NOTES

THE CIVIL COMMITMENT OF STATE-DEPENDENT MINORS: RESONATING DISCOURSES THAT LEAVE HER HETEROSEXUALITY AND HIS HOMOSEXUALITY VULNERABLE TO SCRUTINY

MARIBEL MOREY*

When qualified mental health evaluators' recommendations for the involuntary civil commitment of state-dependent minors complement a state's judicially recognized interests in promoting heterosexual behavior among state-dependent minors while controlling state-dependent girls' heightened heterosexual behaviors, the courts are unlikely to serve as watchdogs of mental health evaluators' vast discretionary powers. The contemporary resonance between the courts' and the mental health community's discourses on adolescent sex facilitates the civil commitment of state-dependent heterosexual girls and nonheterosexual boys, solely on the basis of their sexual behaviors. This powerful resonance threatens the personal autonomy of healthy state-dependent heterosexual girls and nonheterosexual boys. In light of this threat, Morey proposes that before qualified evaluators can recommend adolescent wards of the state to psychiatric hospitals for sexualized behaviors, they should be required to express in writing how the adolescent's behavior is a direct symptom of an emotional disturbance from past sexual abuse. Otherwise, qualified evaluators' ability to rely on gender-based stereotypes of what constitutes appropriate or risky sexual behavior among state-dependent minors will remain largely unchecked.

 J.D., 2006, New York University School of Law; B.A., 2003, University of Notre Dame. A previous draft of this Note received the Leonard M. Henkin Prize from New York University School of Law. I would like to express my gratitude to Professors William E. Nelson, Carol Gilligan, David A.J. Richards, Martin Guggenheim, and Hendrik Hartog, who graciously gave of their time by offering helpful advice during the different stages of this project. As a NYU-University of Cambridge Mainzer Fellow in Gender Studies spending the lent term of 2006 at the University of Cambridge Centre for Gender Studies, I was able to meet Zeynep Gurtin-Broadbent and Irene Daly from the University of Cambridge Centre for Family Research, whose insightful comments helped direct my research of the DSM-IV. Special thanks to all those at the *New York University Law Review* who have worked endlessly on my Note, especially Antoine McNamara, Leslie O'Brien, Emily Bishop, Matthew Hanley, Delcianna Winders, and Michael Livermore. I am grateful to Melissa Buckner and Daleta Christensen from Lawyers for Children America, Inc., Miami office, for inspiring this project. The research for this Note began during the summer of 2004, when I was an Equal Justice America Fellow at the Miami office. I thank my family, especially Jorge, Daysi, and Anthony Morey, for their ongoing support.

INTRODUCTION

While the U.S. Supreme Court has limited the states' ability to control the sexual behaviors of consenting adults,[1] states continue to enjoy control over consenting minors' sexual behaviors, especially the sexual behaviors of minors in the state's care.[2] Contemporary minors in the state's care can find their sexual behaviors vulnerable to state scrutiny and can find themselves vulnerable to medical treatment for sexual behaviors that are not condoned by the courts' and the mental health community's complementary discourses on sex.[3]

The American Psychiatric Association (APA) and a prominent body of mental health literature suggest that state-dependent minors' sexual behaviors—including homosexuality and teenage pregnancy—can be appropriate proxies for diagnosing "one of the most frequently diagnosed conditions" in mental health facilities for minors: Conduct Disorder.[4] When determining state-dependent minors' suitability for placement at these facilities, mental health evaluators enjoy sufficient discretion to consider these minors' sexual behaviors.[5]

This Note explains that when mental health evaluators follow the suggestions of the APA and of this prominent body of mental health literature in analyzing minors' sexual behaviors during a diagnosis of

---

[1] The Court has emphasized the liberty of all adult men and women to partake in consensual sexual behaviors. *See* Lawrence v. Texas, 539 U.S. 558, 567 (2003) (acknowledging that adults may choose to engage in sexual relationships "in the confines of their homes and their own private lives and still retain their dignity as free persons").

[2] *See infra* Part IV.A–B (discussing Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804 (11th Cir. 2004) and Michael M. v. Superior Court, 450 U.S. 464 (1981)).

[3] In *The History of Sexuality*, French philosopher Michel Foucault explains the transformation of sex into discourse, writing that "[t]hrough the various discourses, legal sanctions against minor perversions were multiplied; sexual irregularity was annexed to mental illness . . . a norm of sexual development was defined and all the possible deviations were carefully described." 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 36 (Robert Hurley trans., Pantheon Books 1978) (1976). A discourse on sex gains power when both the legal and mental health communities define certain sexual behaviors as perversions. *See id.* at 36–49 (describing multiple loci of power). American legal history scholar William E. Nelson notes the cyclical movements in the law dealing with adult sexual behavior in twentieth-century United States, citing to Foucault to help explain the shifting focus of sex in the legal discourse of the 1940s. William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 277–79 (1993). Nelson finds Foucault's analysis on the discourse of sex relevant to the legal discourse on sex in mid-twentieth-century America, and Foucault's work continues to be relevant to the contemporary legal discourse on state-dependent minors' appropriate sexual behaviors.

[4] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 87–88 (4th ed. 1994) [hereinafter DSM-IV]; *see infra* Part II.A (discussing DSM-IV definition of Conduct Disorder).

[5] *See infra* Part III (discussing mental health evaluators' discretion in diagnosing mental disorders among state-dependent minors).

Conduct Disorder, they will focus on a girl's heightened heterosexual behavior and a boy's homosexual behavior.

Furthermore, I argue that state actors, including state courts and administrators,[6] are unlikely to serve as watchdogs when the mental health evaluators focus on these state-dependent minors' sexual behaviors.[7] Thus, heterosexual girls and nonheterosexual boys[8] in the state's care become vulnerable to involuntary civil commitment as "emotionally disturbed" minors diagnosed with Conduct Disorder.[9] This Note is not meant to be a general critique of the U.S. child custody system;[10] instead, I hope to illustrate how a continued discourse on sex plays a part in the civil commitment of wards.[11]

---

[6] In my analysis of the state as an institution of government, I focus specifically on the civil commitment proceedings of state-dependent minors in court and on the state actors, like state courts and administrators, who participate in these proceedings alongside mental health evaluators. The overall purpose of this Note is to explore the interaction between the state's legal discourse on sex and the mental health community's scientific discourse on sex.

[7] Regarding girls' heightened heterosexual behavior, see *Michael M.*, 450 U.S. at 470–71 (noting that teen pregnancies have several consequences for state). In *Michael M.*, the U.S. Supreme Court deemed preventing teenage pregnancies a legitimate state interest, *id.* at 472–73, and a state is thus entitled to treat girls' heightened heterosexual activity differently from boys' heightened heterosexual activity by punishing boys for statutory rape but not girls: "[Y]oung men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse." *Id.* at 471–73.

Regarding boys' heightened homosexual behavior, see *Lofton*, 358 F.3d at 818 (noting state interest in encouraging heterosexuality among adolescents). In *Lofton*, the Eleventh Circuit held that the State of Florida has a recognized interest in promoting heterosexuality among adopted children. *Id.* at 818–19. The court emphasized the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling," and upheld Florida's interest in "furthering the best interests of adopted children by placing them in families with married mothers and fathers." *Id.* at 818.

[8] I focus on sexually active heterosexual girls and sexually active nonheterosexual boys in the state's care. I shy away from labeling them "promiscuous heterosexual girls" and "homosexual boys" because, as adolescents, they are still experimenting with their sexual behaviors: Their adolescent sexual behaviors simply show that they are not conforming to the heterosexual model of appropriate sexual behaviors for girls and boys. Through their sexual behaviors, these girls exhibit "heterosexual" preferences and these boys exhibit "nonheterosexual" preferences. In *Michael M.* and in *Lofton*, courts and legislators have expressed a state interest in molding state-dependent minors' sexual behaviors. *See infra* Part IV (discussing how states have shown interest in promoting state-dependent minors' heterosexuality and in preventing pregnancies of state-dependent heterosexual girls).

[9] *See infra* Part II (exploring mental health discourse on inappropriate sexual behavior among minors with Conduct Disorder); *infra* Part IV (discussing legal discourse on regulating appropriate adolescent sexual behavior).

[10] For a general discussion of United States child welfare history, see MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 181–92 (2005) (narrating U.S. child welfare history from late-nineteenth-century to present).

[11] *See infra* Parts II, III (noting how minors' sexual behaviors play significant role in civil commitment process).

In my analysis of the civil commitment process of state-dependent minors in the United States, I focus on state-dependent minors in Florida.[12] For the purposes of this Note, Florida's civil commitment process for state-dependent minors should more or less represent the processes in other states. Civil commitment processes do vary state by state,[13] so further research should be dedicated to studying other states to see if similar problems exist.

Part I details the civil commitment process of state-dependent minors. Part II outlines the Diagnostic and Statistical Manual of Mental Disorders' definition of Conduct Disorder and then engages with the mental health community's discussion of Conduct Disorder among adolescent minors. Part III examines the role of individual qualified mental health evaluators in the civil commitment of state-dependent minors in Florida. Part IV explores the Florida courts' unlikely role as watchdog of the mental health evaluator's discretionary power during the diagnosis of Conduct Disorder among state-dependent heterosexual girls and nonheterosexual boys.

