family.⁵⁹ Moreover, most negative parental behavior related to a child’s gender or sexual identity is not so extreme as to fall within the ambit of child abuse, as it is statutorily defined.⁶⁰

Furthermore, the elements of child emotional abuse are often extremely difficult to prove. Many states require particular indicators of abuse.⁶¹ For example, Arizona recognizes the infliction of “serious emotional damage” as a form of child abuse, but requires evidence of “severe anxiety, depression, withdrawal or untoward aggressive behavior” diagnosed by a healthcare professional.⁶² Similarly, Iowa calls for evidence of “observable

54. See CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT, 1, 2-3 (2014), available at <https://www.childwelfare.gov/pubPDFs/define.pdf>.

55. *In re Shane T.*, 453 N.Y.S.2d 590, 591 (N.Y. Fam. Ct. 1982).

56. *Id.*

57. *Id.* at 594.

58. Rachmilovitz, *supra* note 48, at 1420-24.

59. *Id.* at 1420-21.

60. *Id.* at 1421.

61. *Id.*

62. ARIZ. REV. STAT. ANN. § 8-201 (2014).

and substantial impairment in the child's ability to function within the child's normal range of performance and behavior."⁶³

Difficulties identifying emotional harm are exacerbated by the reality that the ways in which people experience emotional trauma vary widely.⁶⁴ Disruptions to a child's emotional well-being can be long- or short-term, and might not be immediately apparent.⁶⁵ In fact, it might be some years before the effects of emotional abuse become apparent.⁶⁶ One might also imagine "tough" children who do not immediately show signs of abuse even though what is being done to them would likely cause immediately observable disruptions in the lives of other children. Furthermore, law enforcement and the judiciary might be hesitant to challenge fundamental parental rights and the presumption that parents act in their child's best interests.⁶⁷ Unfortunately, the shortcomings of emotional abuse litigation send the message that the judiciary tolerates all but the most extreme manifestations of parental homophobia and transphobia.⁶⁸ These obstacles, coupled with the likelihood of family separation, lead Rachmilovitz to conclude that emotional abuse litigation often fails to effectively advance the interests of LGBT youth.⁶⁹

B. Children in Need of Services (CHINS)

CHINS, also known as CINS or "status offenders," are children whom the juvenile court has determined have engaged in behavior that, while appropriate for adults, is prohibited among children.⁷⁰ CHINS statutes vary by state, but some common offenses include incorrigibility, stubbornness, truancy, waywardness, immorality, alcohol consumption, or sexual experimentation.⁷¹ Rachmilovitz considers and summarily rejects the

63. IOWA CODE ANN. § 232.68 (2014).

64. See *Understanding the Impact of Trauma*, in TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES, NAT'L CTR. FOR BIOTECHNOLOGY INFO., <http://www.ncbi.nlm.nih.gov/books/NBK207191/> (last visited Nov. 13, 2015).

65. See *id.*

66. See *id.*

67. See *Wisconsin v. Yoder*, 406 U.S. 205, 218-219 (1972) (stating that parental rights are fundamental). See also *Troxel v. Granville*, 530 U.S. 57, 68 (2000) ("There is a presumption that fit parents act in their children's best interests.")

68. Rachmilovitz, *supra* note 48, at 1423.

69. *Id.* at 1420-21.

70. *Id.* at 1425.

71. BARRY C. FELD, CASES AND MATERIALS ON JUVENILE JUSTICE ADMINISTRATION, 143-44 (4th ed. 2013).

CHINS framework as a possible avenue for resolving family conflicts related to a child's gender or sexual identity.⁷²

Rachmilovitz opposes this framework because CHINS proceedings implicitly assume that fault lies with the child, and are thereby unhelpful in improving the parent-child relationship.⁷³ Other commentators have echoed this sentiment. For example, Barry Feld has argued, “virtually all of the behaviors subsumed in the status jurisdiction represent efforts either to reinforce the authority of the primary socializing agencies, to reinstate controls over youths, or to enforce the norms of childhood.”⁷⁴ Courts have also recognized that the purpose of Children in Need of Supervision proceedings is “reintegration of the child into her family and resumption of parental custody including parental control.”⁷⁵ With authority grounded in the doctrine of *parens patriae*, CHINS proceedings are not regarded as punitive in nature, but rather rehabilitative and non-adversarial.⁷⁶ Even so, LGBT youth are particularly vulnerable in these proceedings because of their high rates of family conflict and truancy, which often stems from discrimination or bullying at school.⁷⁷ Additionally, some judges automatically associate sexual minorities with deviancy and immorality. As such, LGBT youth might fall victim to negative biases in CHINS proceedings.⁷⁸

