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### The Legally Queer Child

Bruce MacDougall

*Allard School of Law at the University of British Columbia, [macdougall@allard.ubc.ca](mailto:macdougall@allard.ubc.ca)*

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# The Legally Queer Child

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Bruce MacDougall\*

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This article explores the various presumptions and arguments of Canadian courts in largely denying queer children a legal presence. An analysis of the intersection of homosexuality and children is explored with a view to arguing that legally, queer children deserve a voice. The author begins by outlining the development of the legal conceptualization of the “child”. This conceptualization led to the notion of the child as innocent, and thus in need of protection. In comparison, homosexuals came to be characterized as “aberrant” and “predatory”. Protecting children from homosexuals then became a simple step of logic, which ultimately led to the larger legal construction of the “nascently heterosexual” child.

This presumption underlies many of the court decisions reached in this area, often leading to a complete failure on the part of the law to acknowledge and confront the complex and sensitive issues facing queer children. Heterosexual normalization and homosexual “abnormalization” pervades the legal landscape, such that any child exhibiting non-heterosexual tendencies is presumed to have been influenced by an “aberrant” and “predatory” homosexual adult. Legal institutions respond by “protecting” children from homosexual influences, thus denying these children access to gay norms and contexts. The author canvasses the manner in which major institutions and devices—in the context of family and custody; religion; education; and harassment and verbal abuse—are used to ensure the invisibility of the queer child.

In conclusion, it is noted that while some courts are beginning to recognize the queer child, much progress is needed before the queer child is accorded full legal visibility.

Cet article explore les divers arguments et présuppositions proposés par les tribunaux canadiens pour refuser dans l'ensemble une présence juridique aux enfants homosexuels. L'auteur propose une analyse du croisement entre enfance et homosexualité et soutient que les enfants homosexuels devraient avoir une voix juridique. L'auteur amorce son analyse en donnant un aperçu de la conceptualisation juridique de la notion d'«enfant». Cette conceptualisation a mené, selon lui, à considérer l'enfant comme innocent, et partant comme demandant protection. Par comparaison, les homosexuels ont été caractérisés comme des déviants et des prédateurs. La conclusion qu'il fallait protéger les enfants des homosexuels devenait donc une évidence, laquelle menait elle-même à la construction de la notion juridique de l'enfant «hétérosexuel de naissance».

Cette présomption est à la base de nombre de décisions judiciaires qui, selon l'auteur, ont souvent conduit les tribunaux à échouer complètement dans leur reconnaissance et leur appréciation des enjeux complexes et délicats auxquels est confronté l'enfant homosexuel. La normalisation hétérosexuelle et l'«anormalisation» homosexuelle se retrouve partout dans le paysage juridique de telle sorte qu'il est présumé d'emblée qu'un enfant manifestant des tendances non hétérosexuelles a subi l'influence d'un homosexuel adulte «déviant» et «prédateur». Les institutions juridiques répondent en «protégeant» ces enfants des influences homosexuelles, les privant ainsi d'un accès aux normes et aux contextes gais. L'auteur passe en revue la manière dont les institutions et instruments importants dans les domaines de la famille et de la garde, la religion, l'éducation, de même que le harcèlement et l'abus verbal, sont employés pour rendre invisible l'enfant homosexuel.

En conclusion, l'auteur note que si certains tribunaux ont commencé à reconnaître l'enfant homosexuel, il reste beaucoup de chemin à parcourir avant que celui-ci ne se voit conférer une visibilité juridique entière.

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## Introduction

This paper examines legal and, in particular, judicial involvement in erasing or diminishing the existence of gay, lesbian, and other queer children.<sup>1</sup> In a few recent but rare cases, Canadian courts have been forced to acknowledge the possibility that the gay or lesbian child exists; and even then, the courts have applied standards and condoned treatment that simply would not be applied if the issue before the courts concerned other (heterosexual) children. Non-heterosexual children are indeed legally queer. This paper examines first, in Parts I and II, some of the attributes and assumptions that have circumscribed legal considerations of homosexuality and, in particular, homosexuality as it intersects with “children”. Finally, in Part III, an examination is carried out of specific institutions and contexts that have been particularly significant in contributing to the legal disinclination in associating homosexuality with children.

### I. The Invisible Queer Child

The inadequate legal treatment of children and homosexuality is evidence of a far greater social refusal to associate children with homosexuality: an intense and pervading message of heterosexual normalization is thoroughly reinforced in young people, even within “homosocial contexts” like clubs and sports teams. Children are exposed to television shows and movies that almost always portray boys and girls in specific roles—roles with expectations of heterosexuality on maturity. Social and athletic groups (scouts, sports teams, big sisters, etc.) are organized along gender lines with messages of heterosexuality offsetting the homosocial context of the organization itself.<sup>2</sup> Other instances of heterosexual normalization include events such as “Family Day” (i.e., heterosexual “Family Day”), performances by a “king” and “queen” in community or school events, and Valentine’s Day ceremonies and expectations. Such social events are remarkably symbolic—even intentionally symbolic. Their message of heterosexual normalization and homosexual “abnormalization” cannot be lost on any person—young or old; these events are

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<sup>1</sup> While the intent of this paper is to deal with queer children generally, including gay, lesbian, bisexual, transgendered, intersexed, and, perhaps most importantly, “questioning” children, the available decisions and existing law deal only with gay and lesbian children—especially the former. Gay and lesbian children do have at least *some* legal visibility, whereas bisexual, transgender, and other queer children are likely to be even less legally understood or recognized—though in medical and scientific learning they may already have a real presence. Furthermore, adult support movements for gays and lesbians have made significant inroads, whereas those for bisexual and transgender people have made fewer advances, at least in Canada. See Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish, 2002).

<sup>2</sup> See Pat Griffin, “Homophobia in Sport: Addressing the Needs of Lesbian and Gay High School Athletes” in Gerald Unks, ed., *The Gay Teen: Educational Practice and Theory for Lesbian, Gay, and Bisexual Adolescents* (London: Routledge, 1995) 53.

powerful devices of social inclusion or exclusion.<sup>3</sup> While society may not purport to conceive of a child as sexual, it certainly conceives of him or her as *nascently* heterosexual.

As in traditional society, with few exceptions, the law, in the form of legislation, case law, or administrative practice, has great difficulty conceptualizing a child who does not conform to the nascently heterosexual ideal. A child exhibiting homosexual sexuality is presumed to be (or to have been) influenced by an adult. The law responds to such a presumption by sheltering (“protecting”) the child from homosexual people or homosexual influences. Children (including gay children) are thus denied ready access to gay norms and contexts: they are “protected”. At the same time, however, children are exposed to numerous statements or policies designed to convey the message that children who consider themselves homosexual are not normal. In *Hall (Litigation guardian of) v. Powers*,<sup>4</sup> a child, who specifically self-identified as gay, was successful in bringing an action against the principal and the school board to allow him to take his same-sex date to the high school prom. While the court allowed the application, it nevertheless condoned the general anti-homosexual sentiment present in the Catholic school, even in the face of the obvious presence of at least one gay student in its classroom. Clearly, there was no judicial concern for protecting this child’s homosexuality.

The law presumes that children cannot be gay, or lesbian, or anything other than heterosexual. If children are bullied, or if they commit suicide, the courts and legal institutions give excessive weight to even the slightest evidence suggesting that the child was not gay.<sup>5</sup> It is *never* assumed that the child might in fact be gay and that he, or others like him, might be in need of positive reinforcement with respect to their sexuality. One consequence of this failure to recognize potentially gay children is that there are, in fact, very few cases in Canada involving the rights of *queer children*.<sup>6</sup> Those cases that have reached the Supreme Court of Canada, and which are of crucial importance for homosexual youth,<sup>7</sup> were argued at the “adult level”. That is, the primary focus throughout these trials was on adults and adult rights rather than on children.

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<sup>3</sup> See Bruce MacDougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Toronto: University of Toronto Press, 2000) at 157 [MacDougall, *Queer Judgments*].

<sup>4</sup> (2002), 59 O.R. (3d) 423, 213 D.L.R. (4th) 308 (Sup. Ct.) [*Hall* cited to O.R.].

<sup>5</sup> See e.g. *School District No. 44 (North Vancouver) v. Jubran*, [2003] 3 W.W.R. 288, 9 B.C.L.R. (4th) 338 (S.C.) [*Jubran* cited to W.W.R.] (the child was not, in fact, gay despite being tormented by other school children for that reason).

<sup>6</sup> See *Jubran*, *ibid.*; MacDougall, *Queer Judgments*, *supra* note 3 at 110-11; Andi O’Conor, “Who Gets Called Queer in School? Lesbian, Gay, and Bisexual Teenagers, Homophobia, and High School” in Unks, *supra* note 2, 95.

<sup>7</sup> See especially *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 221 D.L.R. (4th) 156 [*Chamberlain* (S.C.C.) cited to S.C.R.]; *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 199 D.L.R. (4th) 1 [*Trinity Western* cited to S.C.R.].

In *Chamberlain v. Surrey School District No. 36*, the argument centred around children's access in schools to educational materials on same-sex parents.<sup>8</sup> MacKenzie J.A., after reviewing the authorities on human dignity and Charter principles in prohibiting adult discrimination on the grounds of sexual orientation, stated that “[d]iscrimination against children because of the sexual orientation of their parents would be even more invidious.”<sup>9</sup> Most invidious, however, and apparently not considered as a possibility by the courts, is discrimination against children because of their own sexual orientation. It did not cross the many judicial minds of both the Court of Appeal and the Supreme Court of Canada that some of the children in the school might be gay or lesbian. Similarly, in *Trinity Western*, where students training to be teachers were required to (and did) sign anti-gay pledges, the judges were apparently ignorant of the interests of non-heterosexual students—certainly such interests were not considered.<sup>10</sup> We might speculate whether cases such as *Chamberlain* and *Trinity Western* would have been treated differently had a gay student challenged the impugned actions. As I have said of the *Trinity Western* case:

The judges did not ask how a homosexual teacher or student would likely feel if they knew that the colleague or teacher had voluntarily signed a document to become a teacher saying that their actions, and therefore they, are biblically condemned and to be lumped in with cheaters, drunks, thieves and so on.<sup>11</sup>

Legal academics and queer activists have also, at times, overlooked the existence and interests of queer children.<sup>12</sup> The interests of queer children are thus largely ignored.

Children often have little or no voice in situations in which they are so directly affected; therefore, adults speak for them. Very often, these adults (frequently government workers, sometimes child-welfare advocates, and occasionally academics) do not understand the complexities inherent in being a gay, lesbian, or

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<sup>8</sup> *Chamberlain v. Surrey School District No. 36* (2000), 191 D.L.R. (4th) 128, [2000] 10 W.W.R. 393 [*Chamberlain* (C.A.) cited to D.L.R.].

<sup>9</sup> *Ibid.* at para. 36.

<sup>10</sup> The notable exception was dissenting Justice L'Heureux-Dubé. See text accompanying notes 136-37.

<sup>11</sup> Bruce MacDougall, “A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Homosexual Equality Discourse—the Cases of *Chamberlain* and *Trinity Western University*” (2002) 35 U.B.C. L. Rev. 511 at 524-25 [MacDougall, “A Respectful Distance”].

<sup>12</sup> For example, Kathleen A. Lahey discusses the difficulties of counting how many children are in gay and lesbian-parented families, but she does not address the more difficult question of how to count gay and lesbian children (*Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999) at 187-90). In their article on *Chamberlain* at the superior court level, Shaheen Shariff, Roland Case and Michael Manley-Casimir identify three general groups of children whose rights and interests were affected by the decision: “Children of parents who personally endorse homosexuality; [c]hildren of tolerant heterosexual parents; [and] [c]hildren of non-tolerant heterosexual parents” (“Balancing Competing Rights in Education: Surrey School Board’s Book Ban” (2000) 10 Educ. & L.J. 47 at 77). Homosexual children themselves are not identified. See also Shaheen Shariff, Roland Case & Linda LaRocque, “Begging the Questions: The Court of Appeal Decision in the Surrey School Board Book Controversy” (2000) 11 Educ. & L.J. 85.

bisexual child; many do not even consider the possibility that a child of such sexual orientation could exist. In reference to the context of child protection generally, Nicholas Bala has said that “[w]hile child protection workers are typically white, well-educated and from middle-class backgrounds, their clients most often are poorly educated, living in or near poverty, and not infrequently members of a racial minority group and living in a family led by a single parent.”<sup>13</sup> To this list, one can add that child protection workers themselves are often heterosexual, or they have a heterosexual view of children even though the children they confront are, at least some of the time, not heterosexual.