Finally, in Part V, I recommend that the contemporary American legal community dedicate further research, study, and scrutiny to the resonance between the courts' and the mental health community's discourses on state-dependent minors' sexual behaviors. Legal advocates should research the civil commitment process of state-dependent minors in their states, question the local mental health community's focus on these minors' sexual behaviors, and examine the appropriateness of the courts' role as watchdog of the mental health community's discretionary power.

---

[12] I became aware of a resonance between contemporary legal and mental health discourses on state-dependent adolescent sexual behaviors when I was an Equal Justice America Fellow at Lawyers for Children America, Inc. (LFCA) in Miami, Florida. In the summer of 2004, I reviewed mental health evaluators' recommendations of state-dependent minors to psychiatric wards and observed that mental health evaluators made mention of girls' heightened heterosexual behaviors and boys' homosexual behaviors to justify these minors' need for institutionalization.

[13] *See* Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 781–82 (1988) (noting that statutes governing civil commitment of minors vary from one state to another). Civil commitment processes also vary within states. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 590–95 (1979) (describing civil commitment processes at various state hospitals in Georgia).

I
CIVIL COMMITMENT OF STATE-DEPENDENT MINORS WITH CONDUCT DISORDER

Two of the primary legal systems of child care and control in the United States are the child welfare system and the mental health system.[14] This Part provides an overview of these systems within the context of the civil commitment of state-dependent minors.

A. State-Dependent Minors in the Child Welfare System

The child welfare system concerns itself with families where children have been neglected or abused.[15] Among other things, the child welfare system can remove neglected or abused children from their parents' custody.[16] After a court declares a child abused or neglected, it may call for the child to enter foster care for a period of time, generally beginning with a year.[17] At this point, the foster care agencies are in charge of deciding in which foster homes the children will be placed and are responsible for supervising their placement to make sure the children are safe.[18]

During this period of time, courts expect parents to address the problems that led to the child's removal from the home.[19] If parents do not, the temporary removal of their parental rights might become permanent.[20] In recent years, state child welfare agencies have increasingly used this extraordinary power to terminate parental rights.[21] When the parents' rights are permanently terminated, the state has custody of the child and acts in loco parentis.[22]

---

[14] *See* Weithorn, *supra* note 13, at 774 (noting that child welfare, juvenile justice, and mental health systems are three main legal systems of child care and control in United States).

[15] *Id.* at 777–78.

[16] *Id.* at 778.

[17] GUGGENHEIM, *supra* note 10, at 175.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 175–76 ("The power to terminate parental rights is less venerable, but it has become well-accepted that, in appropriate cases, states may sever all legal relationships between children and their birth families.").

[21] *Cf. id.* at 176 (noting that recently many have called for much more aggressive employment of power to terminate parental rights). "In the 1990s, a bipartisan effort that included President Clinton and the Moral Majority supported legislation enacted by Congress in 1997 to make termination of parental rights and adoption a significantly more prominent goal of child welfare than it has ever been in our history." *Id.*

[22] Parham v. J.R., 442 U.S. 584, 618–19 (1979). When a state acts in loco parentis, it is acting "in the place of a parent." BLACK'S LAW DICTIONARY 803 (8th ed. 2004); *see* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 809 (11th Cir. 2004) ("In formulating its adoption policies and procedures, the State of Florida acts in the protective and provisional role of *in loco parentis* for those children who, because of various circum-

When the state acts as the child's parent, it enjoys rights a parent would enjoy over his child. For example, the state's power over state-dependent minors in the mental health system may be consistent with the breadth of power parents enjoy over their own children's health care options.[23] Within the mental health system, the state, acting as parent, can seek mental hospitalization for its state-dependent minors.[24]

B. State-Dependent Minors in the Juvenile Mental Health System

The mental health system includes "a wide network of public and private inpatient, outpatient and 'intermediate' care resources (such as halfway houses and day hospitals)."[25] Specifically, state actors are increasingly using mental hospitals as a resource to regulate the behavior of troublesome youth.[26] In fact, Bernard Perlmutter and Carolyn Salisbury, leading legal scholars of and advocates for the Florida foster care community, observe that many of these troublesome youth are state-dependent minors.[27] Psychologist and law professor Lois Weithorn notes that "[b]etween the 1920s and the 1970s, admission rates of minors to mental hospitals increased more than eight-fold,"[28] and explains that this increase reflects the inappropriate psychiatric hospitalization of youth who are troublemakers but who are not "psychotic or seriously emotionally disturbed."[29] Because of this focus on "troublesome" minors, the mental health system currently plays an increasingly large role in the lives of state-dependent minors.

Even as these admission rates increase, the U.S. Supreme Court has been hesitant to prioritize a minor's substantive and procedural

---

stances, have become wards of the state."); GUGGENHEIM, *supra* note 10, at 246 ("[I]t is an odd form of progress that takes away parental control and gives it to the impersonal institution of state officials.").

23 *See Parham*, 442 U.S. at 619 (1979) (noting that, because state agency with custody of child in loco parentis has obligation to take into account best interests of child regarding decision to commit child to mental hospital, agency may speak for child, subject to limits controlling natural parents).

24 *See id.*

25 Weithorn, *supra* note 13, at 779.

26 *Id.* at 783–85, 788–92 (describing rising admission rates of juveniles to mental hospitals and noting that many juveniles in mental hospitals are troublemakers who do not suffer from severe mental illness).

27 Bernard P. Perlmutter & Carolyn S. Salisbury, *"Please Let Me Be Heard:" The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution*, 25 NOVA L. REV. 725, 733 (2001).

28 Weithorn, *supra* note 13, at 783.

29 *Id.* at 783–92 (noting that criteria used to guide decisions to admit minors to mental hospitals are overly broad). "[T]he behaviors that characterize about half of the patients in juvenile psychiatric units do not reflect severe or acute mental illness." *Id.* at 792.

due process rights in the context of civil commitment.[30] In *Parham v. J.R.*,[31] children committed in a Georgia state mental hospital instituted a class action against state mental health officials, claiming they had been deprived of their liberty without procedural due process.[32] In upholding Georgia's mental health statute permitting minors to be committed by parents and guardians, the Court found Georgia's medical fact-finding processes consistent with constitutional guarantees.[33] While the Court acknowledged a possible risk of error in parents' decisions to have their children civilly committed, it did not wish to encroach on the parent/child relationship.[34] The court assumed that minors' best interests are generally met by their parents.[35]

The Florida Supreme Court has not looked beyond the Supreme Court's decision in *Parham*. In *M.W. v. Davis*,[36] the Florida Supreme Court referred to the due process rights outlined in *Parham*,[37] refusing to go beyond the scope of *Parham* in determining the minors' constitutional due process rights.[38]

Both *Parham* and *M.W.* define the extent of Florida minors' constitutionally protected rights not to be involuntarily committed to a psychiatric ward. Under *Parham* and *M.W.*, minors enjoy no federally or state protected constitutional right to refuse involuntary treatment. In *M.W.*, the Florida Supreme Court does extend some procedural due process for those minors who refuse treatment but under the rationale that such an opportunity to be heard in a precommitment hearing, while not constitutionally required, is therapeutic for the minor.[39]

---

[30] *See id.* at 781 ("[T]he Court [has] held that parental discretion . . . [is] adequate to protect minors' constitutional interests.").

[31] 442 U.S. 584 (1979).

[32] *Id.* at 587–88. Appellees sought a declaratory judgment that Georgia's procedures for committing minors violated the Due Process Clause of the Fourteenth Amendment and requested an injunction against their future enforcement. *Id.* at 588. The district court held the procedures unconstitutional, noting that due process required at least the right to an adversarial hearing before an impartial tribunal. *Id.* at 588, 596–97. The Supreme Court reversed the district court's decision. *Id.* at 620–21.

[33] *Id.* at 620.

[34] *See id.* at 600–04 (balancing rights of child and parent and concluding that parents, not courts, should "retain a substantial, if not the dominant, role in the decision" to institutionalize their child).

[35] *Id.* at 602–03.

[36] 756 So. 2d 90 (Fla. 2000).

[37] *Id.* at 99. These rights include the following: "(1) an inquiry by a neutral factfinder, which is not required to be in the form of a judicial inquiry; (2) the inquiry must probe the child's background using all available resources; and (3) there must be periodic review by a neutral factfinder." *Id.*

[38] *See id.* (applying *Parham*).