IV. FAMILIES IN NEED OF SERVICES (FINS)

As an alternative to the emotional abuse and CHINS frameworks, Rachmilovitz proposes a new avenue for resolving assimilation-related family disputes—Families in Need of Services (FINS).⁷⁹ According to Rachmilovitz, unlike the CHINS framework, FINS would privilege the interests of neither parents nor children.⁸⁰ Under Rachmilovitz's proposal, the FINS procedure would require children or their representatives to show that parents' conduct “infringes children's identity interests in harmful ways.”⁸¹ This showing relies on a two-prong test:

72. Rachmilovitz, *supra* note 48, at 1424-27.

73. *Id.* at 1420-21.

74. FELD, *supra* note 71, at 143.

75. L.A.M. v. State, 547 P.2d 827, 834 (Alaska 1976).

76. *In re Silva*, 166 Wash. 2d 133, 140 (Wash. 2009); *In re Gras*, 337 So. 2d 641, 644 (La. Ct. App. 1976).

77. Rachmilovitz, *supra* note 48, at 1427.

78. *Id.*

79. *Id.* at 1428.

80. *Id.* at 1440.

81. *Id.* at 1429.

(a) that the parent's conduct is a heteronormative assimilation demand on a child's identity interest, and (b) that the assimilation demand caused the child a significant level of harm. To satisfy prong (a), a party challenging the parent's conduct would have to show that a child's identity interest was a target for the parent's heteronormative coercive requirement to change, conceal, mute, or flaunt that identity, rather than merely an effort to expose the child to other identity options. Once a party has demonstrated that the parent's action was indeed an assimilation demand, to satisfy prong (b), that party would have to demonstrate a sufficient level of harm and that the harm resulted from the assimilation demand.⁸²

Rachmilovitz defines identity interests as "those imperative to identity exploration or achievement: developing, pursuing, or expressing a sexual identity."⁸³ Additionally, Rachmilovitz makes clear that "[a] parent's action is coercive when it leaves the child with no meaningful opportunity to resist it without suffering grave costs."⁸⁴

A. FINS Framework Unworkable in Current Form

FINS would be ineffective as a solution to family conflicts related to a child's gender or sexual orientation for three reasons. First, while admitting that existing literature has informed the author's use of the term "heteronormative,"⁸⁵ Rachmilovitz glosses over the reality that most people, and certainly most court authorities, have probably never been exposed to critical gender and sex theory. As such, concepts of "heteronormativity" or "assimilation demands" are likely foreign to most in these positions. Of course, the judiciary's unfamiliarity with these concepts is not a compelling reason to reject Racmilovitz's proposal. Indeed, any measure that expands the breadth and depth of the judiciary's knowledge should be promoted. This is because, as Judge Posner has intimated, there is a positive correlation between the wealth of the judiciary's understanding and its ability to administer justice based upon the merits of cases, rather than jurists' personal biases.⁸⁶

82. Rachmilovitz, *supra* note 48, at 1429.

83. *Id.* at 1429, n. 284.

84. *Id.* at 1432.

85. *Id.* at 1429.

