

5-1-2014

LGBT Youth in the Juvenile Justice System: Overrepresented Yet Unheard

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Recommended Citation

Katz, Andrea Beth, "LGBT Youth in the Juvenile Justice System: Overrepresented Yet Unheard" (2014). *Law School Student Scholarship*. 503.

https://scholarship.shu.edu/student_scholarship/503

On a Monday in June, the United States Supreme Court will hand down decisions in Hollingsworth v. Perry and United States v. Windsor, commonly known as the “gay marriage cases.” When the Court held oral arguments in March, thousands of Americans, both proponents and opponents of marriage equality for same sex couples, converged in Washington, DC to make their voices heard. These cases concern the constitutionality of the federal Defense of Marriage Act¹ and Proposition 8, which banned same-sex marriage in California.²

It is not surprising that the marriage equality cases currently before the United State Supreme Court have received a great deal of attention. The national conversation regarding civil rights for lesbian, gay, bisexual, and transgender (LGBT) individuals has centered on marriage equality. Yet, there are significant legal issues that will continue to affect the LGBT community regardless of how the Court rules on these cases. One of these important, yet infrequently discussed, issues is the overrepresentation of LGBT youth in state juvenile justice systems.

This paper concerns the disproportionately high rates of LGBT youth in the justice system, the underlying causes for and impact of that overrepresentation on the youth in the system, and the role of states in addressing this overrepresentation. The central argument is that states are not sufficiently acting to prevent overrepresentation of LGBT youth in the juvenile justice system or protect them from abuse once they are there. This paper will look at why LGBT youth are overrepresented in juvenile detention and the discrimination they face in state custody. It will then discuss state action to address these issues, analyze remedies available through the

¹ United States v. Windsor

² Hollingsworth v. Perry

legal system, and finally propose policy recommendations for states to reduce LGBT youth detention and protect those who are in correctional facilities.

Current Status of LGBT Youth in Juvenile Justice

While research on LGBT youth in the child welfare and juvenile justice systems is still in the early stages, experts agree that LGBT youth are significantly overrepresented in the American juvenile justice system.³ As of 2007, approximately 60,500 American youth were confined in correctional or other residential facilities each night on the order of a juvenile delinquency court.⁴ Another 25,000 youth were held in detention centers while waiting for their cases to go to court or for their placements to come through.⁵

Of those young individuals in confinement, 13-15% identify as LGBT⁶, while gay and transgender youth comprise only 5-7% of the overall youth population in the United States.⁷ These numbers include the approximately 300,000 gay and transgender youth are arrested or detained each year.⁸

Once they are in juvenile detention, both pretrial and post-adjudication, they are often subject to continued discrimination and harassment.⁹

³ Jody Marksamer, *LGBTQ Youth in the Juvenile Justice System*, 2006, available at http://www.nclrights.org/site/DocServer/LGBTQ_Youth_Juvenile_Justice_Factsheet.pdf?docID=1343, (last visited on May 10, 2013).

⁴ The Annie E. Casey Foundation, *NO PLACE FOR KIDS The Case for Reducing Juvenile Incarceration*, 2011, available at http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf, (last visited May 10, 2013).

⁵Id.

⁶ Jerome Hunt and Aisha Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experience of LGBT Youth in the Juvenile Justice System*, Center for American Progress, 2012, available at http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf.

⁷ Id.

⁸ Id.

⁹ See Marksamer, *supra* Note 3.

Once LGBT youth enter the juvenile justice system, a number of systemic failures converge to deprive them of their rights to due process and nondiscriminatory treatment. Rooted in a deep lack of understanding of – and sometimes bias against – LGBT youth, these failures affect LGBT youth at every stage of a delinquency of status offense case.¹⁰

The mistreatment of LGBT youth in juvenile justice systems and the often abusive and traumatic paths that led them there have been greatly ignored, making it difficult for advocates and states to institute system-wide reforms. Referring to these individuals as a “...largely invisible segment of the juvenile justice population”, the Lesbian and Gay Youth Project of the Urban Justice Center commissioned a report on lesbian, gay, bisexual and transgender youth in the New York juvenile justice system to bring attention to the “...unduly harsh and unjust...experiences of LGBT youth in the system, [which are] markedly and chronically worse than those of their heterosexual counterparts.”¹¹ The report found that LGBT youth in the New York system faced a detention structure that at best was unaware of them and their needs and at worst allowed abuse.¹² While the study was conducted in New York, the authors contend that their findings are also representative of the issues LGBT youth face in other states’ juvenile justice systems.¹³

Juvenile Justice

In order to understand the particular harms LGBT youth face in detention, it is critical to first be familiar with the American juvenile justice system in general. In most states, by law, minors cannot be held responsible for criminal offenses. Instead, they are governed by a separate

¹⁰ National Center for Lesbian Rights, *Youth Equity Project*, 2011, available at http://www.nclrights.org/site/PageServer?pagename=issue_youth_equityproject, (last visited on May 10, 2013).