[39] *See id.* at 108 ("Whether or not an evidentiary hearing is constitutionally mandated, our legal system at the very least should afford the child, through his or her attorney and/or

For minors who are not institutionalized, it is their parents who seek to involuntarily commit them.[40] In contrast, for state-dependent minors, it is the state acting in loco parentis that seeks involuntary commitment. At the end of the *Parham* opinion, the Court acknowledged that some minors are not in their parents' care but instead, in the state's care.[41] However, the Court found no need to distinguish between a parent and the state acting in loco parentis.[42] Instead, the Court held that the differences between state-requested and parent-requested commitment did not justify requiring different procedures at the time of the child's initial admission to the hospital.[43]

Although the *Parham* Court did not require different procedures for children in state custody than for those in their parents' custody, scholars argue that these two groups are not similarly situated in the civil commitment process.[44] State-dependent minors make up "[a] very large proportion of children in mental hospitals and other residential treatment facilities."[45] Compared to children in their parents' custody, wards of the state are more likely to be recommended to a state psychiatric hospital as "troublesome youth" with mild adolescent disorders such as "conduct disorder,"[46] and they are more likely to

---

guardian ad litem, a meaningful opportunity to be heard."). Instead of extending a minor's constitutional right to procedural or substantive due process beyond *Parham*, the Florida Supreme Court modified Juvenile Court Rule 8.350. *See In re* Amendment to the Rules of Juvenile Procedure, Fla. R. Juv. P. 8.350, 842 So. 2d 763, 764–66 (Fla. 2003) (securing minor's right to legal counsel when minor opposes mental health evaluator's suggestion for placement in psychiatric ward). I will discuss Rule 8.350 further in Part III.

[40] *See* Weithorn, *supra* note 13, at 780–81 (discussing extent of parental discretion to commit their children).

[41] Parham v. J.R., 442 U.S. 584, 617 (1979).

[42] *Id.* at 618. The Court explained:

> No one has questioned the validity of the statutory presumption that the State acts in the child's best interest. Nor could such a challenge be mounted on the record before us. There is no evidence that the State, acting as guardian, attempted to admit any child for reasons unrelated to the child's need for treatment. Indeed, neither the District Court nor the appellees have suggested that wards of the State should receive any constitutional treatment different from children with natural parents.

Id.

[43] *Id.* at 617–20.

[44] *See* GARY B. MELTON ET AL., NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 157–58 (1998) ("At a minimum, state social workers are apt to have the appearance of a conflict of interest."); Perlmutter & Salisbury, *supra* note 27, at 734 ("Sound policy reasons should prevent a state child welfare agency from being equated with a parent for the purpose of institutionalizing a child.").

[45] Perlmutter & Salisbury, *supra* note 27, at 733 (quoting MELTON, *supra* note 44, at 15–16) (internal quotation marks omitted).

[46] *See* Weithorn, *supra* note 13, at 789–92 (noting that more than half of juvenile psychiatric patients consist of troublemakers, children with relatively mild psychological problems, and children going through normal developmental changes, rather than juveniles suffering from serious mental illness or psychosis); *see also* Perlmutter & Salisbury, *supra*

remain in the hospital for a longer period of time.[47] Part II outlines the APA's description of Conduct Disorder and explores the relevance of state-dependent minors' sexual behaviors in the identification of this often diagnosed disorder.

II
CONDUCT DISORDER AND STATE-DEPENDENT MINORS' SEXUAL BEHAVIORS

Conduct Disorder is "one of the most frequently diagnosed conditions in outpatient and inpatient mental health facilities for children,"[48] and a large number of "troublesome youth" are diagnosed with Conduct Disorder.[49] Many of those defined as "troublesome youth" are state-dependent minors.[50] Putting together these different observations, it seems likely that many state-dependent minors are diagnosed with Conduct Disorder.

A. The DSM-IV Definition of Conduct Disorder

In the diagnosis of Conduct Disorder, the American mental health community relies on the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition* (DSM-IV).[51] The DSM-IV, published by the APA in 1994, is an "official nomenclature . . . used by psychiatrists, other physicians, psychologists, social workers, nurses, occupational and rehabilitation therapists, counselors, and other health and mental health professionals."[52] In Florida, the DSM-IV is the "generally accepted diagnostic manual of the mental health community,"[53] and during the mental health evaluation of minors, a DSM-IV diagnosis serves as one of the mentioned criteria for involuntary admission to a state inpatient psychiatric program.[54]

---

note 27, at 731 (describing growing concerns over "misuse of private mental hospitals to institutionalize 'trouble-some youth' diagnosed with relatively mild adolescent disorders").

47 Perlmutter & Salisbury, *supra* note 27, at 733.

48 DSM-IV, *supra* note 4, at 88.

49 Weithorn, *supra* note 13, at 789–92 (noting overuse and misuse of private mental hospitals to institutionalize "troublesome youth" diagnosed with relatively mild adolescent disorders such as "conduct disorder," "personality disorder," and "adjustment reaction").

50 Perlmutter & Salisbury, *supra* note 27, at 733.

51 FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 64 (2004) ("The gold standard for the diagnosis of serious sexual dysfunctions is the American Psychiatric Association's Diagnostic and Statistical Manual, most recently published in a revised fourth edition in 2000.").

52 DSM-IV, *supra* note 4, at xv.

53 Jill S. Levenson, *Reliability of Sexually Violent Predator Civil Commitment Criteria in Florida*, 28 LAW & HUM. BEHAV. 357, 358 (2004).

54 MARY I. ARMSTRONG ET AL., Evaluation of the State Inpatient Psychiatric Program (SIPP) for FY 2004-2005, at 1–2 (2005), *available at* http://ahca.myflorida.com/Medicaid/

In the DSM-IV, the APA explains that an adolescent's sexual behavior is relevant to a diagnosis of certain mental disorders, including Conduct Disorder.[55] The APA explains that "[t]he essential feature of Conduct Disorder is a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated."[56] If an adolescent is not treated for Conduct Disorder, it "may lead to school suspension or expulsion, problems in work adjustment, legal difficulties, sexually transmitted diseases, unplanned pregnancy, and physical injury from accidents or fights."[57] The APA notes that "Conduct Disorder is often associated with an early onset of sexual behavior, drinking, smoking, use of illegal substances, and reckless and risk-taking acts."[58] An adolescent minor's "early onset of sexual behavior" can thus indicate Conduct Disorder.[59]

B. Conduct Disorder Among State-Dependent Minors

In this section, I clarify the types of sexual behaviors that make adolescent state-dependent minors most vulnerable to diagnoses of Conduct Disorder. The textbook *Child Psychopathology*[60] provides some insight into what the DSM-IV means by "sexual behavior." Chapter Fourteen, "Child Maltreatment," explains that "[s]exualized behaviors [in children] include persistent sexualized behavior (e.g., touching, exposing self or other, excessive masturbation), age-inappropriate knowledge of sexual activity, and/or pronounced seductive or promiscuous behavior."[61] The text explains that adolescents with histories of child sexual abuse are at risk for Conduct Disorder.[62] Within mental health literature, there seems to be an unmentioned yet strong assumption that wards of the state have been sexually abused in some way, either by their original guardians or by one of the various foster family members with whom they have lived.[63] It is

---

quality_management/mrp/contracts/m0505/evaluation_of_SIPP_fy2004-2005_june_2005.pdf.

55 *See* DSM-IV, *supra* note 4, at 87–88 (describing features associated with Conduct Disorder).

56 *Id.* at 85.

57 *Id.* at 87.

58 *Id.*

59 *Id.*

60 CHILD PSYCHOPATHOLOGY (Eric J. Mash & Russell A. Barkley eds., 2d ed. 2003).

61 Christine Wekerle & David A. Wolfe, *Child Maltreatment*, *in* CHILD PSYCHOPATHOLOGY, *supra* note 60, at 632, 642.

62 DSM-IV, *supra* note 4, at 88.

63 *See, e.g.*, MADELYN FREUNDLICH, THE FUTURE OF ADOPTION FOR CHILDREN IN FOSTER CARE: DEMOGRAPHICS IN A CHANGING SOCIO-POLITICAL ENVIRONMENT (1998), http://www.adoptioninstitute.org/policy/polfos.html (explaining that minors most likely to

important to engage the mental health literature that associates certain types of adolescent sexual behavior with histories of sexual abuse, because these sexualized behaviors will make state-dependent minors vulnerable to diagnoses of Conduct Disorder and subsequent involuntary civil commitment.[64]

David Finkelhor explains that adolescent boys who have been sexually abused are more likely to express a sexual interest in minors and a desire to hurt others.[65] These boys also experience more confusion about their gender, sexual identity, and orientation:

> The clinical literature observes that boys are more likely than girls to act out in aggressive and antisocial ways as a result of abuse. Boys are also seen as having more concerns about gender role and sexual orientation because both victimization in general and homosexual victimization in particular are so stigmatizing to males.[66]

More recent scholarship echoes Finkelhor's concern for sexually abused boys' sexual identities. In *Child Sexual Abuse and Emotional and Behavioral Problems in Adolescence: Gender Differences*, the authors explain that "boys, unlike girls, have most commonly been abused by a member of their own sex. This implies that over and above the feelings of shame, guilt, abomination, and anger they share with female victims, male victims may experience confusion about their sexual identity and fears about homosexuality."[67]

Similar connections have been suggested between child abuse and teenage pregnancy: While victimized boys question their sexual identities, sexually abused girls become susceptible to teenage pregnancies. "As sexual abuse of female children and adolescent pregnancy have gained increasingly widespread public recognition as problems in our society, the relationship between early abuse and teenage pregnancy also has become a focus of attention."[68] Some

---

need foster care are also same minors most likely to experience sexual abuse); James A. Rosenthal et al., *A Descriptive Study of Child Abuse and Neglect in Out-of-Home Placement*, 15 CHILD ABUSE & NEGLECT 249, 252–60 (1991) (presenting and discussing findings of quantitative and qualitative study of incidents of various types of child abuse occurring in out-of-home placements in Colorado).