86. RICHARD POSNER, *SEX AND REASON* 1 (1992).

Nevertheless, one cannot gloss over the practical difficulties of calling, as Rachmilovitz does, for courts to analyze cases involving family conflict by “using the vocabulary of assimilation demands.”⁸⁷ Even among leading gender and sex critics, there is no well-recognized, clearly defined meaning attached to these terms. It is relatively uncontroversial to say that the term “heteronormative” can be used to describe attractions between cisgender⁸⁸ males and cisgender females. However, heteronormativity and heterosexuality are not synonymous.⁸⁹ For example, polygamy, which is generally considered a heterosexual practice, probably cannot be described as “heteronormative.”⁹⁰ Others have also described the following (often heterosexual) practices as non-heteronormative: sex with adult toys;⁹¹ polyamory;⁹² furry-fandom, cosplay, and other forms of identity play.⁹³

87. Rachmilovitz, *supra* note 48, at 1409.

88. A cisgender person is someone whose assumed gender identity matches the gender that person was assigned at birth. Katy Steinmetz, *This is What ‘Cisgender’ Means*, TIME (Dec. 23, 2014), <http://time.com/3636430/cisgender-definition/>.

89. JANET R. JAKOBSEN & ANN PELLEGRINI, LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE 28 (2004).

90. *Id.*

91. See Emily Stark, *Get A Room: Sexual Device Statutes and the Legal Closeting of Sexual Identity*, 20 GEO. MASON U. CIV. RTS. L.J. 315, 318-22 (2010).

92. See Maura I. Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439, 440 (2003) (“Imagined as a form of commitment which is flexible and responsive to the needs and interests of the individuals involved, rather than a rigid institution imposed in cookie cutter fashion on everyone, this new polygamy reflects postmodern critiques of patriarchy, gender, heterosexuality, and genetic parenthood.”).

93. See Stephen Reysen et al., *Heterosexual Missionary as the Sexual Default and Stigmatization of Perceived Infrequent Sexual Activities*, 2 ADVANCES SOC. SCI. RESEARCH J. 93, 96 (2015). “Furry Fandom is the collective name given to individuals who have a distinct interest in anthropomorphic animals such as cartoon characters. Many, but not all, furies strongly identify with, or view themselves as one (or more) species of animal other than human.” Kathleen Gerbasi et al., *Furries from A to Z (Anthropomorphism to Zoomorphism)*, 16 SOC’Y & ANIMALS 197, 198 (2008). Cosplay has been defined as “a modern Japanese-English mash-up of the term, costume role-play, originated in Japan during the 1980s by game designer, Takahashi Nobuyuki.” Michael John Healy & Michael B. Beverland, *Being sub-Culturally Authentic and Acceptable to the Mainstream: Civilizing Practices and Self-Authentication*, 69 J. BUS. RES. 224, 225 (2016). The author does not mean to imply that furry fandom or other forms of other identity play typically involve sexual activity. However, regardless of actual practices of furies, mainstream coverage of the fandom frequently stereotypes this subculture as “sexually deviant” or, at the very least, “unconventional”:

On the other hand, while the concept of non-heteronormativity may be outwardly expanding in some respects, at least some performances of queer identity are becoming increasingly normalized with the realization of marriage equality,⁹⁴ the greater visibility of white, gay celebrities,⁹⁵ and widespread popularity of films and primetime television shows featuring white, middle-class gay characters.⁹⁶ Additionally, a significant number of gender and sexuality theorists have been critical of the mainstream gay rights movement of recent decades on the grounds that the movement has effectuated an arbitrary re-drawing of the line dividing “normal” and “other.”⁹⁷ According to these critics, with its laser-like focus on marriage equality, the modern gay rights movement, driven by white liberalism and

[T]he [furry] community’s unconventional way of life has led to the practice begin stereotyped by market-place actors and classified as deviant by researchers. Bryant and Forsyth attributed deviancy to key Furry practices including dressing like animals, finding spiritual connections with real and mythic animals, viewing themselves as other than human, and a subset of practitioners who dres[s] like animals while having sex. This latter group are technically known as “Plushies” and although a sub-set of the community their practices are not engaged in by all Furies. The Furry community has expressed feelings of being put-upon with such focus including its sexualized depiction in the media (through the infamous CSI episode “Fur and Loathing”). This has predictably resulted in feelings of marginalization and a reluctance to disclose.

Id. at 226 (internal citations and quotations omitted).

94. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

95. Waymon Hudson, *Gay Chicago TV Tackles LGBTQ Visibility and the Many Faces of Coming Out*, HUFF. POST (Sept. 15, 2012), http://www.huffingtonpost.com/waymon-hudson/lgbtq-visibility-coming-out_b_1666223.html (“Too often we see the queer community literally white-washed; faces of middle- or upper-class white men are what are predominantly used in pop culture or in the media. This furthers an untrue stereotype of queer people as rich, white, gay elites, when our community is actually incredibly diverse, crossing racial, socioeconomic, and gender expression lines.”).

96. For example, films such as *PHILADELPHIA* (1993) and *BROKEBACK MOUNTAIN* (2005), and television shows like *Will and Grace*, *Glee*, *Ellen*, *Queer as Folk*, *The L Word*, *Modern Family*, and *The New Normal* have received critical and popular acclaim. Tammie M. Kennedy, *Sustaining White Homonormativity: The Kids Are All Right as Public Pedagogy*, 18 J. LESBIAN STUD. 118, 118-19 (2014).

97. *See, e.g.*, JAKOBSEN & PELLEGRINI, *supra* note 88, at 135.

the so-called non-profit industrial complex,⁹⁸ has given rise to “homonormativity,” which effectively advances the interests of white, able-bodied, housed, U.S. citizens – those “already served by existing social and economic arrangements”⁹⁹—while largely ignoring the plight, or even proceeding at the expense, of trans people, LGBT people of color, and immigrants, as well as LGBT people who are incarcerated, disabled, or indigent.¹⁰⁰

Under this ever-evolving conception of “heteronormativity,” the reach of the term is increasingly marked not by opposite sex romance and gender conformance, but by pro-family sentiment, whiteness, capitalism, monogamy, marriage, conventional sexual practices, nativism, and abelism. When the line dividing familiar and “other” identity performances is continuously redrawn, how can one effectively and consistently determine whether a parent’s behavior constitutes a “heteronormative assimilation demand”? With so many possible interpretations of heteronormativity, it is highly doubtful that lawmakers will be able to employ these concepts in any given case, or for that matter, employ these concepts in a way that is likely to survive Due Process challenges.

A second problem with Rachmilovitz’s proposal is that under the assimilationist understanding of heteronormativity just described, Rachmilovitz’s FINS framework is over inclusive in that it could bring parents with reasonable concerns about their child’s developmental health within its purview. If Rachmilovitz’s framework is adopted, the constantly undulating scope of heteronormativity puts parents in a difficult position when it comes to making choices about their child’s upbringing. As noted above, the concept of heteronormativity may include practices such as sex with toys, polyamory, identity play (such as furry fandom), or even dressing outside of one’s culture. This raises an endless string of questions regarding activation of the framework. For example, would parents run the risk of activating the FINS framework by coercively demanding that their minor child refrain from entering a polyamorous relationship? What if the parents demanded that their child not engage in furry fandom or other forms of

98. See, e.g., Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 SEXUALITY RES. & SOC. POL’Y 53 (2008), available at <http://srlp.org/files/NPICtransresistance.pdf>.

99. *Id.* at 59; See also Laura Kacere, *Homonormativity 101: What It Is and How It’s Hurting Our Movement*, EVERYDAY FEMINISM (Jan. 24, 2015), <http://everydayfeminism.com/2015/01/homonormativity-101/>.

100. Kennedy, *supra* note 96, at 119 (“[G]aining acceptance and membership into the heteronormative society often depends on diluting any kind of queer sensibility that might challenge the centrality of neoliberal, middle-class values that also squelch racial, ethnic, socioeconomic, and gender diversity.”)

identity play?¹⁰¹ What if a young woman chose to wear a burqa against her parents wishes, or a young woman whose parents expected her to wear a burqa instead chose not to? It takes no stretch of the imagination to assume, as Rachmilovitz requires, that each of these decisions is, at least in some cases, key to the minor child's exploration and development of a sexual identity. Would parents' coercive demands of their children in these examples activate the framework? Should it? The answers to these difficult questions are beyond the scope of this note. The point is that FINS proceedings might run the risk of chilling some important, already tough-to-navigate parental lessons about expressing one's agency within established social structures.