¹¹ Randi Fienstein, *Justice for all?: A report of lesbian, gay, bisexual, and transgendered youth in the New York juvenile justice system*, 200, available at <http://www.urbanjustice.org/pdf/publications/lesbianandgay/justiceforallreport.pdf> (last visited May 10, 2013).

¹² *Id.* at 6.

¹³ *Id.*

criminal code designed specifically for youth. However, through a waiver process, juveniles may be transferred into adult court if the juvenile court relinquishes its jurisdiction. This is typically for cases involving violent crimes.¹⁴

Children and adolescents accused of perpetrating a crime or adjudicated in the juvenile justice system are treated differently than adults accused or convicted of committing the same crime. While state juvenile justice systems usually function similarly to adult criminal justice systems and have similar aims, such as punishing poor behavior and rehabilitating an individual, the consequences of that behavior may be different based on a jurisdiction's system-wide goals. In recent years, states have implemented sentencing guidelines designed to address the conflicting objectives of the juvenile justice system, weighing retribution and punishment with deterrence and rehabilitation.¹⁵

There is no doubt that in order for the system to serve the interests of justice, youth offenders must be punished and deterred from committing future offenses. Yet, when considering the balance between sanction and treatment, it may be in the long-term best interest of states to tip the scale towards remedy in an effort to bring down recidivism rates and end cycles of violence. There is no question that this approach is not always appropriate. Certain crimes, such as a rape, murder, and other violent infractions, go far beyond youthful indiscretion. In those instances, waiver into the adult criminal system may necessary.

However, the vast majority of youthful offenders commit non-violent crimes.¹⁶ In 2007, less than 26% of all youth in a juvenile detention facility had committed a violent crime.¹⁷ The

¹⁴ Children, Family, and the State Class Discussion April 25, 2013

¹⁵ Mears, D. (2002). Sentencing guidelines and transformation of juvenile justice in the 21st century. *Journal of Contemporary Criminal Justice*, 18: 6-19.

¹⁶ See Casey, *supra* Note 4 at 13.

rest of the offenders were in detention for status offenses, technical violations, violations of public order, property offenses, and non-violent other person offenses.¹⁸

Focusing more on punishment than treatment in these cases may render a juvenile offender more scarred than when he or she entered the system, which is a disservice to that individual and to society as a whole. According to the Casey Foundation, “programs offering counseling and treatment typically reduce recidivism, while those focused on coercion and control tend to produce negative or null effects.”¹⁹ If overly punitive measures can have negative effects then certainly discrimination, particularly bias-based harassment, is harmful to a young person and in direct conflict with the restorative and remedial goals of juvenile justice.

Further, while it is preferable for a child or adolescent to get help before committing a crime, the juvenile justice system is, for better or worse, an entry point into the life of youth in trouble. For many youth offenders, juvenile delinquency is the symptom, not the cause, of a greater problem in their lives. As this paper will discuss, that is particularly true for LGBT youth, many of whom contend with family rejection, bullying in school, or homelessness.

Awareness

Some states and the federal government have just begun to acknowledge the overrepresentation of LGBT youth in the juvenile justice system and the underlying causes. Efforts to address the issues are slow-moving, at least in part, because of a lack of awareness about the existence of LGBT youth and their needs among child welfare and juvenile justice professionals, including case workers and judges. According to the New York report, “[p]rofessionals who work with LGBT youth lack expertise and training on how to meet the

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

needs of this population. Judges, attorneys and social workers have little formal training relating directly to working with the unique needs of this population.”²⁰