[64] *See infra* Part III (explaining great discretion qualified evaluators have in diagnosing Conduct Disorder and noting Florida evaluators' focus on sexual behaviors in recommending minors to psychiatric ward).

[65] David Finkelhor, *Early and Long-Term Effects of Child Sexual Abuse: An Update*, 21 PROF. PSYCHOL.: RES. & PRAC. 325, 326 (1990).

[66] David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, FUTURE CHILD., Summer–Autumn 1994, at 31, 47 (footnotes omitted).

[67] Nadia Garnefski & René F.W. Diekstra, *Child Sexual Abuse and Emotional and Behavioral Problems in Adolescence: Gender Differences*, 36 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 323, 328 (1997).

[68] Jacqueline L. Stock et al., *Adolescent Pregnancy and Sexual Risk-Taking Among Sexually Abused Girls*, 29 FAM. PLAN. PERSP. 200, 200 (1997). Another more recent publica-

believe that a possible consequence of child sexual abuse is adolescent promiscuity, or rather, a lack of chastity.[69] In citing ten studies that found that female victims of abuse were more likely to become pregnant relative to normal controls or to pregnancy estimates for the general population, Caroline Cinq-Mars and her coauthors write: "Although research evaluating the possible link between sexual abuse and teenage pregnancy has yielded mixed findings, the majority of these studies support this association."[70]

In this section, in order to highlight the sexual behaviors mental health evaluators focus on during the diagnosis of Conduct Disorder among state-dependent minors, I have investigated how a prominent body of the mental health literature associates certain adolescent sexual behaviors with an emotional disturbance from past sexual abuse. Finkelhor, among others, seems to suggest that the mental health community should focus on two forms of sexualized behaviors during the diagnosis of Conduct Disorder: adolescent girls' heightened heterosexual behaviors and adolescent boys' nonheterosexual behaviors.[71]

It is important to note that the mental health community *is* divided on the link between an adolescent's sexual behavior and a history of past sexual abuse. Some researchers consider the link between adolescent sexual behavior and past sexual abuse to be tenuous.[72] While victims of child sexual abuse might express their emotional disturbance later in adolescence through increased heterosexual activity or by partaking in homosexual activities, these researchers question whether adolescent sexual behavior is a good indicator of

---

tion, *Sexual At-Risk Behaviors of Sexually Abused Adolescent Girls*, begins with a similar focus:

> Over the past decade, growing attention has been devoted to the aftermath of childhood sexual abuse . . . . Given the possible negative consequences of certain sexual behaviors adopted by adolescents (e.g., sexual promiscuity and lack of condom use leading to sexually transmitted diseases), this aspect of the lives of sexually abused adolescent girls warrants careful examination.

Caroline Cinq-Mars et al., *Sexual At-Risk Behaviors of Sexually-Abused Adolescent Girls*, J. CHILD SEXUAL ABUSE, Number 2, 2003, at 1, 2.

[69] Chaste "generally implies a refraining from acts or even thoughts or desires that are not virginal or not sanctioned by marriage vows." MERRIAM-WEBSTER DICTIONARY 209 (11th ed. 2003). In common parlance, a girl lacks chastity when she engages in heightened heterosexual behavior.

[70] Cinq-Mars et al., *supra* note 68, at 4.

[71] *See supra* notes 65–68 and accompanying text (noting that, according to Finkelhor, among others, these two forms of sexualized behavior are symptomatic of past sexual abuse).

[72] *See, e.g.*, Stock et al., *supra* note 68, at 200 (citing studies of pregnant teenagers who report sexual abuse at rates similar to those reported by general population of women).

past sexual abuse.[73] Thus, by focusing on a state-dependent girl's heightened heterosexual behavior, a mental health evaluator might be relying on a poor indicator of a history of sexual abuse.[74]

Even so, it is quite possible that a large community of qualified evaluators within the American mental health community presume state-dependent minors to have been sexually abused and follow the guidance of a prominent mental health discourse explaining that sexually abused minors are likely to express their emotional distress through two specific types of sexualized behaviors: pronounced heterosexual behavior among girls and homosexual behavior among boys.[75] As such, a large community of qualified evaluators within the American mental health community could be focusing on boys' nonheterosexual and girls' heightened heterosexual behaviors during a diagnosis of Conduct Disorder among state-dependent minors.[76] Part III provides support for this hypothesis by detailing the qualified evaluator's role in the civil commitment process.

III
QUALIFIED EVALUATORS AND THE DIAGNOSIS OF CONDUCT DISORDER

The qualified evaluator plays a central role in the precommitment hearing of state-dependent minors. One Florida attorney who had recently represented a minor in a precommitment hearing explained:

---

[73] *Id.* Stock and coauthors have investigated the association between sexual abuse and propensity towards high-risk sexual behavior:

> First, although a history of sexual abuse was strongly associated with reported sexual intercourse, it was not predictive of pregnancy among girls who had engaged in sexual intercourse. Second, when high-risk sexual behavior, which is strongly associated with sexual abuse, was added to a multivariate model, the effect of sexual abuse on pregnancy was no longer significant.

Id. at 202.

[74] For example, researchers analyzed the impact of past sexual abuse on the sexual behavior of forty-one young mothers, noting: "When the young mothers who had experienced sexual abuse are compared with those who had not, few significant differences emerge on variables such as age at first intercourse, birth control practices, sexual activity, pregnancy reactions, or self-esteem and attitudes toward sexuality." Janice R. Butler & Linda M. Burton, *Rethinking Teenage Childbearing: Is Sexual Abuse a Missing Link*, 39 FAM. REL. 73, 78 (1990).

[75] *See supra* notes 65–70 and accompanying text (discussing prominent mental health discourse associating two types of adolescent sexualized behavior with history of sexual abuse).

[76] *See infra* Part III (listing examples of evaluators focusing on minors' sexual behaviors without clear evidence of emotional disturbance); *infra* note 161 and accompanying text (noting possibility that qualified evaluators will rely on gender-based stereotypes of what constitutes appropriate or risky sexual behavior).

> Most of the hearing concentrated on the fact of what the psychologist had to say. There are no parents involved and in our case, the therapeutic foster parent really liked the child, he just couldn't handle him. He tried, he had good things to say about the child but we couldn't overcome the psychologist.[77]

The qualified evaluator's voice seems to weigh quite significantly at the precommitment hearing.[78] These qualified evaluators have a close relationship with state actors.[79] State actors, such as judges and social workers, place great importance on these qualified evaluators' voices and give these evaluators a central role in the civil commitment process.[80]

As the statutes that define the involuntary civil commitment of emotionally disturbed state-dependent adolescents in Florida show, a qualified evaluator plays a central role in the involuntary civil commitment of adolescent minors.[81] Qualified evaluators are present at the

---

[77] LAWYERS FOR CHILDREN AM., INC., RULE 8.350's FIRST YEAR: THE IMPACT OF LEGAL REPRESENTATION FOR SIPP KIDS 16, 18–19 (2004). Another Florida attorney expressed a similar sentiment: "[Y]ou can't go behind the psychologist's report . . . you're not putting them to the test. The evaluator is only relying on hearsay, how do you deal with that in court? You subpoena and you need more than simply being pulled from the hall for that." *Id.* at 20. A third lawyer explained, "There's no independent evaluation by somebody, the defense can't respond strongly on the last minute . . . . The psychologist was testifying by telephone, we have no right to confrontation and I just don't feel it safeguards the children's rights . . . ." *Id.* at 18.

From June through August 2004, while I was an Equal Justice America Fellow at the Miami office of Lawyers for Children America, Inc., I studied the involuntary civil commitment of state-dependent minors to State Inpatient Psychiatric Programs [SIPP] in Dade County, Florida. While completing this study, I coordinated a roundtable of local lawyers who represent these minors in precommitment hearings. The quotations above are taken from the roundtable discussion (July 2004), a transcript of which is published in the study.

[78] *See id.* One lawyer explained, "I read the file and I cross-examined the child but what position am I [sic] to say that, no [the psychologist is] wrong, [the child is] not paranoid . . . ." *Id.*

[79] As one of the lawyers mentioned, "These are good psychologist [sic] but in some respects they belong to the department. If they say no, no, no, they lose their contract." *Id.* at 20.

[80] *See id.* at 2 ("Without any other professional to counter the doctor's opinion . . . psychologists are especially important actors in the placement process. The doctor's recommendation is highly regarded in the evidentiary hearing . . . ."); *see, e.g.*, Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 540 (1995) ("Psychologists are an essential part of an individualized transfer policy. However, judges must recognize that psychologists are most helpful at interpreting a child's past, not predicting the future.").