Even gay or lesbian adults cannot always speak authentically for a gay or lesbian child. Circumstances change; and voices in different generations speak differently. Some gay and lesbian adults have perhaps forgotten the multitude and complexity of issues that arise with respect to being young and queer. Eric Rofes has noted, for example, that at least two large barriers prevent professionals and gay activists from confronting the phenomenon of the school “sissy”. Rofes writes:

To say *sissies = gay male youth* is considered offensive to many in the gay community. Instead we insist that gay youth are fully integrated throughout our schools: they are on the football team as well as the drama club, student council as well as art class, the computer club and the swim team. We tell the world that childhood sissies grow up to be men of all sexual orientations.

The second reason that little attention has focused on the plight of the sissy is that gay male activists and educators alike carry unresolved feelings about their own sissy pasts. When we left home and fled to a safer location, we did our best to leave our sissy identities behind.<sup>14</sup>

Debbie Epstein and Richard Johnson have a somewhat different perspective on this generational situation. They write that different generational trends in lesbianism have aided in creating a disparity between different generations:

[P]art of the early 1990s apparent explosion of “lesbian chic” has focussed on young, “attractive”, women supposedly less politicized through an engagement with feminism than their older (and “unattractive”) “sisters”, confident, visible on the scene, and apparently invested chiefly in having a good time. Many young lesbians may play with, perform, or invest themselves in, such images, without this constituting the whole of their lives; and their experiences at school may not bear much similarity to the media images or to their own leisure time pursuits.<sup>15</sup>

A final obstacle to the creation of an environment where adults can speak confidently or strongly for queer youth is the dread experienced by many gay and lesbian adults

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<sup>13</sup> Nicholas Bala, “An Introduction to Child Protection Problems” in Nicholas Bala, Joseph P. Hornick & Robin Vogl, eds., *Canadian Child Welfare Law: Children, Families and the State* (Toronto: Thomson Educational, 1991) 1 at 15.

<sup>14</sup> Eric Rofes, “Making Our Schools Safe for Sissies” in Unks, *supra* note 2, 79 at 81.

<sup>15</sup> Debbie Epstein & Richard Johnson, *Schooling Sexualities* (Buckingham: Open University Press, 1998) at 154.

who fear being accused of trying to “convert” young people into homosexuals. Below, I will discuss how the idea of the “proselytizing homosexual” has tenaciously gripped the social landscape. Simply put, gay and lesbian adults working with children, whether as teachers, social workers, or scout leaders, treat the queer child as a highly controversial and potentially volatile issue.

## II. Meaning and Content of “Normal” in the Legal Context of a Child’s Sexuality/Sexual Orientation

### A. What Is a Child?

A preliminary issue, of course, is to determine what we mean by “child”—whether queer or not. The law is surprisingly black and white, though distinctly inconsistent, on this issue. Julia Fionda observes the arbitrary state of the law in the British context:

[L]aws which state that a young person can legally have sex at sixteen, vote at eighteen, drink alcohol at home at five but not purchase it until eighteen, marry (with parental consent) at sixteen but not have a homosexual relationship until eighteen, apply arbitrarily and take little account of the extent to which that person is actually “adult” enough to indulge in such activities.<sup>16</sup>

In Canada, the age of majority is nineteen in British Columbia<sup>17</sup> and eighteen in Alberta.<sup>18</sup> According to the *Marriage Act* of Ontario,<sup>19</sup> a person can only marry (with parental consent) at the age of sixteen. In *Legebokoff v. Legebokoff*, however, it was held that at common law, the marriage of a child of less than seven years was void.<sup>20</sup> The marriage of a male older than seven years but younger than fourteen years, or a female older than seven years but younger than twelve years, was only voidable at the instance when the child attained the required minimum age. The age of consent for most sexual acts is fourteen,<sup>21</sup> but the child pornography provisions of the Criminal Code apply if the person depicted looks to be under the age of eighteen.<sup>22</sup>

Part of the problem in legally conceptualizing the “child” is the fairly recent development of the child qua child as a special concern of the law. The child has also arisen as a new *social* concern. Fionda notes that the construction of children as a social group is a modern phenomenon and that “childhood in this sense was non-

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<sup>16</sup> Julia Fionda, “Legal Concepts of Childhood: An Introduction” in Julia Fionda, ed., *Legal Concepts of Childhood* (Oxford: Hart, 2001) at 13.

<sup>17</sup> *Age of Majority Act*, R.S.B.C. 1996, c. 7, s. 1.

<sup>18</sup> *Age of Majority Act*, R.S.A. 2000, c. A-6, s. 1.

<sup>19</sup> R.S.O. 1990, c. M.3, s. 5(2).

<sup>20</sup> (1982), 28 R.F.L. (2d) 212 at 215 (B.C. S.C.), relying on *Kerr v. Kerr*, [1934] S.C.R. 72 at 77, 2 D.L.R. 369.

<sup>21</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 150.1.

<sup>22</sup> *Ibid.*, s. 163.1.



existent until at least the seventeenth century in (largely middle class) Europe.”<sup>23</sup> To the extent that the law was concerned with children, historically, the child was treated more or less as the property of the father (in much the same manner in which women were treated). In the grammar of the law, the child was accusative, not nominative; therefore, a child was not capable of entering into agreements or fully owning property independently. Blackstone wrote:

The legal power of a father (for a mother, as such, is entitled to no power, but only to reverence and respect) the power of the father, I say, over the persons of his children ceases at the age of twenty one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children.<sup>24</sup>

The law also approached women’s sexuality from a male perspective. Similarly, a child’s sexuality was approached from a male (adult) perspective. As such, the child, as a proprietary object over which adults fought, was not legally conceptualized as distinct from a parent or parent substitute. Michael Freeman notes that remnants of the ideology of the child as property have remained even beyond the period in which modern child law developed.<sup>25</sup> Writing in 1975, Mia Kellmer-Pringle was able to recognize the attitude that “a baby completes a family, rather like a TV set or fridge ... a child belongs to his parents like their other possessions over which they may exercise exclusive rights.”<sup>26</sup>

The idea, then, of a child having rights of his or her own—especially as *against* the rights of adults (and most especially as against the rights of his or her parents)—was not really considered until very recently. Even today, Canadian courts are reluctant to detach children’s rights from those of their parents. In *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, Iacobucci and Major JJ. stated that “a parent’s freedom of religion does not include the imposition upon the child of religious practices which threaten the safety, health or life of the child.”<sup>27</sup> The judges’ apparent recognition of the child’s distinct rights is problematic, however, as they seem more concerned with the physical integrity of the child than with the child’s mental well-being. Furthermore, though there was much acclaim for Canada’s accession to the

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<sup>23</sup> Fionda, *supra* note 16 at 3-4.

<sup>24</sup> William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, vol. 1 (Chicago: University of Chicago Press, 1979) c. 16 at 441.

<sup>25</sup> Michael Freeman, “The Child in Family Law” in Fionda, *supra* note 16, 183 at 187.

<sup>26</sup> Mia Kellmer-Pringle, *The Needs of Children*, 3d ed. (London: Hutchinson, 1975) at 69-70 cited in Freeman, “The Child”, *ibid.* at 187.

<sup>27</sup> *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 225, 122 D.L.R. (4th) 1.

*Convention on the Rights of the Child*,<sup>28</sup> it does not appear to have had much impact in terms of according children real rights as distinct from (and sometimes opposed to) those of their parents.<sup>29</sup>

### **B. Keeping the Child Innocent**

The present-day legal construction of children, in terms of sexuality, is not particularly ancient; though it is, it would seem, deeply entrenched. The legal change in attitude toward children first began in the late Victorian era and it continued into the twentieth century—an era of reform generally. Interestingly, the twentieth century was also the period in which women emerged (legally) as equals to men. However, as women began to be accorded full adult rights, children began to be insulated from access to rights. In essence, children were pushed further and further away from the rights and status associated with adulthood. This theoretical movement encompassed the sheltering of children from “adult” experiences. Sheltering now informs the modern construction of children as innocent—the very antithesis of homosexuals and homosexuality. On this characterization of innocence, Chris Jenks writes that “[s]uch a conception has set the public standards for our demeanour towards the child, and for our expectations of policy and provision in relation to the child. Such infants are essentially pure in heart, angelic and uncorrupted by the world that they have entered.”<sup>30</sup> Lise Gotell states, “The child as a symbol of innocence, asexuality and moral boundaries comes to represent sexual order. The visible sexuality of the child symbolizes, in turn, the violation of sexual order.”<sup>31</sup> The child has thus emerged, primarily, as an asexual legal construction (with heterosexual potential, as will be argued below).

In fostering the idea of the child as innocent, though nascently heterosexual, courts have gone to great lengths to protect children from potential sexual harm. Examples of this arise most frequently in cases where any issue surrounding a child’s sexual expression exists. Therefore, in *R. v. Sharpe*,<sup>32</sup> even though there was no

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<sup>28</sup> 20 November 1989, Can. T.S. 1992 No. 3, (entered into force 2 September 1990, accession by Canada 12 January 1992).

<sup>29</sup> See R. Brian Howe & Katherine Covell, “Schools and the Participation Rights of the Child” (2000) 10 *Educ. & L.J.* 107. See generally Shauna Van Praagh, “Faith, Belonging, and the Protection of ‘Our’ Children” (1999) 17 *Windsor Y.B. Access Just.* 154. On children’s rights generally, see the articles in the special issue of “Children’s Rights: A Re-appraisal in the light of the United Nations *Convention on the Rights of the Child*” (1992) 6 *Int’l J. L. & Fam.*

<sup>30</sup> Chris Jenks, “Sociological Perspectives and Media Representations of Childhood” in Fionda, *supra* note 16, 19 at 26.

<sup>31</sup> Lise Gotell, “Inverting Image and Reality: *R v. Sharpe* and the Moral Panic around Child Pornography” (2001/2002) 12 *Const. Forum Const.* 9 at 13. See also Bruce Ryder, “The Harms of Child Pornography Law” (2003) 36 *U.B.C. L. Rev.* 101.

<sup>32</sup> [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1 [*Sharpe* cited to S.C.R.] (upholding the constitutionality of Canada’s law banning the possession of child pornography, subject to the reading in of two exceptions).

evidence of actual harm to children, the Court went to great pains to consider the *potential* sexual harm child pornography could cause. The minority judgment in *Sharpe* reveals this type of overt judicial protectionism:

The derivation of sexual pleasure from the possession of child pornography undermines children's rights and does violence to the values which are essential to a free and democratic society. In our view, Parliament had a reasonable basis for believing that the prohibition of the possession of child pornography would foster and protect children's *Charter* rights.<sup>33</sup>

Also, in *Sharpe*, the Court faced the most difficult of questions in that it was a child himself who had generated the "pornographic" material;<sup>34</sup> and no other child was involved. Both the majority and the minority devoted much attention to considering and evaluating these issues. The minority was palpably uncomfortable with the association of children and sexual experience. For the minority, L'Heureux-Dubé, Gonthier, and Bastarache JJ. stated:

Parliament has recognized that children are the most vulnerable members of our society and that they are especially vulnerable to sexual abuse. Any provision which protects both children and society by attempting to eradicate the sexual exploitation of children clearly has a pressing and substantial purpose.<sup>35</sup>

As for children's own writings, the minority thought that that issue was best left to lenient sentencing, such that any concern that the law might interfere unduly with the freedom of expression of teenagers should be addressed in light of the *Young Offenders Act*.<sup>36</sup> "[A]ny teenager convicted for possession of child pornography would have the benefit of a more lenient sentence and measures aimed at rehabilitation and social reintegration."<sup>37</sup> It is an astonishing situation that children would be confronted by the criminal justice system simply for possessing sexually explicit depictions of people just like themselves.