A study published in January 2013 suggests that little has changed in the child welfare system in almost a decade despite significant progress in overall LGBT awareness and acceptance.²¹ The study includes guidelines for managing information related to the sexual orientation and gender identity and expression of children in child welfare systems, clearly indicating a need to gather information and act upon it.²² John Mikytuck, the program resources director for LifeTies, a New Jersey based organization that provides residential treatment services for LGBT youth in crisis, affirmed this in his testimony before the New Jersey Assembly Budget Committee on March 12, 2013. He asked the state to expand intake collection and reporting mechanisms to include LGBT categories on child welfare and juvenile justice reporting forms. New Jersey currently does not have a coordinated way to direct services to LGBT individuals in these systems because the state is unable to identify potential recipients of these services. The result is that LGBT youth are often only able to benefit from programs tailored to them after they are diagnosed with a mental health condition or a medical condition, such as a HIV/AIDS.²³

Paths into Juvenile Detention

Homophobia and transphobia at home, in educational environments, and general social settings often lead LGBT youth to the streets and then into the juvenile justice system. According

²⁰ See Fienstein, *supra* Note 11.

²¹ S. Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems*, 2013, available at <http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf>, (last visited on May 10, 2013).

²² *Id.*

²³ John Mikytuck March 12, 2013 Budget Testimony and follow-up conversation.

to a study conducted by the National Gay & Lesbian Task Force in 2006, 20-40% of homeless youth self-identify as GLBT and 60% of those individuals are homeless because of family rejection.²⁴ Others face excruciating disapproval at school or in their communities.²⁵

These high numbers may be correlated to earlier coming out ages for many LGBT youth. The average coming out age is now 14,²⁶ reflecting a marked shift in the past few decades. In the 1980s, the average coming out age ranged between 19 and 23.²⁷ Unlike members of the LGBT community who came out in college or after they left home, many youth today are open with themselves and their communities while in high school and at home.

Coming out earlier allows LGBT teenagers to explore their sexuality and gender identity in the same timeframe as their non-LGBT peers, yet also forces them to confront challenges that previous generations of the LGBT community did not confront. For those individuals whose families and support systems are accepting, coming out is an affirming and celebratory moment. However, for a young person whose parents, peers, or educators are disapproving, coming out can be both emotionally and physically risky.

Rejection by family, peers, and community often sets the stage for an LGBT child or adolescent to enter the child welfare and juvenile justice systems. In a 2012, the Human Rights Campaign conducted a study of over 10,000 LGBT 13-17 year olds.²⁸ The study found that 92%

²⁴ Nicholas Ray, *Lesbian, Gay, Bisexual, and Transgender Youth: An Epidemic of Homelessness*, 2006, available at <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>, (last visited on May 10, 2013).

²⁵ Council on Drug and Alcohol Abuse, DRUG ABUSE AMONG LGBT YOUTH, 2011, available at <http://www.drugabuse.ca/drug-abuse-among-lgbt-youth> (last visited on May 10, 2013).

²⁶ The Life Video

²⁷ National Gay and Lesbian Task Force, *Education Policy*, 2003, available at [Education policy: Issues affecting lesbian, gay, bisexual and transgender youth](#), (last visited on May 10, 2013).

²⁸ Human Rights Campaign, *Growing Up LGBT in America*, 2012, available at http://www.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf, (last visited on May 10, 2013).

of those surveyed face hostility toward homosexuals.²⁹ Asked to describe one thing in their lives they would like to change right now, 26% of respondents cited non-accepting families, 21% said school/bullying problems, and 18% fear of being out or open. In the same study, 42% said that the community in which they live is not accepting of LGBT people and 45% felt that their state government is not accepting.³⁰

A 2009 survey had similar findings. The study was comprised of more than 7,000 LGBT middle and high school students ages 13–21.³¹ It found high rates of harassment, intimidation, and bullying in school based on sexual orientation, with 80% of the respondents reporting verbal harassment, 40% physical harassment, 60% lack of safety, and 20% physical assault, all at school.³²

Feelings of disapproval and lack of acceptance are even more profound for transgender and gender-nonconforming youth. In a 2006 study conducted by the Gay, Lesbian and Straight Education Network, 90% of transgender youth reported that they felt unsafe at school.³³ While some school climates have improved since then, the current numbers are not likely to be significantly lower. Further, they also feel disconnected from gay, lesbian, and bisexual peers and organizations, making it more difficult to get help if needed.³⁴

While the statistics on LGBT teen rejection show its breadth, anecdotal accounts reveal its depth. During committee hearings on the passage of the Anti-Bullying Bill of Rights, New Jersey's anti-bullying statute, dozens of students testified on their experiences being harassed,

²⁹ Id.

³⁰ Id.