[81] The Florida Statutes Annotated set forth the necessary procedure for determining whether a minor should be involuntarily committed:

> Whenever the department believes that a child in its legal custody is emotionally disturbed and may need residential treatment, an examination and suitability assessment must be conducted by a qualified evaluator who is appointed by the Agency for Health Care Administration. . . . The qualified evaluator must be a psychiatrist or a psychologist licensed in Florida who has at least 3

precommitment hearing described in the revised Rule of Juvenile Procedure 8.350,[82] and are responsible for determining whether minors have mental or emotional crises, illnesses, or disturbances. Chapter 394.493 of the Florida Statutes Annotated[83] explains that the "target populations for child and adolescent mental health services" are those who (a) are undergoing "an acute mental or emotional crisis;" (b) "have a serious emotional disturbance or mental illness;" (c) "have an emotional disturbance;" and (d) "are at risk of emotional disturbance."[84] Qualified evaluators must provide written findings that the minor "appears to have an emotional disturbance serious enough to require residential treatment and is reasonably likely to benefit from the treatment," and that "[a]ll available modalities of treatment less restrictive than residential treatment have been considered, and a less restrictive alternative that would offer comparable benefits to the child is unavailable."[85] The qualified evaluators define an "emotional disturbance," and they possess a great amount of freedom in doing so.[86] The purpose of this Note is to make visible

---

> years of experience in the diagnosis and treatment of serious emotional disturbances in children and adolescents and who has no actual or perceived conflict of interest with any inpatient facility or residential treatment center or program.

FLA. STAT. ANN. § 39.407(5)(b) (West 2003). Similarly, the Florida Statutes Annotated specify the content of the qualified evaluator's required initial written report on a child referred for residential treatment. *See id.* § 39.407(5)(c) (listing three findings qualified evaluator must make).

[82] At the precommitment hearing:

> [T]he court shall consider, at a minimum, all of the following: (i) based on an independent assessment of the child, the recommendation of a department representative or authorized agent that the residential treatment or hospitalization is in the child's best interest and a showing that the placement is the least restrictive available alternative; (ii) the recommendation of the guardian ad litem; (iii) a case review committee recommendation, if there has been one; (iv) the written findings of the evaluation and suitability assessment prepared by a qualified evaluator; and (v) the views regarding placement in residential treatment that the child expresses to the court.

FLA. R. JUV. P. 8.350(a)(11)(A). I was present at several precommitment hearings of state-dependent minors in Florida from June through August 2004. Based on my experience, I have listed those people the court consults at the precommitment hearings of state-dependent minors in Florida. Aside from the minor, the other parties present at the precommitment hearing are: a Department of Children & Families representative, a guardian ad litem, and the qualified evaluator.

[83] FLA. STAT. ANN. § 394.493 (West 2003).

[84] *Id.* § 394.493(1).

[85] *Id.* § 39.407(5)(c).

[86] *See infra* notes 88–92 and accompanying text (outlining specific cases of qualified evaluators recommending minors to mental health facilities and noting that only two minors were recommended for traditional mental illnesses).

how individual evaluators can use their own subjectivity in judging the appropriateness of sexual behavior among adolescent girls and boys.[87]

I now turn to specific cases of state-dependent minors being recommended to mental health facilities in Florida. In the summer of 2004, I studied the explanations qualified evaluators offered for the civil commitment of twenty-five wards of the state in Dade County, Florida. These twenty-five cases were randomly selected from a list of state-dependent minors who had been recommended to psychiatric hospitals from 2002 to 2004 and whose ages ranged from eleven to seventeen years old.

Of the twenty-five psychological evaluations, only two adolescents were recommended by qualified evaluators for traditional mental illnesses.[88] Of the remaining twenty-three, four were already in juvenile detention. The remaining nineteen were recommended by qualified evaluators for some form or risk of emotional disturbance or crisis.[89] Of the nineteen, twelve adolescents were recommended to a psychiatric ward, with their sexual behaviors as a central listed factor in the qualified evaluator's analysis.[90] The qualified evaluators described these minors as exhibiting the following: "sexually inappropriate behavior," "homosexual tendencies," "history of sexual abuse," "history of physical abuse, illicit substance abuse and prostitution,"

---

[87] In 1973, the APA voted to exclude homosexuality as a general category of mental disorder in the *Diagnostic and Statistical Manual of Mental Disorders, Third Edition* and to replace it with sexual orientation disturbance:

> [I]n America, psychoanalysis changed from an open-minded and humane study to an increasingly insular and sectarian orthodoxy whose view of sexual preference as a mental disease more reflected American moral orthodoxy than it did careful empirical study. After some internal struggle, only in 1973 did the Board of Trustees of the American Psychiatric Association decide to remove homosexuality from the *Diagnostic and Statistical Manual of Psychiatric Disorders*.

DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW 337 (1998). This change "reflected the point of view that homosexuality was to be considered a mental disorder only if it was subjectively disturbing to the individual." HAROLD I. KAPLAN & BENJAMIN J. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1056 (4th ed. 1985). The DSM-IV now has a category dedicated to "sexual and gender identity disorders." DSM-IV, *supra* note 4, 493–538. In addition to several subcategories of sexual and gender identity disorders, there is also a "catch-all" disorder called "Sexual Disorder Not Otherwise Specified." *Id.* at 538. The manual states: "This category is included for coding a sexual disturbance that does not meet the criteria for any specific Sexual Disorder . . . ." *Id.*

[88] One was recommended for "schizophrenia" and the other for "paranoid schizophrenia." LAWYERS FOR CHILDREN AM., INC., *supra* note 77, at 25–32 (patients D.F. and C.L.).

[89] *See id.* (patients M.C., J.R., F.E., M.P., D.B., A.P., C.S., A.M., A.S., J.A., D.G., J.C., J.E., X.D., D.K., M.V., B.C., M.A., and P.Y.).

[90] *See id.* (patients M.C., D.B., C.S., A.M., A.S., J.A., J.C., J.H., J.E., N.E., B.C., and P.Y.).

"behavioral problems which include sexual preoccupation," "risky behaviors, including risky sexual behaviors," "sexually-deviant behaviors," "inappropriate sexual behavior and poor self-esteem," and being "disassociative [while] act[ing] out sexually with little awareness of what she is doing."[91] Some were described as being "at risk for sexual exploitation" and others in need of "sexual offender treatment."[92] In these evaluations, the qualified evaluators focused on the adolescent minors' sexual behaviors, but they did not clearly show how this sexual behavior reflected an emotional disturbance in the adolescent minor.

While some of these minors might have been severely disturbed, these evaluators should still have clarified how this behavior reflected a disturbance: It is important that emotionally undisturbed heterosexual girls and nonheterosexual boys are not assumed to be disturbed minors with Conduct Disorder. Once the mental health evaluators diagnose minors and recommend them for placement at psychiatric wards, it is difficult, if not impossible, for child advocates to contest the recommendations in court.[93] As I explain in Part IV, the State of Florida and its actors will rarely question the mental health community's recommendations that state-dependent heterosexual girls and nonheterosexual boys be committed to state inpatient psychiatric wards. This is because the courts have upheld the molding of heterosexual girls' and nonheterosexual boys' sexual behaviors as valid interests unto themselves.

IV
THE STATE'S DEMONSTRATED INTEREST IN MOLDING ADOLESCENT SEXUAL BEHAVIOR AND UNLIKELY ROLE AS WATCHDOG

This Part examines the State of Florida's power to promote heterosexual behavior among state-dependent minors and its interest in preventing teen pregnancies among this same community of minors.

---

[91] *Id.*

[92] *Id.* at 26–27. When focusing on the adolescent ward's sexual behavior, it is up to the qualified evaluator's own subjectivity to define risky or inappropriate sexual behavior—to define what it means to act out sexually. *Id.* at 25–32. FLA. STAT. ANN. § 394.493(1) (West 2003) does not limit the evaluator's discretion in defining risky or inappropriate sexual behavior during the mental health evaluations of minors and adolescents. *See supra* note 83–84 and accompanying text (describing section 394.493 of the Florida Statutes Annotated).

[93] *See supra* Part III (discussing role of mental health evaluators in civil commitment of state-dependent minors). As the discussion at the roundtable of Florida lawyers suggests, the courts seem to defer to these mental health evaluators' recommendations. *See* LAWYERS FOR CHILDREN AM., INC., *supra* note 77, at 1–22.

A. *Providing Heterosexual Modeling*

In *Lofton v. Secretary of the Department of Children & Family Services*,[94] a three-judge panel of the Eleventh Circuit Court of Appeals refused to strike down Florida's statewide ban on adoption by practicing homosexuals.[95] Despite recognizing one of the gay foster parents involved in the lawsuit as an "exemplary" caregiver for his foster children,[96] the panel ruled unanimously that adoption is a privilege that can be denied to all gay individuals.[97]

The court emphasized the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling,"[98] and upheld Florida's interest "in furthering the best interests of adopted children by placing them in families with married mothers and fathers."[99] The court in *Lofton* characterized adoption as a privilege: "Unlike biological parentage . . . adoption is wholly a creature of the state."[100] Moreover, "[b]ecause of the primacy of the welfare of the child, the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas."[101] The court explained that practicing homosexuals could be denied this privilege because the state has a recognized interest in providing heterosexual modeling to its adolescent minors,[102] and the court reasoned that a home anchored by both a mother and a father is best prepared to provide such heterosexual modeling.[103] The court's recognition of a state interest in providing heterosexual modeling suggests that it would support the promotion of heterosexual behavior and the prevention of homosexual behavior among state-dependent minors.

---

94 358 F.3d 804 (11th Cir. 2004).

95 *Id.* at 806.

96 *Id.* at 807.