### **C. The Homosexual as Aberrant and Predatory**

The late Victorian period and early twentieth century saw the development of the foundations of our modern construction of children as distinct from adults (both socially and in the law). So, too, did the concepts of "homosexual" and "heterosexual" become established. Historically, certain homosexual acts (particularly buggery/sodomy) carried criminal consequences; however, neither the law nor society had any real conception of a *person* as either homosexual *or* heterosexual until the

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<sup>33</sup> *Ibid.* at para. 203.

<sup>34</sup> See Gotell, *supra* note 31 at 21; June Ross, "R v. *Sharpe* and the Defence of Artistic Merit" (2001/2002) 12 Const. Forum Const. 23 at 24; Shannon Bell, "*Sharpe's* Perverse Aesthetic" (2001/2002) 12 Const. Forum Const. 30 at 30.

<sup>35</sup> *Supra* note 32 at para. 194.

<sup>36</sup> R.S.C. 1985, c. Y-1, as rep. by *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 199.

<sup>37</sup> *Supra* note 32 at para. 231.

twentieth century.<sup>38</sup> Only over time did the law and society begin to characterize certain men, and then certain women, as homosexual. However, as I shall argue, such a characterization for a child was unimaginable.

While it is true today that men and women may be classified as “homosexual” for certain legal purposes, the prevalent attitude nevertheless remains that adult homosexuality is an aberration—it entails a state of heightened sexualization. Thus, homosexuality is directly equated with sexual acts in a way that heterosexuality is not.<sup>39</sup> Judges have made this assumption even in cases where they have taken a “positive” approach to the actual resolution of a legal situation involving homosexuality. The judicial presumption that homosexuals are abnormally preoccupied with sex is reflected in numerous cases. In *Little Sisters Book and Art Emporium v. Minister of Justice*, the court considered the treatment by Canada Customs and Revenue Agency of imported literature with homosexual content.<sup>40</sup> Smith J. stated, without any consciousness of a double standard, that “[s]ince homosexuals are defined by their homosexuality and their art and literature is permeated with representations of their sexual practices, it is inevitable that they will be disproportionately affected by a law proscribing the proliferation of obscene sexual representations.”<sup>41</sup> Less “sympathetic” courts have had no difficulty jumping to conclusions about the sexual propensities of homosexuals. In *Vriend v. Alberta*,<sup>42</sup> McClung J.A., for the majority at the Court of Appeal, knew nothing about the specific sexual practices of Mr. Vriend, who had lost his job because he was gay. Nevertheless, he felt comfortable concluding that Mr. Vriend was engaged in sodomy—an act he thought the Alberta legislature should not validate.<sup>43</sup> Furthermore, McClung J.A. clearly associated homosexuality with criminally abnormal sexual practices as this is the only possible explanation as to why the judge thought it was relevant to the case to mention “the Dahmer, Bernardo and Clifford Robert Olsen prosecutions” as recently raising “heightened public concern about violently aberrant sexual configurations and how they find expression against their victims.”<sup>44</sup>

Besides the presumption that homosexuals are excessively sexual, a further justification for the perception that homosexuals are abnormal appears to be, at least

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<sup>38</sup> See Wayne R. Dynes, ed., *Encyclopedia of Homosexuality*, vol. 1 (New York: Garland, 1990) at 555-56, s.v. “homosexual (term)”. See generally David F. Greenberg, *The Construction of Homosexuality* (Chicago: University of Chicago Press, 1988).

<sup>39</sup> See generally MacDougall, *Queer Judgments*, *supra* note 3; but see especially MacDougall, *Queer Judgments*, *supra* note 3, c. 2 at 63 (“Censorship and Censoriousness”).

<sup>40</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* (1996), 131 D.L.R. (4th), 18 B.C.L.R. (3d) 241 (Sup. Ct.); aff’d (1998), 160 D.L.R. (4th) 385, 54 B.C.L.R. (3d) 306 (C.A.); rev’d [2000] 2 S.C.R. 1120, 193 D.L.R. (4th) 193.

<sup>41</sup> *Ibid.* at para. 135.

<sup>42</sup> (1996), 181 A.R. 16, 132 D.L.R. (4th) 595 (C.A.) [*Vriend* (C.A.) cited to D.L.R.], rev’d [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

<sup>43</sup> *Vriend* (C.A.), *ibid.* at para. 32.

<sup>44</sup> *Ibid.* at para. 36.

to some judges, the propensity of homosexuals (both men and women) to force their sexual practices on others—including, or perhaps especially, on children. This presumption is wholly unfounded since it is almost always heterosexuals who prey sexually on children. Lise Gotell writes, in commenting on *Sharpe*, that “child sexual abuse is overwhelmingly a heterosexual crime. This is erased in the dominant construction of the pedophilic child pornographer as homosexual. Representations of Sharpe have focussed obsessively on his homosexuality.”<sup>45</sup> Nevertheless, this view of homosexuals as predators of the young finds abundant expression and support in judicial decisions. For example, violence in institutions is identified as homosexual. In one case involving the sentencing of a young offender<sup>46</sup> the court was concerned that if the youth was put into an adult facility, there would be a risk that he would be forced into homosexual activity. As a psychological report referred to by the court noted, “[H]e would easily be the target of regular and frequent, sometimes forced homosexual activity that occurs in these [adult] institutions. This includes gang rape and a great deal more.”<sup>47</sup> The court explained that “[a]ggressive homosexual inmates are not automatically placed in segregation.”<sup>48</sup> In another young offender case,<sup>49</sup> in setting out why there were problems in moving the accused to an adult facility, Murray J. noted:

A young offender who is not sufficiently tough will be abused physically, sexually and used to carry out the wishes of other inmates, such as being a drug courier. If he refuses the protection and homosexual advances from a tougher, older inmate, then he will be raped and abused until he accepts that protection.<sup>50</sup>

Note that the “advances” are not simply sexual; they are homosexual.

Other instances where judges make the wrong presumptions about homosexuals include cases where an adult sexually assaults a child of the same sex. In such cases, some judges appear to think it is logical to turn the case into a paradigm that serves to illustrate the nature of homosexuals and homosexuality generally. It is unimaginable that a court would follow this kind of reasoning in an equivalent heterosexual situation. For example, in *R. v. Paquette*,<sup>51</sup> where a man was convicted of sexual assault and gross indecency on a boy, the court considered the threat of the boy

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<sup>45</sup> Gotell, *supra* note 31 at 15.

<sup>46</sup> *R. v. T.D.E.* (1991), 116 A.R. 382 (Prov. Ct. (Youth Div.)).

<sup>47</sup> *Ibid.* at para. 30.

<sup>48</sup> *Ibid.* at para. 40.

<sup>49</sup> *R. v. G.J.M.* (1992), 130 A.R. 33 (Q.B.), rev'd (1993), 135 A.R. 204 (C.A.), leave to appeal to S.C.C. refused, [1993] 2 S.C.R. vii.

<sup>50</sup> *Ibid.* at para. 47. See also *Collin v. Kaplan* (1982), [1983] 1 F.C. 496, 143 D.L.R. (3d) 121 (T.D.); *R. v. H (R.A.)*, [1989] O.J. No. 604 (Youth Ct.) (QL); *R. v. S. (W.)* (1989), 31 O.A.C. 372, 69 C.R. (3d) 168; *R. v. M.(A.J.)* (1986), 46 Alta. L. R. (2d) 306, 29 C.C.C. (3d) 418 (Q.B.); *Piche v. Canada (Solicitor General)*, [1984] F.C.J. No. 1008 (T.D.) (QL); *R v. E.S.*, [1991] A.J. No. 873 (Prov. Ct. (Youth Div.)) (QL).

<sup>51</sup> [1988] B.C.J. No. 1624 (Co. Ct.) (QL).

becoming homosexual. In addressing the accused adult, the judge's underlying belief that the boy could be "converted" (obviously from heterosexual to homosexual) was central to the analysis. Selbie Co. Ct. J. said:

This fatherless boy was vulnerable and you took full advantage of that. You deliberately and carefully gained the trust of the boy and his mother with the intention of abusing it and if you believe that leading a youth into homosexuality is not an abuse, then this Court disagrees with you. ...

We have here then the sordid scenario of an aging homosexual on the hunt for a young vulnerable youth with little or no concern for the long term effect on the youth himself.<sup>52</sup>

The language used by the judge conveys the underlying assumptions of the court: the "aging homosexual", the "fatherless boy", the "young vulnerable youth", and "his mother" are all part of a "hunt" that is a "sordid scenario". It is difficult to conceive of the use of judicial language such as "an aging heterosexual" or "leading a girl into heterosexuality" in circumstances where the victim of a male perpetrator is a girl.

Associating homosexuals and homosexuality with a desire to have sex with children is sometimes not entirely a consciously made connection on the part of the court. Rather, it is more of an automatic association. In a Nova Scotia case, a provincial court judge ordered a man to stay away from boys "unless accompanied by a heterosexual adult."<sup>53</sup> The underlying assumption was that the company of a homosexual adult would not adequately protect boys from being preyed upon. Further, when the courts are more accepting of homosexuals and homosexuality in deciding cases involving children and homosexuality, concern and fear seem to creep into the analysis to the extent that wrong presumptions about homosexuality are drawn. Fear of sexual conversion of the child, exposure of the child to promiscuity, and the threat of homosexual advances are concerns that simply would not arise in the equivalent heterosexual context. In *Templeman v. Templeman*, for example, there was a custody and access dispute between a divorced mother and father over their two children.<sup>54</sup> The father had realized, during the marriage, that he was gay; subsequently, the marriage had broken down. The court acknowledged that homosexuality in a parent would not, in and of itself, prevent custody or access for that parent. Nevertheless, in granting access to the father, the court added, "In the event that the respondent [father] exposes his children to a promiscuous lifestyle or to harmful influences, the petitioner of course, has the right to vary these access provisions."<sup>55</sup> There was no evidentiary basis of any kind whatsoever to give rise to the concern for the father's tendency towards promiscuity. He was, however, homosexual—thus, the judicial concern arose "naturally".

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<sup>52</sup> *Ibid.* at paras. 5-6.

<sup>53</sup> See Rick Conrad, "Apology Not Enough, Says Gay Rights Group" [Halifax] *Mail-Star* (16 December 1995) A9.

<sup>54</sup> [1986] B.C.J. No. 1426 (S.C.) (QL).

<sup>55</sup> *Ibid.* at para. 12.

#### **D. The Nascently Heterosexual Child**

Inherent in the notion that homosexual adults prey on children and that children need to be protected from homosexuality, is, of course, the related idea that homosexuality is not natural to, or native in, children. Rather, children are conceived of as pure and innocent. This notion of innocence gives meaning to the idea of “protection”—without it, “protection” would be meaningless. Note, however, that children are not protected from heterosexuality. Thus, while children are not thought to be sexual, or to have an “active” sexual orientation, they are nevertheless treated as nascently heterosexual. That is, they are thought of as beings who naturally will develop into heterosexuals. They may not have a present sexual orientation; however, they should be exposed only to heterosexual situations so as to ensure that they reach their “heterosexual potential”. The various hetero-erotic messages children receive are either not considered “sexual” or not considered relevant. Sometimes, such messages are not considered at all. Since homosexuality is, on the one hand, associated with sex, and on the other hand, associated with images of deviant sex acts, the inevitable conclusion is that homosexuality cannot be associated with children: to allow such an association creates the potential for children to be seduced into adopting the “homosexual lifestyle”. Also, if children can be taught to be homosexual, then in what other “deviant” sexualities might children be implicated?