³¹ Centers for Disease Control and Prevention, Lesbian, Gay, Bisexual, and Transgender Health, 2009, available at <http://www.cdc.gov/lgbthealth/youth.htm>, (last visited on May 10, 2013).

³² Id.

³³ See Ray, *supra*, Note 24 at 59.

³⁴ Id.

intimidated, and bullied in school and online because of their sexual orientation, gender identity, or others perceptions of those characteristics. They spoke of years of traumatic abuse at the hands of their peers and, in some cases, faculty, that included being hit, spit on, and harassed on the internet on a daily basis while their schools did little if anything. Parents also spoke to the Legislature about their children's experiences, some of whom had committed suicide in the wake of constant threats.³⁵

The effects of this rejection manifests in a variety of ways that can eventually lead LGBT youth into juvenile detention, including drug abuse as a form of escape, truancy, and survival crimes committed while homeless. For example, research done by the University of Pittsburgh found that LGBT youth are 190% more likely to resort to substance abuse as a result of feeling alienated.³⁶

The LGBT youth present at those legislative hearings were supported by accepting parents. However, for those who face rejection at school and then more when they come home, the abuse often proves too much. Unable to endure the continued rejection by family, peers, or members of their community, many LGBT youth leave home. They quickly discover the harsh realities of homelessness. Tiffany "Life" Cocco, homeless for seven years, shared, "[i]n our homes, we are not free to be who we are, but the streets are a lot worse. When you are gay and it is obvious that you are a part of the LGBTQ community, you get discriminated on hard."³⁷

³⁵ November 11, 2010 Testimony at the Assembly and Senate Education Committees

³⁶ Medical News Today, *Gay Youth Report Higher Rates Of Drug And Alcohol Use - University Of Pittsburgh Researchers Report Findings In Journal Addiction*, 2008, available at <http://www.medicalnewstoday.com/releases/101682.php>, (last visited on May 20, 2013).

³⁷ A Day in Our Shoes Video produced by The Life

Alternatively, “[o]ftentimes, homophobic families kick LGBT youth out, creating a subgroup of homeless youth dubbed “throwaways.”³⁸ One out of three children who come out to their parents are kicked out.³⁹ “Others still are removed by child welfare agencies as a result of abuse and neglect stemming from that family rejection. Once in out-of-home placements, more than 75% of LGBT youth experience renewed discrimination and abuse because of their sexual orientation and gender identity.⁴⁰ As a consequence, LGBT youth in these environments end up homeless.⁴¹

In New York City alone, there are approximately 3,800 homeless youth, around 1,500 who identify as LGBT.⁴² Yet, there are only 200 shelter beds available in the entire city, resulting in extensive waiting lists.⁴³ At the Ali Forney Center, just one shelter for homeless LGBT youth, there are over 100 individuals waiting for a bed each night.⁴⁴

Prospects are especially poor for transgender and other gender non-conforming youth living on the street. Some reports show that for these individuals the need or risk for needing a shelter is as high as every one in five. This is compounded by most emergency and short-term shelters being segregated by sex, causing non-conforming individuals to either be turned away or stay at a shelter they do not feel is safe or appropriate for them.⁴⁵

As the National Gay & Lesbian Task Force points out, “[w]ith homeless LGBT youth on the street lacking stability in many areas of their lives, including shelter, nourishment, and

³⁸ See Ray, *supra*, Note 24 at 53.

³⁹ http://www.nj.com/politics/index.ssf/2013/01/conference_spotlights_struggle.html

⁴⁰ See Ray, *supra*, Note 24.

⁴¹ *Id.*

⁴² See Life Video, *supra* Note 37.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Ray, *supra*, Note 24 at 58.

ongoing educational opportunities, it is not surprising that many resort to desperate means to survive.”⁴⁶ Desperate means of survival can often turn into crimes of survival.

Out of despair and a need for survival, homeless gay and transgender youth are more likely to report to criminal behaviors, such as drug sales, theft, or ‘survival sex’, which put them at risk of arrest and detainment. These youth are also at an increased risk of detainment for committing crimes related to homelessness, such as a violating youth curfew laws and sleeping in public spaces.⁴⁷

In the eyes of a punitive justice system, a person who has sex for a place to sleep is a prostitute, someone who self-medicates because she does not have money for healthcare is a drug user, and someone rummaging in a garbage can for dinner is a thief. These are all crimes of survival, committed either because a homeless youth feels like he or she does not have another option or because there really is no other viable alternative. However, these acts are often enough to drag a homeless youth into the juvenile justice system.