97 *Id.* at 806, 827. Six plaintiffs-appellants brought the case against the Department of Children and Family Services (DCF). Steven Lofton was a registered pediatric nurse who raised from infancy three Florida wards, all of whom had tested positive for HIV at birth. *Id.* at 807. The court noted, "By all accounts, Lofton's efforts in caring for these children have been exemplary, and his story has been chronicled in dozens of news stories and editorials as well as on national television." *Id.* Two of the other plaintiffs were licensed DCF foster parents whose applications with DCF to serve as adoptive parents were "denied because of their homosexuality." *Id.* at 808.

98 *Id.* at 818.

99 *Id.*

100 *Id.* at 809.

101 *Id.* at 810.

102 *Id.* at 818–22.

103 *Id.* at 820.

B. *Upholding the Promotion of Chastity Among Adolescent Women*

Even when the state can mold the sexual behavior of wards of the state through heterosexual modeling, another issue still looms: teenage pregnancy among heterosexual adolescent wards. In the following case, the U.S. Supreme Court discussed and upheld the state's interest in preventing teenage pregnancies among all minors.

In *Michael M. v. Superior Court*,[104] the Court upheld a statutory rape law designed to prevent teenage pregnancies that punished only male offenders but not female ones.[105] Michael M., a seventeen-year-old male, was accused of violating California's statutory rape law.[106] The law defined unlawful sexual intercourse as "'an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years old.'"[107] The statute thus made men alone criminally liable for such conduct. Michael M. challenged the law on the basis of gender discrimination.[108]

In a plurality decision, the Court held that the law did not violate the Equal Protection Clause of the Fourteenth Amendment,[109] noting that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse."[110] The Court explained that "teenage pregnancies, which have increased dramatically over the last two decades, have significant social, medical, and economic consequences for both the mother and her child, and the State."[111] The state has a recognized interest in preventing such pregnancies[112] and is justified in treating girls' heightened sexual activity differently from boys' heightened sexual activity.[113] The state,

---

104 450 U.S. 464 (1981).

105 *Id.* at 466–67; *see* Gabrielle Morgan, *"Character Standard" or Sex Discrimination? Students' Exclusion from National Honor Society Called a Violation of Title IX*, 14 BERKELEY WOMEN'S L.J. 116, 121 n.32 (2004) (referring to Supreme Court's gendered treatment of statutory rape in *Michael M.*).

106 *Michael M.*, 450 U.S. at 466.

107 *Id.* (quoting CAL. PENAL CODE § 261.5 (West Supp. 1981)).

108 *Id.* at 467.

109 *Id.* at 466, 476. U.S. CONST. amend. XIV states that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

110 *Michael M.*, 450 U.S. at 471.

111 *Id.* at 470 (footnotes omitted).

112 *Id.*

113 *See id.* at 472–73 ("[A] legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.").

along with the teenage mother and child, carries the consequences of teenage pregnancy.[114]

Professor Michelle Oberman further emphasizes this link between sex-specific classifications of heterosexual adolescent behavior and the state's interest in preventing teen pregnancy.[115] In discussing *Michael M.*, Oberman argues that "contemporary statutory rape laws and policies demonstrate a disturbingly wide consensus that the purpose of these laws is to combat teen pregnancy and out-of-wedlock births."[116] Over twenty years after the Court's decision, *Michael M.* remains an important point of analysis for sex-specific classifications and, more specifically, for those sex-specific classifications the state enforces with the intended goal of preventing teenage pregnancies.[117]

While the issue of statutory rape does not obviously relate to the sexual behavior of adolescent wards, wards of the state are highly prone to teenage pregnancy and out-of-wedlock births.[118] Therefore,

---

[114] *See id.* at 470 (noting that teenage pregnancies have substantial costs for state); Buck v. Bell, 274 U.S. 200, 207 (1927) (discussing high costs to state of pregnancies of state-dependent mentally impaired women).

[115] *See* Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tool to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 806–07 (2000) [hereinafter Oberman, *Girls in the Master's House*] (noting that teen pregnancies are deemed repugnant because of their negative effect on the economy); *see also* Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 159–60 (2004) [hereinafter Oberman, *Turning Girls into Women*] (discussing enduring double standard regarding teenage male and female sexual activity).

[116] Oberman, *Girls in the Master's House*, *supra* note 115, at 806.

[117] For example, *American Jurisprudence* cites solely to *Michael M.* to explain that "statutes are valid where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." 16B AM. JUR. 2D *Constitutional Law* § 831 (1998 & Supp. 2006). In *United States v. Virginia*, Justice Scalia, writing in dissent, cites to the legal precedent of *Michael M.* in noting that "intermediate scrutiny . . . has been our standard for sex-based classifications for some two decades." 518 U.S. 515, 574 (1996) (Scalia, J., dissenting). Justice Scalia seemed to fear confusion on the legal standard of sex-based classifications and used court precedent like *Michael M.* (along with two other cases) to establish that the Court had already "categorically *held* strict scrutiny to be inapplicable to sex-based classifications." *Id. See generally* Stephanie Bornstein, *Undue Burden: Parental Notification Requirements for Publicly Funded Contraception*, 15 BERKELEY WOMEN'S L.J. 40 (2000) (criticizing and warning of effects of parental notification laws for teenagers seeking contraception); Oberman, *Turning Girls into Women*, *supra* note 115, at 167–68 (discussing public policy concerns with existing statutory rape law and divergence in accounts of sexual encounter in *Michael M.* case).

[118] "The few studies that exist on sexual activity rates for youths in foster care place these youths at higher than average risk of engaging in premarital sexual activity." Child Welfare League of America, Sexual Activity, Contraceptive Use, Pregnancy and Parenting Among Youths in Foster Care (Sept. 1997), http://www.cwla.org/programs/fostercare/sexualityfcyouth.htm. For example:

the state's ability to treat a boy's heterosexual behavior differently from a girl's heterosexual behavior, where the objective is to prevent teen pregnancies, does relate to the sexual behavior of wards. Compared to other adolescents, wards of the state are highly susceptible to teen pregnancy,[119] making them vulnerable to sex-specific treatment of adolescent heterosexual behavior designed to curb such pregnancy.

Lofton and *Michael M.* indicate that courts will uphold statutes that promote adolescent heterosexuality and limit teenage pregnancies since these goals are legitimate state interests. The State of Florida and its officials thus have little reason to question the mental health community's recommendations of state-dependent heterosexual girls and nonheterosexual boys to state inpatient psychiatric wards with diagnoses of Conduct Disorder. Florida need not challenge such determinations because, whether or not these minors' sexual behaviors are actually symptoms of emotional disturbance, these placements help further recognized state interests: The psychiatric wards serve to treat these girls' heightened heterosexual behaviors and these boys' nonheterosexual behaviors.

C. Societal Conceptions of Appropriate Sexual Behavior

The contemporary resonance between the judicial and mental health discourses on adolescent sex could be reinforcing societal conceptions of appropriate sexual behaviors among (arguably) its most vulnerable population: state-dependent minors.[120] Overall, a focus on a girl's heightened heterosexual behavior and a boy's homosexual behavior within mental health and judicial discourses on sex reflects societal conceptions of appropriate sexual behaviors among young

---

> Barth's 1990 survey of youths formally [sic] in foster care found that 40% reported having been pregnant since leaving foster care. Only 25% of the general female population in the same age group [sic] age 18 to 24-[sic] had given birth.
>
> In another study by Westat, 42% of the youths responding had either given birth to or fathered a child.

Id. (footnotes omitted); *see also* WESTAT, INC., A NATIONAL EVALUATION OF TITLE IV-E FOSTER CARE INDEPENDENT LIVING PROGRAMS FOR YOUTHS, at xvi–xx (1991) (analyzing prevalence of pregnancy among state-dependent minors); Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK 419, 426–27 (1990) (discussing rate of pregnancy among former foster youth).

119 Child Welfare League of America, *supra* note 118.

120 *See* Perlmutter & Salisbury, *supra* note 27, at 731–33 (noting that children who exhibit standard teenage behavior, including "engaging in excessive sexual activity," are increasingly being admitted into psychiatric institutions and many of these "troublesome" youths come from state foster care homes); Weithorn, *supra* note 13, at 788–89 (arguing that many institutionalized children are merely "troublemakers" and do not suffer from severe mental disorders).

women and men.[121] In *Between Voice & Silence*, Jill Taylor, Carol Gilligan, and Amy Sullivan explain: "Adolescent girls' sexuality has traditionally been viewed by the dominant culture as problematic and in need of regulation. This is particularly true for poor and working-class adolescents: images of irresponsible, promiscuous girls who do not think or care about themselves, about the future, about anything, often prevail."[122]

While society traditionally finds interest in controlling a girl's heightened heterosexual behavior, it also finds interest in prohibiting homosexual behavior primarily among boys and men. For example, at the center of French philosopher Michel Foucault's presentation of homosexuality in Western history is the homosexual male.[123] He writes that "[h]omosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphrodism of the soul."[124] Professor David Richards, whose work focuses on the contemporary legal discourse on sexuality, explains that historically the homosexual male has undermined appropriate masculine sexuality, in much the same way that a girl displaying heightened heterosexual behavior undermines appropriate feminine sexuality.[125] This disparate focus on adolescent girls' and boys' sexual behaviors is similarly illustrated through the current resonance between the courts' and the mental health community's discourses on state-dependent minors' sexual behaviors.