There are numerous examples of this presumption that homosexuality is not native to children (and the corresponding idea that children will develop naturally into heterosexuals). In *Saunders v. Saunders*,<sup>56</sup> where a father in a homosexual relationship wanted access to his child, Wetmore Co. Ct. J. stated, “Surely it cannot be argued the exposure of a child to unnatural relations is in the best interests of that child of tender years.”<sup>57</sup> In another case, where a school principal was convicted of sexually assaulting boys, Marshall J., in a lengthy discussion of pedophilia and its effects on children, said, “Serious problems of sexual adjustment and sexual orientation in life often also follow. All show a sharp loss in self-esteem and confusion in their own sexual orientation. Some go on to develop frank homosexuality and paedophilia itself.”<sup>58</sup> In *R. v. Noyes*,<sup>59</sup> despite witness evidence suggesting it was doubtful that the sexual assault of a male child by a male adult “might lead to future paedophilia or homosexuality in the victim himself,” Paris J. thought it not “unreasonable ... that a process of patterning of the child’s sexual personality may take place, just as such patterning takes place in other areas of a child’s personality, attitudes and beliefs during the crucially formative years of pre-pubescence and early adolescence.”<sup>60</sup>

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<sup>56</sup> (1989), 20 R.F.L. (3d) 368 (B.C. Co. Ct.).

<sup>57</sup> *Ibid.* at 370-71.

<sup>58</sup> *R. v. H. (E.)*, [1987] N.W.T.R. 168 at 174 (Sup. Ct.).

<sup>59</sup> (1986), 6 B.C.L.R. (2d) 306 (S.C.), aff’d (1987), 22 B.C.L.R. (2d) 45 (C.A.), leave to appeal to S.C.C. refused, 27 B.C.L.R. (2d) xxxv.

<sup>60</sup> *Ibid.* at 316. In *R. v. Roestad* (1971), [1972] 1 O.R. 814, 19 C.R. (N.S.) 190 (Co. Ct.), leave to appeal refused (1971), 19 C.R. (N.S.) 235 (Ont. C.A.), the court faced the issue of whether to

While it is true that many children may be ambivalent about their sexual orientation, the unspoken assumption in these cases is that children should be steered toward heterosexuality. A child naturally developing as a homosexual is believed to have been contaminated. Nowhere is the possibility considered by the courts that a child is decidedly homosexual.

The aversion to associating children with homosexuality is not only prevalent in judicial decisions. Some laws, with respect to “homosexual” practices, were grounded in a fear of homosexual contagion. Reed J., in *Halm v. Canada*, said of the section on anal intercourse (section 159) of the Criminal Code:<sup>61</sup>

A reading of the debates of the legislative history, including the Wolfenden Report, makes it clear that a distinction was made between the age of consent under what is now section 159 and the age of consent for other types of consensual sexual activity because (1) homosexual practices were considered immoral and (2) there was a concern that homosexuality was a learned behaviour or a disease such that de-criminalizing the activity in question could lead to youth being corrupted.<sup>62</sup>

Thus, the language of disease permeates the law’s treatment of homosexuality and children. Implicit in these statements about the abnormality of homosexuality, is the assumption that homosexuality is alluring to those with weak minds (including children): it is both seductive and unnatural or aberrant. This perceived seductive quality leads courts, the legal system, and society to conclude that homosexuality infects society—much like a contagious disease. The courts act as the guardians of social good in this respect, inhibiting the undue spread of homosexuality. This perception of homosexuality as infectious is blatant, for example, in the 1953 case of *R. v. National News Co. Ltd.*<sup>63</sup> In this case, a company was charged with possession of obscene matter, including the novel, *Women’s Barracks*,<sup>64</sup> which dealt with lesbianism. Pickup C.J. noted:

Counsel contends that the tendency to corrupt and deprave should be related to normal persons only. If this means persons who are immune to immoral influence from obscenity, the legislation under consideration would not be

designate a man faced with charges involving sex with boys as a dangerous sexual offender. The court heard evidence on the subject of whether the boys could become homosexual as a result of the attacks. Graburn J. summarized the evidence of one of several experts as follows:

Synthesizing Dr. Cooper’s evidence, he is of the view that out of the large number of boys who would be involved, it could be assumed that at least two would be adversely affected either by becoming a homosexual or by suffering psychological disturbances (at 229).

In reference to another situation, the judge called becoming homosexual “a potential harm” (at 230). See also *R. v. W.B.S.* (1992), 127 A.R. 65, (*sub nom. R. v. P.(M.)*), 73 C.C.C. (3d) 530 (C.A.).

<sup>61</sup> *Supra* note 21, s. 159.

<sup>62</sup> *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 at 358-59 (T.D.). See *R. v. M. (C.)* (1995), 23 O.R. (3d) 629, 41 C.R. (4th) 134 (C.A.), Abella J.A.

<sup>63</sup> [1953] O.R. 533 (C.A.) [*National News*].

<sup>64</sup> Tereska Torres, *Women’s Barracks* (New York: Fawcett, 1950).



necessary at all. On the other hand, I am not holding that matter is obscene which tends to corrupt and deprave only persons who are corrupted and depraved. Between these extremes there must be a large section of the public, young and old, whose minds are not corrupt and depraved but are open to immoral influences.<sup>65</sup>

Legally, homosexuals are conceived of as sexual and predatory by nature; however, there is also a legal expectation that homosexuals must alter their sexual practices. For example, this expectation of ready change is implicit in both attitudes toward children and also toward adults. Such an expectation is reflected in the Roman Catholic Church's condemnation of homosexual "acts"—the hope being that homosexuals will change their ways. To the extent that the law does recognize a child, or an adult, as gay or lesbian, too frequently there is an expectation that that person will control actions flowing from their homosexual "condition". The pinnacle of this judicial and legal attempt at the desexualization of homosexuality is most clearly reflected in *Re Layland and Minister of Consumer and Commercial Relations*, where Southey J. noted:

The law does not prohibit marriage by homosexuals provided it takes place between persons of the opposite sex. Some homosexuals do marry. The fact that many homosexuals do not choose to marry, because they do not want unions with persons of the opposite sex, is the result of their own preferences, not a requirement of the law.<sup>66</sup>

One variation on this judicial attempt at desexualization is where the courts analogize same-sex relationships to one of "just friends". In *Egan v. Canada*, for example, the court compared the living arrangements of a homosexual couple with that of a "bachelor and a spinster who live together" as a means of reaching the conclusion that neither type of couple "fall[s] within the traditional meaning of the conjugal unit or spouses."<sup>67</sup> Likewise, in the same case, La Forest J. noted that gays and lesbians are like "all sorts of other couples living together such as brothers and sisters or other relatives, regardless of sex, and others who are not related, whatever

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<sup>65</sup> *National News*, *supra* note 63 at 542. It has been argued that more recent cases on pornography are just more up-to-date versions of this attempt to protect weak people from moral corruption. See Brenda Cossman, "Feminist Fashion or Morality in Drag? The Sexual Subtext of the Butler Decision" in Brenda Cossman *et al.*, eds., *Bad Attitude/s on Trial: Pornography, Feminism and the Butler Decision* (Toronto: University of Toronto Press, 1997) 107; Brenda Cossman, "Disciplining the Unruly: Sexual Outlaws, *Little Sisters* and the Legacy of *Butler*" (2003) 36 U.B.C. L. Rev. 77; Richard Moon, "R. v. *Butler*: The Limits of the Supreme Court's Feminist Re-Interpretation of Section 163" (1993) 25 Ottawa L. Rev. 361; Ryder, *supra* note 31.

<sup>66</sup> (1993), 14 O.R. (3d) 658 at 666-67, 104 D.L.R. (4th) 214 (Gen. Div.).

<sup>67</sup> (1991), [1992] 1 F.C. 687 at 704, 87 D.L.R. (4th) 320 (T.D.), appeal dismissed [1993] 3 F.C. 401, 103 D.L.R. (4th) 336 (C.A.), appeal dismissed [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609 [*Egan* (S.C.C.) cited to S.C.R.].

reasons these other couples may have for doing so and whatever their sexual orientation.”<sup>68</sup>

The judicial expectation of suppression or desexualization is even stronger when sexual expression originates in a homosexual child. In *Hall*, MacKinnon J. rightly rejected such a characterization by stating that “[t]hough dancing can be sexually expressive, it is not necessarily so. It cannot fairly be equated with having sex.”<sup>69</sup> Nevertheless, the implication of this statement is that homosexual sex could, appropriately, be controlled or suppressed by a Catholic school. Similarly, in *Trinity Western*, even homosexual students were expected to abjure from any homosexual activity while attending Trinity Western University.<sup>70</sup>

While there are numerous instances where courts seek to protect children from adult homosexuality, there is very little evidence of legal effort to protect them from adult homophobia. Substantial effort is made, in cases like *Sharpe*, to consider the potential harm to a child that may arise in cases involving anything of a sexual nature. Courts have, however, failed to consider that this child might be gay or lesbian—that this child may be in need of protection from homophobic situations or statements. In situations of *homophobic* expression, or even homosexual expression, the interests of homosexual children are not canvassed. In the cases discussed in the following pages, the issue of homosexuality is almost always considered with respect to the adult: whether a homosexual adult can get custody; whether books about same-sex parents can be in the curriculum; whether a person, who has signed a document stating that homosexuality is biblically condemned, is a fit teacher. The potential harm of homophobia to a homosexual child is simply not addressed, even where, as in *Chamberlain* (S.C.C.) or *Trinity Western*, the facts and the legal holding would have a direct impact on children. *Potential* harm to children was the whole point of much of the argument in *Sharpe*, despite no evidence of such harm. In *Chamberlain* and *Trinity Western*, by contrast, the notion that there may be potential harm to a *homosexual* child—which would almost certainly result if the child were at all aware of the circumstances of the case—was not raised for consideration. The reason for this lack of consideration is the complete obliteration of the queer child from the legal/judicial mind. Only in cases like *Hall*, where the court was forced to confront

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<sup>68</sup> *Egan* (S.C.C.), *ibid.* at para 19. This was stated despite strong judicial authority to the contrary. As Cory and Iacobucci JJ. said:

Sexual orientation is more than simply a “status” that an individual possesses. It is something that is demonstrated in an individual’s conduct by the choice of a partner. The *Charter* protects religious beliefs and religious practice as aspects of religious freedom. So, too, should it be recognized that sexual orientation encompasses aspects of “status” and “conduct” and that both should receive protection. Sexual orientation is demonstrated in a person’s choice of a life partner, whether heterosexual or homosexual. It follows that a lawful relationship which flows from sexual orientation should also be protected (*ibid.* at para. 175).

<sup>69</sup> *Hall*, *supra* note 4 at para. 49.

<sup>70</sup> *Trinity Western*, *supra* note 7.

the queer child, are the interests of the gay or lesbian child considered. Even then, when the courts do address the queer child, they do not fully engage in the issue. Instead, they focus on protecting other interested adults and institutions (e.g., the Catholic Church), thereby undermining any attention given to the issue of the queer child.

### III. State Authorized Devices for Normalizing the Child

The remaining part of this paper explores a handful of important devices and institutions used by the law, particularly in the context of judicial decisions, to perpetuate the invisibility of gay and lesbian youth and ensure the separation of children from homosexuality. These devices and institutions are still remarkably well-entrenched, despite the manner in which the principle of non-discrimination on the basis of sexual orientation has taken hold in Canada. The legal devices of normalization to be examined include: conceptions of family and custody, religion, education, and homophobic and verbal abuse. It should be noted, too, that there are other devices. Historically, one of the most important devices was the criminal law. A remnant of its “normalizing” attempts can still to be found in section 159 of the Criminal Code, which prohibits anal intercourse with those under eighteen years of age (except in a husband-wife situation).<sup>71</sup> This provision has only been struck down in two jurisdictions in Canada. In her reasons for striking down this provision as unconstitutional, Abella J.A., for the Ontario Court of Appeal, noted that this section has an adverse impact on gay youth given that “[a]nal intercourse is a basic form of sexual expression for gay men” and that “[u]nmarried, heterosexual adolescents 14 or over can participate in consensual intercourse without criminal penalties; gay adolescents cannot.”<sup>72</sup> Section 159 is still potentially applicable in other jurisdictions—this must surely be seen by gay youth as an indictment of their sexuality.