According to *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, homelessness is the single greatest predictor of a youth’s likelihood of entering the juvenile justice system.⁴⁸ The report found that 39% of homeless LGBT youth have had at least minimal involvement in the juvenile justice system.⁴⁹ The connection between homelessness and juvenile detention has grown in some cities and towns in the United States by an increase in the criminalization of homelessness, meaning an effort to criminalize many of the activities that are life-sustaining for individuals living on the street. In efforts to “clean up” downtown areas and “gentrify” up and coming neighborhoods, lawmakers have made it easier for law enforcement to target and arrest those living on the street. In Sarasota, Florida, for

⁴⁶ See Ray, *supra*, Note 24 at 55

⁴⁷ See Ray, *supra*, Note 24 at 3.

⁴⁸ Katayon Majd, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, 2009, available at http://www.equityproject.org/pdfs/hidden_injustice.pdf (last visited on May 10, 2013).

⁴⁹ See Hunt, *supra* Note 6 at 3.

example, the city passed a law that allowed police to arrest a person who has “no other place to live.”⁵⁰ Further, between 2002 and 2006, there was a 14% increase in municipal prohibitions on sitting or lying in various public spaces.⁵¹

LGBT youth are most at risk for detention by default, meaning they remain in detention centers even if they have not been adjudicated. In this instance, parents and guardians are unwilling to take them back. Typically, an arrested or detained juvenile will be released only if an authorized adult takes custody of that individual. Many LGBT children and adolescents make initial contact with the juvenile justice system as the result of family conflict, spurred or exasperated by lack of acceptance regarding the youth’s sexual orientation or gender identity. Prosecutors often file charges against LGBT youth for being “incorrigible” or beyond the control of their parents or guardians.⁵² Then, when it is time for release, their parents often refuse to take them back.⁵³

For youth who are in a detention center as a result of committing a crime of necessity while homeless or from an altercation with family member who is not accepting, it is more likely that they will be left in detention until a foster or group home placement becomes available.⁵⁴ According to a 2012 issue brief published by the Center for American Progress, “...our nation’s schools, law enforcement officers, district attorneys, judges, and juvenile defenders are not equipped to manage the unique experiences and challenges...” of LGBT youth.⁵⁵

Summed up well in a 2010 article in *The Nation*:

⁵⁰ See Ray, *supra*, Note 24 at 71.

⁵¹ *Id.*

⁵² See Ray, *supra*, Note 24 at 2.

⁵³ John Mitytuck video

⁵⁴ See Hunt, *supra* Note 6 at 5-6.

⁵⁵ See Hunt, *supra* Note 6 at 1.

The road to incarceration begins in pretrial detention, before the youth even meets a judge. Laws and professional standards state that it's appropriate to detain a child before trial only if she might run away or harm someone. Yet for queer youth, these standards are frequently ignored. According to UC Santa Cruz researcher Dr. Angela Irvine, LGBT youth are two times more likely than straight youth to land in a prison cell before adjudication for nonviolent offenses like truancy, running away and prostitution. According to Ilona Picou, executive director of Juvenile Regional Services, Inc., in Louisiana, 50 percent of the gay youth picked up for nonviolent offenses in Louisiana in 2009 were sent to jail to await trial, while less than 10 percent of straight kids were. "Once a child is detained, the judge assumes there's a reason you can't go home," says Dr. Marty Beyer, a juvenile justice specialist. "A kid coming into court wearing handcuffs and shackles versus a kid coming in with his parents—it makes a very different impression."⁵⁶

Discrimination in the Juvenile Justice System

While LGBT youth leave home or out-of-home placements to get away from discrimination and persecution, they are unlikely to find refuge in the juvenile justice system. They are at heightened risk of physical, sexual, and psychological abuse in detention at the hands of both other youth and staff.⁵⁷ Even when staff is not directly participating in abuse, they are perpetuating it by either turning a blind eye to mistreatment among detained youth or they are ignoring the underlying issues by segregating LGBT individuals from the general population.⁵⁸

In addition to direct harm, LGBT youth are also subjected to indirect inequities, such as inadequate healthcare and inappropriate counseling methods. A 2009 report entitled, "Comprehensive LGBT-Inclusive Sexual Health Care For Youth in State Custody as a Human Right: The Teen SENSE Initiative," produced by the Center for HIV Law and Policy, stated:

Once in state custody facilities, LGBTQ youth routinely face harassment, discrimination, isolation, and abuse. This social stigma, discrimination, and

⁵⁶ Daniel Redman, *I Was Scared to Sleep: LGBT Youth Face Violence Behind Bars*, 2010, available at <http://www.thenation.com/article/36488/i-was-scared-sleep-lgbt-youth-face-violence-behind-bars#>, (last visited on May 10, 2013).