A third reason to question the effectiveness of Rachmilovitz's framework is that it is under-inclusive. Consider Escuela Caribe, a "Christian therapeutic residential boarding facility"¹⁰² that is the subject of the 2014 documentary, *Kidnapped for Christ*.¹⁰³ Based in the Dominican Republic, outside the jurisdiction of U.S. courts, Escuela Caribe operated as a "boarding school" where American parents could send their gay and lesbian teens for "behavior modification."¹⁰⁴ Teens at this facility were physically and emotionally abused, made to perform exercises for hours at a time, and subjected to solitary confinement.¹⁰⁵ According to Escuela Caribe representatives and parents, the teens were sent to Escuela Caribe because of "misbehavior."¹⁰⁶ The teens, however, tell a different story.¹⁰⁷ According to them, they were sent to Escuela Caribe to undergo "reparative" therapy to convert them from gay to straight.¹⁰⁸

Recall that Rachmilovitz states, "a party challenging the parent's conduct would have to show that a child's identity interest [] was a target

101. Furry fandom is a prime example for evaluating Rachmilovitz's framework for two reasons. The first reason is the existence of negative sexual stereotypes associated with furry fandom. See Healy & Breverland *supra* note 93, at 226. The second reason that furry fandom is a useful tool for evaluating the framework is its popularity among young people. Sharon Roberts et al., *Clinical Interaction with Anthropomorphic Phenomenon: Notes for Health Professionals about Interacting with Clients who Possess this Unusual Identity*, 40 HEALTH & SOC. WORK 42 (2015) (noting that 90% of the fandom are under the age of 30).

102. Zoe Schlanger, *Where American Teens were Abused in the Name of God*, NEWSWEEK (Jul. 10, 2014), <http://www.newsweek.com/where-american-teens-abused-name-god-258182>.

103. KIDNAPPED FOR CHRIST (Red Thorn Productions 2014).

104. Schlanger, *supra* note 101.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

for the parent's heteronormative coercive requirement to change, conceal, mute, or flaunt that identity, rather than merely an effort to expose the child to other identity options."¹⁰⁹ Under this test, the parent who sends his or her child to Esceula Caribe might be off the hook as far as FINS proceedings go because the parent and the camp's mission statement affirm that the parent was not targeting the child's identity interest. Rather, the parent was targeting the "behavior" of the child. Virtually any parental act—even reparative therapy—can be defended on the grounds that it targeted behavior rather than an identity interest, or that it merely "exposed" the child to an alternative identity. Therefore, the FINS framework is so under-inclusive that it lacks any real force.

V. USING PRE-TRIAL DIVERSION IN EMOTIONAL ABUSE CASES AS A TOOL FOR KEEPING FAMILIES INTACT

Any form of intervention in cases involving family conflict over a child's gender or sexual identity should place family unity as a primary goal. However, when families turn to CHINS and other informal forms of alternative dispute resolution, children typically enter the proceedings at a disadvantage. Like victims of domestic violence, children who allege parental abuse often cannot effectively defend their interests in mediation proceedings because they have endured, and perhaps still feel the pressure of, coercion and control. The relative weakness of children in informal proceedings is exacerbated by the implicit, structural bias in favor of parental authority. The power differential present in parent-child relationships thus renders traditional mediation and CHINS proceedings ineffective.

On the other hand, the adversarial nature of emotional abuse litigation provides child victims of emotional abuse with a champion in the form of a prosecutor. The formality of emotional abuse proceedings helps put children on equal footing with their parents, but this often comes at the cost of separation of the family. This is especially damaging to LGBT children because there are so few state and community services that can provide support for them outside the family.

Pretrial diversion in emotional abuse cases has the potential to combine the best of both rehabilitative CHINS proceedings and adversarial emotional abuse litigation while simultaneously avoiding the shortcomings of each system. Pretrial diversion "refers to the procedure of postponing prosecution either temporarily or permanently."¹¹⁰ The purpose of pretrial diversion is "(1) sparing appropriately selected first-offenders the stigma of

109. Rachmilovitz, *supra* note 48, at 1429.

110. *People v. Padfield*, 136 Cal. App. 3d 218, 228 (Cal. Ct. App. 1982).

a criminal record by prompt exposure to community educational and counseling programs and (2) relieving the congested criminal courts of some relatively minor...prosecutions.”¹¹¹ Generally, the dismissal of criminal charges is conditioned upon the successful completion of a diversion program.¹¹²