The four devices that I have chosen to examine in more detail show both the extent of legal attempts at normalization and the extent to which the gay or lesbian child is accorded a lesser legal significance than a homosexual adult. In many cases, the interests of the queer child are simply overlooked—a result that would be very difficult to imagine with respect to an adult’s interests, or even the interests of a heterosexual child. The queer adult once had a similar invisibility (except in criminal cases), but this has since been partially remedied. One wonders whether the queer child will eventually emerge legally, not just as an object of the law, but as a subject with independent depth and character. As this section will show, however, the devices and institutions used to suppress the homosexual child are very deeply rooted; the task is great.

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<sup>71</sup> *Supra* note 21.

<sup>72</sup> *R. v. M. (C.)* (1995), 23 O.R. (3d) 629 at 636, 98 C.C.C. (3d) 481 (C.A.). See also *R. v. Roy* (1998), 161 D.L.R. (4th) 148, 125 C.C.C. (3d) 442 (Q.C.A.).

### A. Conceptions of Family and Custody

One device that has been used to normalize the child's sexuality is legal control of the behaviour of the parents. The idea appears to be that maintaining a heterosexual environment for children is the best assurance that their nascent heterosexuality will develop normally. This issue arises most obviously and frequently in the context of custody cases.<sup>73</sup> Until very recently, when issues of child custody arose, it was automatically thought best for the child to be placed in an environment that would foster his (nascent) heterosexuality. Ideally, this meant placing the child in a heterosexual environment with no exposure to "deviant" sexualities. Such an environment consisted of one (heterosexual) father and one (heterosexual) mother living together.<sup>74</sup> If the child was unfortunate enough to have a homosexual parent, that parent—if allowed to have any contact with the child—would be expected to closet his or her homosexuality. While more recent cases do not exhibit the same level of overt hostility to the idea of a homosexual parent having custody, there is still evidence of unease. At the very least, questions that would not arise in a comparable heterosexual situation are asked.<sup>75</sup>

In one custody case, the mother regained custody of her daughter when she ceased cohabiting with her female lover. When she later resumed cohabitation with that partner, MacKinnon J. said:

It is, in my view, relevant and significant that the mother would risk losing custody of the girls rather than terminate her cohabitation with Mrs. Whittle. She knew the basis of the order of Macdonell J. It was she who sought the variation on the grounds of terminating the cohabitation. In resuming it, she left no doubt as to the priority of her relationship with her companion. It was the paramount consideration. She wanted custody. It was, however, not at the sacrifice of the homosexual relationship.<sup>76</sup>

As reflected in that case, a court sometimes "bribes" a gay parent by implying that if the parent gives up his or her homosexuality, he or she may have a chance in taking custody of the child. Where the homosexual parent is not expected to give up homosexuality altogether, he or she is, at least, expected to hide it from the children. As discussed earlier, homosexuality is not perceived by the courts as an essential part of the person, but rather as something of an acquired vice that can easily be secreted away from children. Self-censorship appears to be construed as a positive activity for

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<sup>73</sup> A thorough examination of the case law on this point can be found in Donald G. Casswell, *Lesbians, Gay Men, and Canadian Law* (Toronto: Emond Montgomery Publications, 1996) at 252-87. See also Natasha Kim, "Much To Do About Something: Destabilizing Law's Support of Dominant Ideologies in the Context of Lesbian Mother Custody Claims in Canada" (2000) 9 Dal. J. Leg. Stud. 73.

<sup>74</sup> See generally Susan B. Boyd, *Child Custody, Law, and Women's Work* (Oxford: Oxford University Press, 2003) at 99-100.

<sup>75</sup> See Susan B. Boyd, "Lesbian (and Gay) Custody Claims: What Difference Does Difference Make?" (1998) 14 Can. J. Fam. L. 131.

<sup>76</sup> *Elliott v. Elliott*, [1987] B.C.J. No. 43 at para. 24 (S.C.) (QL).

homosexuals. For example, in *K v. K*,<sup>77</sup> an action for divorce and custody of the children was brought. The mother in the case was a homosexual. The court awarded custody to the mother, but thought it was important that the woman's relationship "be discreet and ... not flaunted to the children or to the community at large."<sup>78</sup> In another case, a homosexual father who wanted access to his child, lived with his same-sex lover (which is all we are told about the father and his partner).<sup>79</sup> The mother, it appears, did not outright oppose access, but she was "very concerned that the children [two girls] be exposed to a lifestyle that [was] highly confusing, disruptive and contrary to their moral upbringing."<sup>80</sup> The mother was particularly concerned about overnight access. These concerns were echoed by the court, when McIntyre J. noted that he could "readily understand and ... share Mrs. W's concern about overnight access because it could be harmful to the children while [the father's] present lifestyle continues."<sup>81</sup> The resulting court order was that the father was not to be awarded overnight visits with his children while engaging in his present lifestyle.<sup>82</sup> The underlying judicial message seems to be that the court would rather have a father lie about his sexual orientation than be honest. Essentially, the expectation of the court was that the father would give up his homosexuality.<sup>83</sup> Where parents are not upfront about their sexuality, however, a different issue seems to arise. In another case, where the mother was "in the closet", the court stated that "what [was] relevant to the issue of care and control [was] the mother's lying." Diamond J. went on to say, "I am satisfied that dishonesty is an integral part of her life. This mother is a stranger to the truth!"<sup>84</sup> The homosexual parent can thus be (legally) damned either way—for being forthright; or for not revealing his or her true sexual orientation.

In the custody context, another instance of this bias against homosexuality is the relative frequency with which one parent will allege the homosexuality of the other, in order to reduce the other's chance of obtaining custody. For example, in *J.E.B. v. R.G.B.*, a husband forced his wife to sign a separation agreement by threatening that "if she did not sign the agreement, she would never see her kids again. He threatened to drag her through the court system, and to expose, publicly, her lesbian relationship."<sup>85</sup> Courts have been unusually receptive to investigating the truth of such claims even though homosexuality is "not supposed to matter" in custody disputes.

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<sup>77</sup> [1976] 2 W.W.R. 462, (1975) 23 R.F.L. 58 (Alta. Prov. Ct.) [cited to W.W.R.].

<sup>78</sup> *Ibid.* at 469.

<sup>79</sup> *Worby v. Worby* (1985), 43 Sask. R. 135, 48 R.F.L. (2d) 369 (Q.B.) [cited to Sask. R.].

<sup>80</sup> *Ibid.* at para. 7.

<sup>81</sup> *Ibid.* at para. 8.

<sup>82</sup> *Ibid.* at para. 9.

<sup>83</sup> See also *Bernhardt v. Bernhardt* (1979), 10 R.F.L. (2d) 32 (Man. Q.B.); *D. v. D.* (1978), 20 O.R. (2d) 722, 88 D.L.R. (3d) 578 (Co. Ct.).

<sup>84</sup> *Ewankiw v. Ewankiw* (1994), 99 Man. R. (2d) 302 at para. 23 (Q.B. (Fam. Div.)) [*Ewankiw*]. See also *S. v. S.*, [1992] B.C.J. No. 1579 (S.C.) (QL); *S v. S.*, [1996] B.C.J. No. 1923 (S.C.) (QL).

<sup>85</sup> *J. E. B. v. R. G. B.*, [1996] B.C.J. No. 2717 at para. 10 (S.C.), Beames J. (QL).

The issue of parental homosexuality and the seriousness with which courts treat it, conveys the message to children, aware of the conflict, that homosexuality is abnormal, “deviant”, and generally negative. In one custody case, it was alleged that a vindictive mother attempted to discredit the father.<sup>86</sup> In reference to the mother, Hamilton L.J. noted, “The most damaging reference is that by her to her own son, in which she described his father as a ‘faggot.’”<sup>87</sup> This retort was apparently incited in response to a “facetious remark” from the husband.<sup>88</sup> Nevertheless, the wife had built into her mind “a characterization of her former husband as a homosexual.” Most crucially, as the judge noted, she was able to discredit the father in the eyes of his son.<sup>89</sup> Although custody was awarded to the father, according to the court, the mother’s attempt to discredit the father in the eyes of the boy was successful: the child came to perceive homosexuality in a negative light.

Allegations of homosexuality by one parent against another may also lead to judicial scrutiny of the personal life of the “homosexual” parent. In *Re O and O*,<sup>90</sup> a mother told her son that it was wrong to sleep in his father’s bed because the son would become homosexual.<sup>91</sup> The judge rightly found this to be unusual behaviour on the part of the mother. However, because the mother raised the possibility of the father being homosexual, the court proceeded to examine all of the evidence to determine whether there was any truth to the allegations. Such allegations, easily made, can have very damaging consequences on family members.<sup>92</sup>

In yet another case, a husband petitioned for a divorce from his wife on the basis of mental cruelty.<sup>93</sup> Among the many instances alleged by the husband was the one that his wife “[had] an obsession about lesbians and in correcting the children, she [told] them they don’t want to grow up to be lesbians ... She has carried on a one-sided hate against the husband’s parents because they ‘drink beer’ and because the

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<sup>86</sup> *Martini v. Martini*, [1987] B.C.J. No. 2757 (S.C.) (QL).

<sup>87</sup> *Ibid.* at para. 12.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> (1980), 30 O.R. (2d) 588, 117 D.L.R. (3d) 159 (H.C.J.) [cited to O.R.].

<sup>91</sup> *Ibid.* at 591.

<sup>92</sup> See also *Whyte v. Whyte* (1991), 101 N.S.R. (2d) 249 (S.C. (T.D.)); *Hahn v. Stafford*, [1985] O.J. No. 595 (H.C.J.) (QL); *Guerard v. Parent*, [1986] B.C.J. No. 1836 (S.C.) (QL) was a custody case where the mother alleged homosexuality on the part of Mr. Guerard, who was not the father, but who played a major role in raising the boy. Drost L.J. said:

During the course of the trial it became apparent that Cynthia Parent was the source of several allegations concerning Mr. Guerard, namely: that he is a homosexual and had at one time a homosexual relationship with the child’s father, Georges Parent; that he had unsavoury and dangerous contacts in the underworld who were a threat to Mrs. Parent’s safety; and that he might have sexually abused the child. When Mrs. Parent gave evidence concerning these and other matters, I concluded that her testimony was untrue. There was no evidence to support her claim that Mr. Guerard is homosexual (at para. 27).

<sup>93</sup> *Austin v. Austin* (1986), 77 N.B.R. (2d) 79 (Q.B. (Fam. Div.)).

grandmother is a 'lesbian.'"<sup>94</sup> According to Guerette J, "[t]here [was] not one iota of evidence to support these terrible accusations and the husband ... satisfied [the judge] that all these manifestations of the wife's personality arise out of a disoriented and distraught mind."<sup>95</sup> Clearly, the wife's accusation of lesbianism was used to hurt somebody. However, did not the judge himself, do the same thing? It was the *judge* who said that calling somebody a lesbian is "terrible". Also, it was the judge who thought it appropriate to look for evidence as to whether the statement was true.<sup>96</sup>

In all of these cases, it is striking that while the homosexuality of one parent may not outright preclude that parent from gaining custody, the actions of the *accusing* parent in raising such an issue are not thought of as a relevant factor in determining that parent's fitness to gain custody. That one parent may deliberately instill extremely negative views of homosexuality into a child is not thought of as a valid justification for precluding custody. The possibility that a potentially gay or lesbian child may be forced to live in such a hostile, homophobic environment is not considered either.

The general assumption, then, is that it is in the best interests of the child to be raised in a heterosexual environment. The sexual orientation of the home environment is always perceived of in terms of the sexual orientation of the parents. Courts are grossly inept in asking whether, in fact, a homosexual environment would be preferable for certain children—the child is always assumed to be heterosexual; and the preferable household is always heterosexual. However, based on this rationale, might it not be argued that a homosexual household is better for a homosexual child?<sup>97</sup> Again, because the child is assumed not to have a sexual orientation, and most definitely not to be homosexual, the question of the appropriate "sexual environment" is not even asked. The queer child simply does not exist.