D. Historical Analogy with Buck v. Bell

To emphasize the continued and threatening presence of this societal conception of sex in American courts and in the American mental health community, I offer an American historical analogy to the contemporary resonance between these two discourses on sex.

In *Buck v. Bell*,[126] the Supreme Court of Appeals of the State of Virginia upheld, and the U.S. Supreme Court affirmed, the involun-

---

121 *See* FOUCAULT, *supra* note 3, at 36–49 (discussing historical treatment, by courts and society at large, of sexual behaviors classified as perversions); Nelson, *supra* note 3, at 266–68 (summarizing development of popular opinion and law governing sexual speech and conduct in New York from 1920 to 1980).

122 JILL MCLEAN TAYLOR ET AL., BETWEEN VOICE AND SILENCE: WOMEN AND GIRLS, RACE AND RELATIONSHIP 114 (1995) (citations omitted).

123 *See* FOUCAULT, *supra* note 3, at 43 (describing initial characterization of homosexual as homosexual man).

124 *Id.*

125 "The male homosexual . . . was the dissident to male gender that the female prostitute was to her gender: the male homosexual's love for other men . . . challenged the male gender norm of aggressive competition with other men . . . ." RICHARDS, *supra* note 87, at 296.

126 Buck v. Bell (*Buck I*), 130 S.E. 516 (Va. 1925), *aff'd*, 274 U.S. 200 (1927).

tary sterilization of Carrie Buck, a state-dependent heterosexual girl.[127] When Carrie Buck was involuntarily admitted to a psychiatric ward, she was a seventeen-year-old ward of the state.[128] Buck was an unmarried adolescent mother, and her foster parents sought her institutionalization in "a desperate attempt to remove the embarrassment of a pregnant but unwed girl from their home."[129]

During Buck's commitment proceeding, the doctor of the hospital testified that Buck was "feebleminded of the . . . Moron Class, and a moral delinquent."[130] The psychiatric ward's board reviewed the doctor's recommendations, concluding:

> Carrie Buck is a feebleminded inmate of this institution and by the laws of heredity is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health, and that the welfare of the said Carrie Buck and of society will be promoted by such sterilization . . . .[131]

Her involuntary sterilization was challenged.[132] During the legal proceedings, experts testified that Buck had "the mind of a child 9 years old" and that she and her mother were both "feeble-minded."[133]

The U.S. Supreme Court upheld the constitutionality of the sterilization of mentally ill individuals.[134] Justice Holmes relied on the importance of the state interest in preventing undesired pregnancies,[135] explaining that the state's judicially recognized interest in preventing Buck's pregnancy, and other pregnancies like it, outweighed Buck's own interests in not being sterilized.[136]

---

127 *Buck I*, 130 S.E. at 516–17.

128 *Id.* at 517.

129 Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 54 (1985).

130 *Id.* at 49 (internal quotation marks omitted).

131 *Id.* at 50 (internal quotation marks omitted).

132 Buck v. Bell (*Buck II*), 274 U.S. 200, 205 (1927); *Buck I*, 130 S.E. at 516–17.

133 *Buck I*, 130 S.E. at 517.

134 *Buck II*, 274 U.S. at 205, 207–08.

135 Justice Holmes wrote:

> In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds [for involuntary sterilization] do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

Id. at 207.

136 *See id.* (drawing analogy to compulsory vaccination and stating that it is better to prevent continuation of "those who are manifestly unfit" than to await their death by execution or starvation).

Several contemporary scholars have explained that Buck showed no signs of feeblemindedness.[137] Philip Thompson notes: "Despite the assessments of the 'experts' reviewing her case in 1926, Ms. Buck was later noted for being an 'avid reader and a lucid conversationalist, even in her last days.'"[138] Paul Lombardo also states that "[t]hroughout Carrie's adult life she regularly displayed intelligence and kindness that belied the 'feeblemindedness' and 'immorality' that were used as an excuse to sterilize her."[139]

These scholars have argued that Buck's involuntary treatment and civil commitment were means of accomplishing a perceived interest in preventing certain pregnancies: "To many social reformers of the 1920's, Carrie Buck was a sad example of the type of person that threatened to disrupt American society. Her life had been characterized by such irrational 'immorality, prostitution, and untruthfulness' that her [state] guardian had been forced to commit her to an asylum."[140] Paul Lombardo puts it quite simply: "The single fact of her unwed motherhood was the [doctor's] proof of her deficiency."[141] Through involuntary treatment and civil commitment, state actors sought to prevent Ms. Buck's ability to reproduce, in an effort "to prevent our being swamped with incompetence."[142]

---

137 *See, e.g.*, J. DAVID SMITH & K. RAY NELSON, THE STERILIZATION OF CARRIE BUCK 3, 219–21 (1989) (describing Carrie Buck as literate, social, and normal); RONALD B. STANDLER, FUNDAMENTAL RIGHTS UNDER PRIVACY IN THE USA 5 (2005), *available at* www.rbs2.com/priv2.pdf ("[L]ater investigators found that Carrie [Buck] had normal intelligence, but Carrie had attended only five years of school, and her daughter had above average intelligence.").

138 Phillip Thompson, *Silent Protest: A Catholic Justice Dissents in* Buck v. Bell, 43 CATH. LAW. 125, 147 (2004) (quoting LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES 603 (1991), and citing Roberta M. Berry, *From Involuntary Sterilization to Genetic Enhancement: The Unsettled Legacy of* Buck v. Bell, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 419 (1998)).

139 Lombardo, *supra* note 129, at 61.

140 Robert J. Cynkar, Buck v. Bell*: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1418 (1981); *see generally* DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 96–112 (1985) (discussing history and "scientific" principles of eugenics and its convergence with racial and moral prejudices in promulgation of laws designed to keep inferior qualities like "feeblemindedness" from passing on to subsequent generations); SMITH & NELSON, *supra* note 137, at 242–49 (describing economic and political rationales used to advance policies designed to prevent mentally retarded persons from reproducing); J.E. Coogan, *Eugenic Sterilization Holds Jubilee*, CATH. WORLD, Apr. 1953, at 44, 44 (explaining how sterilization policy was only enforced against poor, uneducated individuals whose behavior was considered immoral or otherwise in need of discipline); Stephen Jay Gould, *Carrie Buck's Daughter*, NAT. HIST., July 1984, at 14, 17 ("The annals of [Carrie Buck's] trial reek with the contempt of the well-off and well-bred for poor people of 'loose morals.'").

141 Lombardo, *supra* note 129, at 53.

142 Buck v. Bell (*Buck II*), 274 U.S. 200, 207 (1927).

In sum, the Supreme Court of Appeals of the State of Virginia was able to control Buck's sexual behavior by labeling her feebleminded. However, although "[b]randed by Holmes as a second generation imbecile, Carrie provided no support for his glib epithet throughout her life."[143] The mental health community's discourse on sex and Carrie's consequent civil commitment complemented the state's judicially recognized interest in preventing undesirable pregnancies. Today, the same holds true in a different context: State actors, including state courts and administrators, are able to involuntarily commit a state-dependent heterosexual girl vulnerable to teenage pregnancy by characterizing her not as "feebleminded," but rather, as "emotionally disturbed" with Conduct Disorder.[144] Similarly, state actors can involuntarily commit a state-dependent nonheterosexual boy by labeling him not "mentally ill," but rather, "emotionally disturbed" with Conduct Disorder.[145]

Branded by contemporary state actors and mental health evaluators as emotionally disturbed minors with Conduct Disorder, these heterosexual girls' and nonheterosexual boys' perceived shortcomings stem from her lack of chastity[146] and his homosexual behavior. Part V explains how the legal community of child advocates should address the contemporary resonance between the courts' and the mental health community's discourses on sex.

V
NORMATIVE ARGUMENTS FOR PERSONAL AUTONOMY

Healthy heterosexual girls and nonheterosexual boys in the state's care become vulnerable to a loss of personal autonomy when the powerful resonance between contemporary judicial and mental health discourses on sex leads to their civil commitment.[147] During the commitment process, state-dependent heterosexual girls and nonheterosexual boys should be afforded constitutional protection

---

143 Lombardo, *supra* note 129, at 61.

144 *See supra* Part II.B (discussing types of sexual behaviors that make adolescent state-dependent minors most vulnerable to diagnoses of Conduct Disorder).

145 Until 1973, the APA listed homosexuality as a mental disorder in the DSM-III. *See supra* note 87.

146 *See supra* note 69 (defining chastity).

147 In this Note, I have attempted to show how contemporary courts' and the mental health community's discourses on state dependent minors' sexual behaviors resonate with (or rather, complement) each other. As a result of these resonating discourses, the courts and the mental health community together combine to construct an even more powerful discourse controlling the sexual behavior of the state-dependent minor. Since the discourses complement each other, neither the courts nor the mental health community has an interest in limiting the other's discourse.

from mental health evaluators who might be concerned both with treating emotionally disturbed minors and with curbing certain sexual behaviors. Because the state has a supposed interest in promoting heterosexuality among its minors, the state can perhaps deprive a state ward of homosexual parents.[148] Furthermore, if the state has an interest in preventing certain pregnancies among its minors, the state can perhaps treat boys' and girls' heightened heterosexual behaviors differently in the framing of statutory rape laws.[149] However, the state should not be able to vindicate these interests through the involuntary commitment of healthy nonheterosexual boys and heterosexual girls.