Only a handful of states provide pre-trial diversion in cases of child abuse.¹¹³ For example, in California, a prosecutor may refer a person suspected of committing an act of child abuse or neglect to the county social services or probation department for counseling, treatment, or other services.¹¹⁴ Under this rule, referral is not available to persons charged with sexual abuse.¹¹⁵ In determining whether to make the referral, the prosecutor must seek the advice of the county social services or probation department.¹¹⁶ Additionally, Connecticut's equivalent Pre-trial Family Violence Education diversion program allows child abuse victims an opportunity to respond to their parents' application to the program.¹¹⁷ Once enrolled in the program, parents are required to complete 15 hours of training over a ten-week period.¹¹⁸ Conversely, some local laws of Alabama expressly state that a person charged with child abuse is ineligible for pretrial diversion.¹¹⁹

California and Connecticut's approach to pre-trial diversion in cases of suspected emotional abuse of children is preferable to Alabama's. Pretrial diversion retains the benefits of emotional abuse litigation in that the prospect of prosecution upon failure to complete counseling gives children the added authority they need to defend their interests. However, unlike litigation, the counseling and therapy mandated by pretrial diversion programs promote family unity and connect parents to community-based resources. Diversion programs thus retain the rehabilitative focus of CHINS proceedings without placing children at a disadvantage.

111. *Id.*

112. *Id.*

113. Amber Widgery, *Pretrial Diversion*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 13, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx>.

114. CAL. PEN. CODE § 1000.12 (2006).

115. *Id.*

116. *Id.*

117. *Pre-Trial Diversion & Alternative Sanctions*, CONN. GEN. ASSEMBLY (Sept. 22, 2004), http://www.cga.ct.gov/2004/pridata/Studies/Alternative_Sanctions_Briefing.htm.

118. *Id.*

119. ALA. CODE § 45-18-81.22 (1975).

Unlike altogether new proposals, the pretrial diversion framework is already in place across the fifty states. Although many of these programs are only available to youthful offenders and drug-users, the already existing administrative procedures and state family services departments, as well as the relatively small number of families for whom this option would be available, would eliminate many of the growing pains associated with extending pretrial diversion programs to address family conflict.

State and local statutes typically grant prosecutors broad discretion to make diversion available.¹²⁰ Of course, there are a few states that still do not recognize emotional abuse as a form of child abuse, and even among states that do, the statutory requirements are sometimes stringent and difficult to prove.¹²¹ While the shortcomings of current child emotional abuse statutes are a rich topic worthy of further exploration, that endeavor is beyond the scope of this note. This note merely proposes that pretrial diversion is a viable alternative to CHINS proceedings and emotional abuse litigation. Diversion programs provide an informal method for dealing with cases that the formal, adversarial criminal system might ignore due to a prosecutor's finding of insufficient evidence to support a conviction. Diversion can thus be used to widen the scope of state intervention in family conflict.

VI. CONCLUSION

This note began by framing the problem of LGBT youth homelessness. Homelessness is more prevalent among LGBT youth than straight youth, and homelessness is generally harder on queer youth than straight youth. Several scholars have identified family conflict over a child's gender or sexual identity as one of the factors contributing to homelessness.

This note provided an overview of two existing mechanisms for dealing with family conflict over a child's gender or sexual identity—emotional abuse litigation and CHINS. Some regard emotional abuse litigation and CHINS as ineffective means to conflict resolution. Litigation often contributes to family separation, and CHINS does not provide children with a platform to bring about change in their home lives. This note discussed one commentator's proposal for dealing with family conflict, and argued that this approach is unworkable. This note then proposed the use of pretrial diversion as an alternative mechanism for resolving familial conflict and promoting family unity. The problem of LGBT youth homelessness cannot be overstated. This note attempts to bring attention to this urgent matter. Ultimately, this note seeks to promote the

120. *Id.*; COLO. REV. STAT. ANN. § 18-1.3-101 (2014).

121. *See supra* notes 61-66 and accompanying text.

implementation of workable, yet innovative strategies for curbing the epidemic of LGBT youth homelessness in the United States.