## **B. Religion**

The law affords religion an enormous role in shaping the mind of a child. It accomplishes this in two ways: by giving parents unfettered control over the religious views inculcated into a child; and by allowing religion to have a strong influence on the education of a child. Furthermore, in both contexts, the forced exposure of children to religious messages can be (and very often are) relentlessly homophobic.

In the previous section's discussion, I addressed the "moral" issue raised by some parents who allege the homosexuality of the other parent: that is, from a moral perspective, should the child not be protected from the homosexuality of a parent? The courts condone a characterization of homosexuality in this manner, thus making

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<sup>94</sup> *Ibid.* at para. 15.

<sup>95</sup> *Ibid.*

<sup>96</sup> The divorce was granted and custody of the two girls awarded to the father.

<sup>97</sup> Analogies could be made to other situations of "best interests", where decisions are made ignoring vital factors such as the race of the child. See *e.g.* Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30 Osgoode Hall L.J. 375.

sexual orientation an issue of morality in a way that other prohibited grounds of discrimination are not. In fact, the courts rarely take issue with the characterization of homosexuality as a moral issue.<sup>98</sup> Thus, the identity of homosexual children is branded as a “moral” issue—a phenomenon that does not occur with respect to heterosexual children. “Moral” arguments about homosexuality are invariably made according to the moral precepts of a particular religion. Thus, queer equality rights issues, including those of queer children, are often argued in the context of (and sometimes judged against) a particular *religious* morality—a situation that has no parallel in Canadian cases dealing with equality rights as they pertain to race, sex, ethnicity, and so forth (and even religious equality itself).

In the context of parental custody suits, where homosexuality is involved, the religious views of one party to the litigation are accorded a great deal of judicial respect—even where such religious views diminish the value of the party who is homosexual, rendering him or her nothing more than “a homosexual”. In *P-B. (D.) v. P-B. (T.)*,<sup>99</sup> for example, where a gay father sought access to his children, the mother asserted that homosexual behavior was against her religion.<sup>100</sup> The judge, quite rightly, responded that the mother’s religious beliefs could not be used to bar either the father or his same-sex partner from access rights “where those rights [were] in the best interests of the children.”<sup>101</sup> However, the judge also thought it was relevant that there was no evidence of the father “doing anything deliberately for the purpose of undermining the children’s religious training.”<sup>102</sup> Thus, “doing anything deliberately” to undermine the child’s religious training was unacceptable; but it was apparently acceptable for straight parents to teach their children hateful ideas about gay parents’ “life-styles”. Likewise, it *is* acceptable for gay parents to be forbidden from “undermining” religious teaching. The court did not consider the possibility that the children were, themselves, homosexual. Furthermore, would the court be so accepting of one parent’s religious views if *that* parent claimed that he or she considered the race, or national origin, of the other parent’s new partner to be immoral according to his or her religion?

Religion can also be used as a device for instilling ideas of sexual normalcy in children. Those with strong religious views are able to use public institutions as a means of disseminating their (religious) views and attitudes about homosexuality. The most important recent case addressing this issue is *Chamberlain* (S.C.C.), where elected members of a school board denied an application to have books describing

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<sup>98</sup> See MacDougall, *Queer Judgments*, *supra* note 3 at 124; Bruce MacDougall, “The Separation of Church and Date: Destabilizing Traditional Religion-Based Legal Norms on Sexuality” (2003) 36 U.B.C. L. Rev. 1 at 11-15 [MacDougall, “The Separation of Church and Date”]. See generally Robert Wintemute, “Religion vs. Sexual Orientation: A Clash of Human Rights?” (2002) 1 J. L. & Equality 125.

<sup>99</sup> [1988] O.J. No. 2398 (Prov. Ct. (Fam. Div.)) (QL).

<sup>100</sup> *Ibid.* at para. 14, Felstiner J.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*



children with same-sex parents made available as school resources.<sup>103</sup> Specifically, the issue arose out of the *School Act* of British Columbia:

76(1) All schools and Provincial schools must be conducted on strictly secular and non-sectarian principles.

(2) The highest morality must be inculcated, but no religious dogma or creed is to be taught in a school or Provincial school.<sup>104</sup>

A resolution, referred to as the “Three Books Resolution”, was passed by the Board of Trustees of the Surrey School District (“Board”) on 24 April 1997, indicating that the Board did not approve of the use of three books, which depicted children with same-sex parents, as “Recommended Learning Resources”.<sup>105</sup> The issue arose against a background of considerable public acrimony in Surrey, as one side was driven by religious views. For example, the trial judge noted that there was evidence “that at least one trustee who voted for the motion, ... [had] campaigned for several years to promote a greater role for religion in governance of the community, including on the issue of homosexuality.”<sup>106</sup> The court concluded that the Board had acted inappropriately; and the majority of the Supreme Court of Canada upheld the trial judge’s finding. Of importance to the judges at the various court levels was the role of parents in the education process, particularly when those parents have strong religious views. McLachlin C.J. acknowledged that parents have an important role to play in school administration; however, she cautioned that although parental involvement was important, it could not come at the expense of respect for the values and practices of all members of the school community. She stated:

The requirement of secularism in s. 76 of the *School Act*, the emphasis on tolerance in the Preamble, and the insistence of the curriculum on increasing awareness of a broad array of family types, all show, in my view, that parental concerns must be accommodated in a way that respects diversity. Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference.<sup>107</sup>

Unresolved, however, is the issue of whether legislation could withstand constitutional scrutiny if it were drafted so as to allow parents a far greater role in, say, the early stages of curriculum development. Or, could the legislature simply defer important areas of education and its administration to parents’ groups so as to avoid Charter requirements? In *Chamberlain*, Gonthier J. in his dissent at the Supreme

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<sup>103</sup> *Chamberlain* (S.C.C.), *supra* note 7.

<sup>104</sup> *School Act*, R.S.B.C. 1996, c. 412.

<sup>105</sup> The Board issued no prohibition on the three books being available as library resources. The difference between a recommended learning resource and a library resource seemed to be that the former “is relevant to the learning outcomes and content of the course or courses” whereas the latter is intended to be merely “appropriate for the curriculum” (*Chamberlain* (C.A.), *supra* note 8 at para 52).

<sup>106</sup> *Chamberlain v. Surrey School District No. 36* (1998), 168 D.L.R. (4th) 222 at para. 94, 60 B.C.L.R. (3d) 311, [1998] B.C.J. No. 2923 (S.C.) (QL).

<sup>107</sup> *Chamberlain* (S.C.C.), *supra* note 7 at para. 33.

Court level certainly thought it was appropriate for parents to have a determinative role in children's education—even if that meant the imposition of specific views on the whole academic system. In stressing the decisive role that parents should play in the education of children, he implied that the interests of minorities could be overridden where such interests ran contrary to the beliefs of parents. He went on to say that in educating children, parents play a primary role while the state plays a secondary role.<sup>108</sup> Parents, he said, have “the right to bring up and educate [their] children in line with [their] conscientious belief[s] ...”<sup>109</sup>

More obvious instances of religious beliefs dictating heterosexual normalcy can be seen in the context of denominational schools, where the underlying denomination inculcates views hostile to homosexuality.<sup>110</sup> In some jurisdictions, these denominational schools are supported by the state. Recently, in *Hall*, the conflict between constitutional guarantees of freedom of religion versus that of non-discrimination based on sexual orientation have been brought into sharp focus.<sup>111</sup> The case arose out of the desire of Marc Hall, a student attending a Roman Catholic school in Ontario, to take his boyfriend, as his date, to his high school prom. Hall had been attending that school, and other publicly-funded Catholic schools, since he first started school.<sup>112</sup> The principal of the school in question denied Hall permission to attend the prom with his boyfriend. His reasoning was that “interaction at a prom between romantic partners is a form of sexual activity and that, if permission were granted to Mr. Hall to attend the prom with his boyfriend as a same-sex couple, this would be seen both as an endorsement and condonation of conduct which is contrary to Catholic church teachings.”<sup>113</sup> The court noted that the Roman Catholic Church's Catechism “declares that homosexuality is contrary to natural law and can under no circumstances be approved.”<sup>114</sup> The Catechism states: “homosexual acts are intrinsically disordered.”<sup>115</sup> The school board refused to reverse the principal's decision. Thereupon, Hall sought an interlocutory injunction restraining the defendants from preventing his attendance at the prom with his boyfriend. At the eleventh hour, just before the prom was to begin, MacKinnon J. granted Hall the injunction.

Despite the favourable result of the granting of the injunction, MacKinnon J. remarked that “[t]he Board could have counselled Marc on his Church's teachings

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<sup>108</sup> *Ibid.* at para. 102.

<sup>109</sup> *Ibid.* at para. 107.

<sup>110</sup> See Hilary M.G. Paterson, “The Justifiability of Biblically Based Discrimination: Can Private Christian Schools Legally Refuse to Employ Gay Teachers?” (2001) 59 U.T. Fac. L. Rev. 59.

<sup>111</sup> MacDougall, “Separation of Church and State”, *supra* note 98 at 1.

<sup>112</sup> Catholic schools in Ontario are financed through the public purse because of their special status under section 93 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>113</sup> *Hall*, *supra* note 4 at para. 4.

<sup>114</sup> *Ibid.* at para. 23.

<sup>115</sup> *Ibid.*

about the sinful nature of all premarital sexual activity (heterosexual or homosexual) and about the sinful nature of homosexual genital contact.”<sup>116</sup> Surely, the judge was acutely aware of the despair many homosexual youth face. Nevertheless, the judicial sentiment was that Hall’s school could teach him, unconstrained, about the evils of acting on his sexual orientation. I have argued elsewhere that in teaching courses such as literature, biology, physical education, and in student activities where the core subject matter is not religious, a (religious) school is exercising a governmental function, and thus, the Charter should be applicable.<sup>117</sup> A comparison should be drawn between the *Hall* situation and one where the issue was not sexual orientation, but sex, race, or ethnic background. A particular religion could quite conceivably teach that women are inferior or that black people should be kept separate from others. But what if followers of that religion wished to operate a state-accredited educational institution? It may be true that such followers simply would not receive state support.<sup>118</sup> However, more to the point is the fact that a court would surely be concerned, at least in part, with the invidious position in which a female or black student might be put if such views were taught as an ordinary part of the curriculum. In *Hall*, however, even though it was clear that Hall was gay, the court was not compelled to address the potential negative consequences of a school teaching anti-homosexual sentiment where homosexual students were clearly present. Thus, religion and religious teachings are often used as a sound justification for ignoring homosexual children.

### C. Education

Aside from the specific issue of religious beliefs influencing thoughts on homosexuality in education, the education system is notorious for its heterocentricity.<sup>119</sup> It is difficult to argue with the proposition that over the years, the education system (along with the mass media) has become ever more important in shaping the views of youth. At the same time, students in schools have little voice in how education is provided to them.<sup>120</sup> Education and its institutions are permeated with adult voices and adult perspectives.

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<sup>116</sup> *Ibid.* at para. 49.

<sup>117</sup> MacDougall, “The Separation of Church and State”, *supra* note 98 at 21.

<sup>118</sup> See L’Heureux-Dubé J.’s (dissenting) US race analogy in *Trinity Western*, *supra* note 7 at paras. 70-71.

<sup>119</sup> See Gerald Unks, “Thinking About the Gay Teen” in Unks, *supra* note 2, 3 at 5; Margot Francis, “On the Myth of Sexual Orientation: Field Notes from the Personal, Pedagogical, and Historical Discourses of Identity” in Janice L. Ristock & Catherine G. Taylor, eds., *Inside the Academy and Out: Lesbian/Gay/Queer Studies and Social Action* (Toronto: University of Toronto Press, 1998) 72 at 75; Epstein & Johnson, *supra* note 15 at 128; William P. Norris, “Liberal Attitudes and Homophobic Acts: The Paradoxes of Homosexual Experience in a Liberal Institution” in Karen M. Harbeck, ed., *Coming Out of the Classroom Closet: Gay and Lesbian Students, Teachers, and Curricula* (New York: Harrington Park Press, 1992) 81.