While the U.S. Supreme Court disagrees with me,[150] a minor should be considered sexually autonomous and should be allowed to partake in consensual sexual activities without fearing civil commitment.[151] In *Lawrence v. Texas*,[152] the Court explained that "sexual behavior" is "the most private human conduct."[153] Sexual behavior falls within a special realm of personal privacy that generally should be shielded from state intrusion.[154] The *Lawrence* Court did make a point of excluding minors from its holding: "The present case does not involve minors. . . . The case does involve two adults who, with full and mutual consent, engaged in sexual practices common to a homosexual lifestyle."[155] Yet the *Lawrence* holding should apply and be extended to minors as well. Minors should have the right to explore their sexualities with other consenting minors without fearing involuntary civil commitment.

---

148 Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 806, 822–27 (2004) (holding there is no constitutional bar to state law precluding homosexual adults from adopting children and recognizing that Florida had articulated "reasonably conceivable rationale" for such policy).

149 Michael M. v. Superior Court, 450 U.S. 464, 470–73 (1981).

150 *See* Ayotte v. Planned Parenthood of N. New Eng., 126 S. Ct. 961, 966 (2006) ("States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their 'strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'" (alterations in original) (quoting Hodgson v. Minnesota, 497 U.S. 417, 444 (1990) (opinion of Stevens, J.))).

151 Like an adult, a minor should be afforded a certain degree of privacy rights.

152 539 U.S. 558 (2003).

153 *Id.* at 558. The Court held that a Texas statute criminalizing sexual intercourse between two persons of the same sex violated the Due Process Clause. *Id.* at 578–79.

154 *See id.* at 562, 567 (noting that "[l]iberty presumes an autonomy of self that includes . . . certain intimate conduct" and law at issue in *Lawrence* "touche[d] upon the most private human conduct, sexual behavior").

155 *Id.* at 560.

As the Supreme Court noted in *Powell v. Texas*,[156] the threat posed to the individual by involuntary civil commitment is significant.[157] The majority explained that with "[t]herapeutic civil commitment . . . one is typically committed until one is 'cured.' Thus, to do otherwise than affirm [the lower court's decision] might subject [individuals] to the risk that they may be locked up for an indefinite period of time . . . ."[158] In fact, this risk is also real for state-dependent minors who remain institutionalized for longer periods than do children who are committed by their parents.[159]

While this loss of personal autonomy is egregious, a prominent group of scholars within the mental health community explains that minors, including state-dependent minors, who exhibit certain sexual behaviors are in need of treatment.[160] This segment of the mental health literature associates certain adolescent sexual behaviors with an emotional disturbance. I find it necessary to balance the minor's autonomy interests against the mental health community's claims that certain minors are in need of treatment. In light of these two competing concerns, I suggest that the qualified evaluators should only be able to make mention of an adolescent's sexual behavior during the civil commitment process if the behavior is linked to the minor's emotional disturbance from past sexual abuse. That is, before qualified evaluators can recommend adolescent wards of the state to psychiatric hospitals for sexualized behaviors, the qualified evaluators should be required to express in writing how the adolescent's behavior is a direct symptom of an emotional disturbance from past sexual abuse. Otherwise, a qualified evaluator's ability to rely on gender-based stereotypes of what constitutes appropriate or risky sexual behavior among state-dependent minors will remain largely unchecked, and healthy heterosexual girls and nonheterosexual boys will continue to find themselves civilly committed.[161] As Weithorn notes, qualified evaluators' discretionary power allows them to use personal moral standards during the civil commitment process:

---

156 392 U.S. 514 (1968).

157 *Id.* at 529 (observing that imprisonment may be preferable to civil commitment because one is incarcerated for statutorily prescribed, fixed terms rather than committed indefinitely or until "cured").

158 *Id.*

159 Perlmutter & Salisbury, *supra* note 27, at 733.

160 *See supra* notes 60–70 and accompanying text.

161 *See* Weithorn, *supra* note 13, at 783–88 (noting increased rates of commitment of children and adolescents and arguing that such increase likely does not reflect appropriate response to psychological problems of children and adolescents); *supra* Part III (describing role of qualified evaluators in civil commitment process of state-dependent minors and noting that high rate of commitment for sexual behavior is not accompanied by clear articulation of link between said behavior and emotional or psychological disturbance).

> Not only do [some] criteria cite "sexual promiscuity" as an example of "self-defeating" and/or "self-destructive" behavior necessitating "immediate acute-care hospitalization [as] the only reasonable intervention," but they fail to define what type of sexual activity constitutes "promiscuity." Such a standard allows anyone using the guidelines to apply personal moral standards in making admission decisions. No link between the sexual activity and a basic mental disturbance must be demonstrated prior to admission; the link apparently is presumed.[162]

If the evaluator cannot prove that the adolescent's sexual behavior is a direct symptom of an emotional disturbance from past sexual abuse, then the adolescent's sexual behavior should be shielded from the scrutiny of state actors: It is the adolescent's private matter. This requirement should help the courts and the mental health community distinguish healthy heterosexual girls and nonheterosexual boys from minors who actually need treatment.

I recommend that child advocates first research each state's ability to use psychiatric wards to vindicate its recognized interests in promoting heterosexuality and in preventing teenage pregnancies among its minors.[163] By recommending further research and possible litigation against the state, I wish to address the fact that people,

---

162 Weithorn, *supra* note 13, at 786 (quoting NAT'L ASS'N OF PRIVATE PSYCHIATRIC HOSPS., GUIDELINES FOR PSYCHIATRIC HOSPITAL PROGRAMS: CHILDREN AND ADOLESCENTS 3–4 (1984)).

163 In the context of minors' involuntary civil commitment, some courts have considered minors' liberty interest and their fundamental rights to free movement. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 600 (1979) ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment . . . ."); M.W. v. Davis, 756 So. 2d 90, 97 (Fla. 2000) (quoting *Parham* for the same language). However, the Supreme Court has ultimately prioritized the rights of parents (and of states acting as parents), *see Parham*, 442 U.S. at 617–18 (concluding that child's status as ward of state "do[es] not justify requiring different procedures at the time of the child's initial admission to the hospital"), to involuntarily commit minors to psychiatric wards. *See id.* at 604 ("The fact that a child may balk at hospitalization . . . does not diminish the parents' authority to decide what is best for the child."). Because courts do not tend to prioritize the autonomy interests of minors, a legal argument emphasizing minors' substantive due process rights might not be successful in court. The courts might be more receptive to an argument highlighting the unequal treatment of minors during the civil commitment process. For example, the holding in *Buck v. Bell*, 274 U.S. 200 (1927), was limited in *Skinner v. State of Oklahoma*, 316 U.S. 535 (1942), by a successful equal protection argument. *Id.* at 541–42 (holding that statute mandating sterilization for individuals convicted of larceny but not for those convicted of embezzlement, though both crimes constituted same "quality" of offense under state law, violates equal protection clause and distinguishing statute at issue in *Buck* on ground that it "'enable[d] those who otherwise must be kept confined to be returned to the world, and thus open[ed] the asylum to others'" (citing *Buck*, 274 U.S. at 208)). Children's rights advocates should consider articulating the unequal gender-based treatment of minors as an equal protection violation of both state and federal constitutions.

whether in the 1920s or in the 2000s, hold prejudices about appropriate sexual behavior in their discourses on sex, and that state actors and qualified evaluators are no exception. Most qualified evaluators and state actors are sensible individuals, but adolescent minors like Carrie Buck *have been* involuntarily committed by the state for questionable reasons. Much as the state believed itself to have an interest in preventing certain pregnancies in *Buck v. Bell*,[164] contemporary states, including their courts and administrators, continue: (1) to entertain a discourse on appropriate sexual behavior among state-dependent minors; (2) to have a recognized interest in molding minors' sexual behaviors; and (3) to find resonance with the mental health community's discourse on sex. This powerful resonance continues to threaten the personal autonomy of powerless, state-dependent minors.

CONCLUSION

The civil commitment of heterosexual girls and nonheterosexual boys to psychiatric wards, on the basis of their sexual behaviors, was a real possibility in 1920s America both when the Court decided *Buck v. Bell* and when the APA listed homosexuality as a mental disorder.[165] It remains a real possibility today: The contemporary resonance between judicial holdings and the mental health community's discourse on sex facilitates the civil commitment of state-dependent heterosexual girls and nonheterosexual boys, solely on the basis of their sexual behaviors.

Left defenseless against a powerfully resonating discourse, these minors are involuntarily and indefinitely deprived of their personal autonomy by the contemporary wisdom of judicial and mental health actors—actors who seem to perpetuate an enduring discourse on sex that finds perversion and immorality in women's heightened heterosexuality and in men's homosexuality.[166]

---

[164] 274 U.S. 200, 207 (1927) (characterizing involuntary sterilization as sacrifice, for collective good, legitimately required by society of "those who already sap the strength of the State").

[165] *See supra* note 87.

[166] *See supra* notes 3, 120–25 and accompanying text.