<sup>120</sup> See Paul Meredith, “Children’s Rights and Education” in Fionda, *supra* note 16, 203 at 204.

The education system has not always been successful at creating a comfortable “space” for young people who are, or think they are, queer.<sup>121</sup> Education systems have put up barriers to queer content in schools, and such barriers maintain an atmosphere of hostility, or at best, indifference to the “other-than-heterosexual”.<sup>122</sup> In recent cases addressing homosexual issues in the education context, there has been little progress. In fact, one may well wonder how a gay or lesbian student might respond to the mostly negative messages conveyed by judges as to the relative value of being gay as compared to heterosexual.

Until *Chamberlain* (S.C.C.), very little case law directly addressed the issue of whether it was appropriate to exclude (positive) material about homosexuality from school curricula. Mostly, the decision to include such material into the curriculum was left to parents’ groups, and even now, after *Chamberlain* (S.C.C.), parents’ groups play a large role.<sup>123</sup> In one instance in the late 1980s, a parents’ group in Prince George succeeded in ensuring that a book, called *Boys and Sex*, was banned from the senior secondary school library in part because it “was inappropriate” in discussing homosexuality, among other things.<sup>124</sup> The parents feared that the book would “undermine children’s faith in both their parents and in religion.”<sup>125</sup>

In *Chamberlain* (S.C.C.), where the books were far more mainstream than in the Prince George case, the ultimate result was more inclusive of homosexuality. As mentioned above, however, the Supreme Court’s decision to include the materials was based on the wording of the *School Act* of British Columbia<sup>126</sup> and *not* on any general constitutional principle that could stand to protect gays and lesbians in other

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<sup>121</sup> The following policy was in place in Britain from 1987-1994:

There is no place in any school in any circumstances for teaching which advocates homosexual behaviour, which presents it as the “norm”, or which encourages homosexual experimentation by pupils. Indeed, encouraging or procuring homosexual acts by pupils who are under the age of consent is a criminal offence. It must also be recognised that for many people, including members of various religious faiths, homosexual practice is not morally acceptable, and deep offence may be caused to them if the subject is not handled with sensitivity by teachers if discussed in the classroom (Department of Education and Science Circular 11/87, *Sex Education at School*, at para. 22, as cited in Meredith, *ibid.* at 214).

<sup>122</sup> The socializing impact of schools on sexuality, especially with reference to racial minorities, is discussed in Epstein & Johnson, *supra* note 15 at 108-29.

<sup>123</sup> One interesting approach to achieve different results here would be to consider the issue from the perspective of the child using the *Convention on the Rights of the Child*, *supra* note 28. See Margaret Ann Wilkinson & Lynne (E.F.) McKechnie, “Implementing the Information Rights of Canadian Children” (2002/2003) 20 Can. Fam. L. Q. 429.

<sup>124</sup> See *Serup v. School District No. 57* (1987), 39 D.L.R. (4th) 754, 14 B.C.L.R. (2d) 393 (S.C.). See also Terri A. Sussel, *Controversies in School Law: A Handbook for Educational Administrators* (Vancouver: EduServ, 1990) at 89-90. The book also discussed “masturbation, premarital sex, sex games among pre-pubescent children, and sex with animals” (at 89).

<sup>125</sup> Sussel, *ibid.*

<sup>126</sup> *Supra* note 104.

legislative circumstances. Furthermore, as noted, the judges failed to show any concern for, or even awareness of, gay and lesbian or other queer youth in the schools. Rather, the discussion focused on adults: the books in question addressed homosexual adults; and the rights adjudicated upon were adults' rights. Further, adults brought the legal challenge to the Board's actions.

Importantly though, even those adults who brought the challenge forward were not treated receptively by the court. At the Court of Appeal, the motives of those who sought to include gay and lesbian material in the curriculum were cast in a dubious light. The court rendered a thinly-veiled critique of these homosexual rights advocates for choosing the particular situation in question to raise rights issues. Specifically, Mackenzie J.A. questioned the motives of those who argued for the inclusion of the three books as classroom resources. He simply could not accept that the initiative of the petitioners was "aimed only at demonstrating the presence of nurturing values in alternative families generally."<sup>127</sup> Instead, he believed that "[t]he three books in issue were selected for their sexual orientation dimension"; and further, that the children were simply a means of causing the books to "come to the attention of parents who would object to the sexual orientation dimension as morally offensive."<sup>128</sup>

As I have said elsewhere in the context of this case:

As a result, even today, the public school curriculum is riddled with hetero-erotic messages for children, a situation that is simply taken for granted. Furthermore, while the discourse of rights advocates is apparent (and "controversial"), the discourse of those who advocate tradition is often in a code that is so familiar that those (like the judge) do not take notice of it, though its meaning is clearly exclusionary of homosexuals. So, the vocabulary of morality, children, parental authority, community, values, discipline and even education is usually intended, albeit sometimes unconsciously, to convey a particular *heterosexual* meaning and context.<sup>129</sup>

Within the education context, the invisibility of queer children and their concerns is even more apparent in *Trinity Western*—a case involving a university that "served the needs of the whole Christian community."<sup>130</sup> In this case, the British Columbia College of Teachers ("B.C.C.T.") refused to accredit the teacher education program of the university because, in the opinion of the B.C.C.T., the proposed program was discriminatory and contrary to public policy as graduates were likely to be biased when dealing with homosexual students.<sup>131</sup> The B.C.C.T. argued that students at the

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<sup>127</sup> *Chamberlain (C.A.)*, *supra* note 8 at para. 59.

<sup>128</sup> *Ibid.*

<sup>129</sup> MacDougall, "A Respectful Distance", *supra* note 11 at 535-36.

<sup>130</sup> *Trinity Western*, *supra* note 7 at para. 3 (according to Trinity Western University's January 1995 application to the B.C.C.T. for approval of its revised teacher training program).

<sup>131</sup> The B.C.C.T. is empowered under section 4 of the *Teaching Profession Act* to

[E]stablish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold

university, including those wanting to be teachers, were required to (and did) subscribe, on admission, to a code of conduct (a “Community Standards” document). Part of the agreement included the obligation to refrain from homosexual behaviour. This requirement was found in a paragraph that read:

REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED.  
These include but are not limited to drunkenness, ... all forms of dishonesty including cheating and stealing, ... involvement in the occult ... and sexual sins including viewing of pornography, premarital sex, adultery, and homosexual behaviour ... [biblical references omitted].<sup>132</sup> Faculty and staff were required to sign a similar document. The BCCT refused to accredit graduates from Trinity Western University unless they had taken another year of studies at Simon Fraser University.

The decision of the B.C.C.T. was upheld on appeal to the college’s council, but was overturned by the British Columbia Supreme Court. At the British Columbia Court of Appeal, the trial judge’s decision was affirmed on the basis that there was no reasonable foundation for the B.C.C.T.’s finding of discrimination.<sup>133</sup> The majority of the Supreme Court of Canada upheld that decision on appeal, with L’Heureux-Dubé J. being the sole dissenter. What is perhaps most striking from these decisions of the various levels of court is that, with the exception of L’Heureux-Dubé J., the concerns and perspectives of gay and lesbian youth were not canvassed. Adult perspectives and attitudes of adults, including homosexual adults, were addressed; but the queer *youth* perspective was invisible.

The majority decision in *Trinity Western* protected religious freedom, even where that meant pardoning the discriminatory acts of particular religious individuals entering the public arena as teachers. The majority accomplished this by taking an

certificates of qualification and applicants for membership and, ... to encourage the professional interest of its members ...” (R.S.B.C. 1996, c. 449).

This was the reference to the public interest that the B.C.C.T. invoked as justification for considering the Trinity Western admissions policy in deciding on the certification of its teacher education programme: “The BCCT argue[d] that teaching programs must be offered in an environment that reflects human rights values and that those values can be used as a guide in the assessment of the impact of discriminatory practices on pedagogy” (*Trinity Western*, *supra* note 7 at para. 11). The B.C.C.T. required graduates of Trinity Western to do a year of study at Simon Fraser University in order to consider them for qualification as teachers.

<sup>132</sup> *Trinity Western University v. College of Teachers (British Columbia)* (1997), 41 B.C.L.R. (3d) 158 at para. 13, 47 C.R.R. (2d) 155 (S.C.).

<sup>133</sup> At the British Columbia Court of Appeal level, Rowles J.A., dissenting, said:

The condemnation of homosexual behaviour in the Community Standards is capable of discriminating against gays and lesbians in two ways:

- 1) through the exclusion of gay and lesbian students and faculty;
- 2) through the declaration that homosexual behaviour is biblically condemned and the requirement that faculty accept this statement as a fundamental article of faith (*Trinity Western University v. British Columbia College of Teachers* (1998), 169 D.L.R. (4th) 234 at para. 220, 59 B.C.L.R. (3d) 241 (C.A.)).

extremely narrow view of what constitutes an individual “acting on belief”. Iacobucci and Bastarache JJ. said:

[T]he proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU [Trinity Western University] fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.<sup>134</sup>

The majority did not accept that the actual act of signing the document was a homophobic act. Instead, the Court stated, “While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully.”<sup>135</sup>

The majority judges did not ask how homosexual teachers or students would feel if they knew that a colleague had voluntarily signed a document attesting to the fact that their actions, and therefore they, are to be biblically condemned. Anybody signing such a document was, in effect, agreeing that homosexuals ought to be equated with cheaters, drunks, and thieves. This concern was raised by L’Heureux-Dubé J. in dissent. She said, in a rare example of judicial awareness of gay and lesbian youth:

Evidence shows that there is an acute need for improvement in the experiences of homosexual and bisexual students in Canadian classrooms. ...

The B.C. report also showed that 37 percent of the gay and lesbian youth questioned feel like outsiders at school. *None* of the youth gave high ratings to the quality of his or her family relationships. Almost 40 percent have dramatically low self-esteem. Two-thirds often hear homophobic remarks made by other students at school. Nearly one in five had been physically assaulted at school in the past year.<sup>136</sup>

L’Heureux-Dubé J. at least attempted to view the situation from the perspective of a queer student:

Without the existence of supportive classroom environments, homosexual and bisexual students will be forced to remain invisible and reluctant to approach their teachers. They will be victims of identity erasure, forced to endure what Professor Kathleen Lahey has called “a ‘spiral of silence’ in which lesbians and gays modify their behaviour to avoid the impact of prejudice”.<sup>137</sup>

Such views are, however, distinctly unusual from the bench. Much more common is the attitude that disputes about homosexuality in schools are disputes among adults

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<sup>134</sup> *Trinity Western*, *supra* note 7 at para. 36.

<sup>135</sup> *Trinity Western*, *ibid.* at para. 35 (Iacobucci and Bastarache JJ.).

<sup>136</sup> *Ibid.* at paras. 82, 84.

<sup>137</sup> *Ibid.* at para. 91 (citing *Brillinger v. Brockie* (2000), 37 C.H.R.R. D/15 at para. 35 (Evidence, Prof. Kathleen Lahey)).

about adult issues. A further example of this appears in the case of a Manitoba teacher who wished to, but was denied, permission to reveal her sexual orientation to her students in grades seven and eight.<sup>138</sup> She had apparently observed prejudice against and intolerance of homosexuals in the classroom. She therefore thought her disclosure might force students “to confront the truth that homosexuals were not individuals deserving of discrimination.”<sup>139</sup> The denial of permission was justified by the assistant superintendent on the basis it was thought “inappropriate for a teacher, in the course of the objective presentation of any instructional material, to declare their own sexual orientation, be they heterosexual or homosexual.”<sup>140</sup> This case is interesting because it reveals how a school board was uncomfortable with allowing children to confront homosexuality; but also how the school board was blind to the fact that heterosexual teachers reveal their heterosexuality to students all the time. These disclosures are never considered problematic. At the Court of Appeal, Twaddle J.A. stated:

[I]t might be reasonable to prohibit a teacher from discussing intimate details of his or her sex life—or even from disclosing the teacher’s sexual orientation—as a means of encouraging students to choose the teacher’s lifestyle, but unreasonable to prohibit a teacher from using the fact of his or her homosexuality as a means of combatting intolerance of homosexuals.<sup>141</sup>

Inherent in this view is the idea that adult homosexuality is contagious to children and that homosexuality is something students may study as an outside phenomenon. That children might see *themselves*, personally, as homosexual is largely inconceivable. Legally, the child is almost always an outsider on matters of sexual orientation.

#### **D. Harassment and Verbal Abuse**

A fourth device to consider in the context of normalization is harassment and verbal abuse. This device is, undoubtedly, the most direct form of marginalization that a queer child will experience. Undoubtedly, it is the biggest factor in conditioning people generally, from an early age, to associate non-heterosexuality with negativity. Hostility and abuse is taught to be an appropriate and justifiable response. This device can be termed an institution because harassment and abuse has become an almost accepted part of our society, even within the running of public institutions. Agencies of law and justice do little to attack really the prevalence of harassment and abuse.

Children are taught from a young age to associate homosexuality with negativity and denigration. Attempts to humiliate a person by calling him “homosexual” begin early in life. *R. v. Homma* illustrates the fear many children experience of homosexual

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<sup>138</sup> *Assiniboine South Teachers’ Assn. of the Manitoba Teachers’ Society v. Assiniboine South School Division No. 3* (1998), 163 D.L.R. (4th) 343, 128 Man. R. (2d) 231 (Q.B.); appeal allowed 187 D.L.R. (4th) 385, [2000] 8 W.W.R. 1 [Assiniboine (C.A.) cited to D.L.R.].

<sup>139</sup> *Assiniboine* (C.A.), *ibid.* at para. 2.

<sup>140</sup> *Ibid.* at para. 3.

<sup>141</sup> *Ibid.* at para. 32.



identification in schools.<sup>142</sup> In that case, two boys, who were being sexually abused by their male teacher, did not report the incidents. As Taggart J.A. noted, “The two boys did not make complaints of the conduct of the appellant because they were embarrassed. They intimated that they might be considered by their peers to be homosexuals.”<sup>143</sup> This fear by children of being ridiculed as homosexual is a response that children have learned from adults. Often, it is taught in the family context, and particularly in the context of marital breakdown and custody disputes. Some of these situations are bizarre. In one case, a mother and father were in a dispute over the father’s access to the children.<sup>144</sup> The father was both abusive and alcoholic and had previously sexually assaulted a teenage boy. During one of the father’s last overnight access weekends, he made allegations that the mother’s boyfriend had molested their sons.<sup>145</sup> When the mother came to collect her children, “in front of her sons and the accompanying police, [the father said] ‘Go play with your homosexual boyfriend.’”<sup>146</sup> The father did not perceive himself as homosexual. He had little to be proud of; but he still felt he could “elevate” himself above the mother’s “boyfriend” by belittling him as “homosexual”.<sup>147</sup>

Adults can use abusive terms for homosexuals around children in a deliberate attempt to hurt children. Adults play on the humiliation they know the child has been taught to feel and associate with homosexuality. In *R. v. Hawkins*, the accused was convicted of the sexual assault of a fourteen-year-old girl.<sup>148</sup> Part of the assault involved a lesbian fantasy of the accused. As part of the girl’s harrowing experience, the accused asked the girl whether her friends were lesbians. When she responded in the negative, the accused appeared to get angry.<sup>149</sup> In this case, the adult, and the violence he committed, conveyed the message that the lesbian is both a fantasy object for men and a term of abuse. In another case, the boyfriend of a mother “was verbally abusive, calling the girls sluts, tramps and lazy and calling the boys lazy and queer.”<sup>150</sup> In exposing children to this type of homophobia, heterosexual normalization is strengthened. The bullying of queer children at school is probably the first encounter many children experience with respect to their sexual feelings and society. Eric Rofes has written:

As I got older, and fully entered the society of children, I met the key enforcer of social roles among children: the bully. The bully was the boy who defined me as queer to my peers. If they had not already noticed, he pointed

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<sup>142</sup> [1989] B.C.J. No. 793 (C.A.) (QL).

<sup>143</sup> *Ibid.* at para. 10.

<sup>144</sup> *R.R.T. v. G.T.*, [1994] O.J. No. 2453 (Prov. Div.) (QL). See also *Children’s Aid Society of the Regional Municipality of Waterloo v. R. (T.)*, [1990] O.J. No. 766 (Prov. Ct. (Fam. Div.)) (QL).

<sup>145</sup> *Ibid.* at para. 18.

<sup>146</sup> *Ibid.* at para. 21.

<sup>147</sup> See MacDougall, *Queer Judgments*, *supra* note 3 at 141.

<sup>148</sup> *R. v. Hawkins*, [1986] B.C.J. No. 1115 (C.A.) (QL).

<sup>149</sup> *Ibid.* at para. 5, Esson J.A.

<sup>150</sup> *R. v. N.(R.K.)* (1997), 32 O.R. (3d) 537 at 540 (C.A.).

out my non-conformity. He was ever-present throughout my childhood, like an evil spirit entering bodies on different occasions. He haunted me at school, throughout my neighborhood, during synagogue, even at birthday parties. In any group of three or more boys, the bully was present.<sup>151</sup>

*Jubran v. Board of Trustees* provides a stark reminder of the pervasiveness of harassment and abuse in public institutions. At first instance, the British Columbia Human Rights Tribunal awarded damages to a high school student who did *not* identify as gay despite homophobic epithets by other students.<sup>152</sup> The Supreme Court of British Columbia agreed that “the heart of the attack on Jubran drew on terms that come quickly to the lips of homophobes.”<sup>153</sup> It was found that Jubran was not a homosexual and that the students who attacked him did not believe him to be a homosexual. The court therefore found that Jubran could not be discriminated against—simply, he was not gay. In spite of this result, the case demonstrates complete judicial ignorance of the hostility many gay and lesbian children do face. Would a child who actually *is* gay, self-identify as such before a tribunal or court that is blind to homosexual issues? Is not the creation of a homophobic environment, whereby any child (whether gay or lesbian) might suffer from oppression, enough to motivate a court to act? William Black has said:

The fact that Mr. Jubran was a teenager makes it more likely that he would internalize some of the sting of the homophobic taunts even if he identified himself as heterosexual. Teenage years are a time of coming to terms with one’s sexuality. Doubts and anxieties are not at all uncommon. Even a teenager who clearly identifies himself or herself as heterosexual may have sometimes had feelings inconsistent with that identity and may thus be susceptible to accusations of being gay or lesbian.<sup>154</sup>

The court’s tolerance in *Jubran* of an anti-gay environment was similarly present in the case of *Culhane v. Rawlings*.<sup>155</sup> In this case, a plaintiff alleged that the defendant had defamed him at work by calling him “a son of a bitch and a male person who performed homosexual acts.”<sup>156</sup> In response, McCart C.J. said:

If this was all that the defendant said to the plaintiff, I would have no hesitation in acceding to the defendant’s request that I strike out the statement of claim as disclosing no reasonable cause of action. If I had one dollar for everytime I heard either of those expressions during some three years in the armed forces and at summer jobs while attending university and law school, I would have been financially independent by the time I was 25 years old. Their use is so

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<sup>151</sup> Rofes, *supra* note 14 at 79-80.

<sup>152</sup> *Jubran v. Board of Trustees*, [2002] C.H.R.D. 10, 2002 BCHRT 10.

<sup>153</sup> *Jubran*, *supra* note 5 at para. 6.

<sup>154</sup> William Black, “Grading Human Rights in the Schoolyard: *Jubran v. Board of Trustees*” (2003) 36 U.B.C. L. Rev. 45 at 52 [footnote omitted].

<sup>155</sup> *Ibid.* at para. 2.

<sup>156</sup> [1987] O.J. No. 1562 (Dist. Ct.) (QL).

commonplace as to be virtually incapable of constituting defamation. In some perverse way they seem to be used as expressions of friendship.<sup>157</sup>

Furthermore, the above-mentioned examples have been limited to verbal abuse in the context of children. Aggressive and very public homophobic pronouncements by various religious and political leaders must surely have a deeper impact on children at a broader level. What of children who know, as might be the case in the *Trinity Western* situation, that their very own teachers have signed declarations that are hostile to homosexuals? When queer children see their heterosexual classmates exploring their sexuality with the support of their schools, parents, and churches, how are they to feel when they are told, at best, that they will be treated with sympathy, but that under no circumstances should they explore their tendencies toward homosexuality? As L'Heureux-Dubé J. stated in *Trinity Western*, the status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected:

I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the “sexual sin” of “homosexual behaviour” from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. But, in the words of the intervener EGALÉ, “[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation” (factum, at para. 34).<sup>158</sup>

## Conclusion

Growing up as a queer child can be difficult. One writer has said, “The world of children was a cruel place for me.”<sup>159</sup> It is true that children, including queer children, are bound to be raised in a predominantly heterosexual environment. It is also true that “it is a fundamental premise of our society that coercive government interference in family life should be kept to a minimum.”<sup>160</sup> However, at times, courts *do* get actively involved in family situations involving children. Is it too much to expect courts to be aware of the distinct possibility that the children in these cases are not (always) heterosexual? As William Black said in the context of *Jubran* case:

In a school of over 1,300 students, it seems clear that there must have been a significant number of other students who either identified themselves as gay or lesbian, at least internally, or who had doubts about their sexuality. There was evidence in the *Jubran* case concerning a survey of male students showing

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<sup>157</sup> *Ibid.* On the tolerance by teachers of homophobic slurs as opposed to racial slurs, see James T. Sears, “Educators, Homosexuality, and Homosexual Students: Are Personal Feelings Related to Professional Beliefs?” in Harbeck, *supra* note 119, 29 at 35.

<sup>158</sup> *Trinity Western*, *supra* note 7 at para. 69.

<sup>159</sup> Rofes, *supra* note 14 at 80.

<sup>160</sup> Bala, *supra* note 13 at 1.

that seven percent of male students and eight percent of female students did not think of themselves as heterosexual. [footnote omitted]<sup>161</sup>

Some courts are beginning to see the queer child. This recognition includes an awareness of some of the damaging consequences that can result from ostracizing queer children. In *Hall*, Mackinnon J. noted: “I have already observed that the effects of this sort of exclusion are pervasive, serious and contribute to an atmosphere of self destructive behaviour among gay youth.”<sup>162</sup> And, in *Trinity Western*, L’Heureux-Dubé J. remarked: “The study found that 46 percent of the gay and lesbian youth had attempted suicide at least once. Their average age at the first suicide attempt was 13 years.”<sup>163</sup> While such recognition is important, it is also important for courts to realize that most gay and lesbian students are *not* suicidal but still need judicial recognition and support. A judicial recognition of the devices and institutions that have been used to perpetuate queer child invisibility would aid in creating a more normal environment for these young people, whose rights should not be dependent or constrained by the prejudices and preconceptions of the adults in their world.

Important, too, is to find a way for children themselves to be comfortable bringing these issues of sexual orientation in front of legal institutions. This process may involve a reassessment of the way in which such institutions operate, as has become established in other legal contexts involving children.<sup>164</sup> And, most especially, courts have to accept that queer children may not speak directly about issues relating to their sexuality in the same open and certain manner that an adult might discuss such issues. Courts have to improve at anticipating issues that affect queer children; this includes being sensitive to *potential* harm, as judges in child pornography cases exhibit toward children generally. The courts should not make the assumption that homosexuality, or other queer sexuality, is not an issue merely because the person, either in front of the court, or implicated in the case, has not reached the age of majority or consent. In the parlours of the law, queer children should be both seen and heard.

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<sup>161</sup> Black, *supra* note 154 at 54.

<sup>162</sup> *Hall*, *supra* note 4 at para. 56.

<sup>163</sup> *Trinity Western*, *supra* note 7 at para. 69.

<sup>164</sup> This is particularly true in the criminal procedure context. See Wendy van Tongeren Harvey & Paulah Edwards Dauns, *Sexual Offences Against Children and the Criminal Process*, 2d ed. (Toronto: Butterworths, 2001).