⁵⁷ See Ray, *supra*, Note 24 at 6.

⁵⁸ See Ray, *supra*, Note 24 at 78.

harassment encourage high-risk activity among LGBT youth. Shamed into silence, these youth are also unable to obtain adequate sexual health care. Even where staff may be well-intentioned, the inability to recognize and respond to the unique sexual health care needs of LGBTQ youth leaves these youth without adequate sexual health care. Incarcerated youth...depend on the state to meet these needs.⁵⁹

LGBT wards often have particular health needs, some resulting from the pre-detention experiences. For instance, a youth who was a sex worker or used sex as a way to secure shelter for an evening may need treatment for sexually transmitted infections. Also, a transgender individual taking black market hormone injections may suffer from negative reactions. These are issues that healthcare workers in juvenile detentions centers should be sensitive to and prepared to address, though often they are not.⁶⁰

Many of LGBT youth need significant psychological counseling. Instead, they are object subject to harassment and emotional abuse in detention. For some, this is made painfully worse by state efforts to “pray the gay away.”

In an East Coast state that's the subject of an ongoing investigation, prison authorities permit religious volunteers to enter a youth facility to lead explicitly antigay Bible classes. Lesbian youths who refuse to attend the programs have had their sentences extended from nine to upwards of thirteen months. In Mississippi, a judge—with parental approval—sent a lesbian youth to a private hospital for two weeks to cure her homosexuality. In Pennsylvania, a counselor handed out antigay religious tracts to youth in her facility. In Georgia, when a child who had never committed a sexual offense came out as transgender, she was sent to a facility for youth likely to commit sexual offenses against children.”⁶¹ Only in 2007 did Louisiana’s juvenile justice system discontinue the practice of subjecting lgbt youth in the state’s juvenile detention system to “sexual identity confusion” counseling.⁶²

⁵⁹<http://www.aids2031.org/pdfs/lgbtqinclusive%20sexual%20health%20care%20for%20youth%20in%20state%20custody%20as%20human%20right.pdf> at 4

⁶⁰ *Id.*

⁶¹ See Redman, *supra* Note 56.

⁶² *Id.*

Legal Remedies

Youth in state custody, regardless of their sexual orientation or gender identity, have federal and state constitutional and statutory rights. These rights guarantee a young person safety in their placement as well as freedom from deprivation of their liberty interest. Many lesbian, gay, bisexual, and transgender (LGBT) youth have these rights violated on a regular basis.⁶³

In light on limited state reform efforts, LGBT youth and their advocates may look to the courts for relief. While the legislative intent may not have been to help protect youth, several states have enacted statutes that could help LGBT youth in juvenile detention and correction centers. However, these laws vary in inclusion of sexual orientation and gender identity, limiting their utility. For example, Rhode Island prohibits discrimination based on sexual orientation and gender identity or expression in a state facility.⁶⁴ While this covers LGBT individuals in a state run facility, it is unclear if a not-for-profit or a private agency contracting with the state would be similarly governed. In Minnesota, discrimination based on sexual orientation, though not gender identity, in the rendering of public assistance is prohibited.⁶⁵ Iowa's law prohibits discrimination by state employees against a person in care or custody of a state institution based on sex.⁶⁶

Many states prohibit discrimination in public accommodations, which may include detention centers depending on the jurisdiction. Louisiana's law prohibits discrimination in areas of public accommodation, yet does not include gender identity or sexual orientation.⁶⁷ New Jersey's law against discrimination prohibits discrimination in places of public accommodation

⁶³ Rudy Estrada, *The Legal Rights of LGBT Youth in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know*, 2006, available at <http://lgbt-youth-project.pbworks.com/f/estrada--legal%20rights%20of%20lgbt%20youth%20in%20state%20custody.pdf> (last visited on May 10, 2013).

⁶⁴ R.I. GEN. LAWS § 28-5.1-7 (a)

⁶⁵ MINN. STAT. §363A.02 (4)

⁶⁶ IOWA CODE ANN. § 19B.12 (2)

⁶⁷ LA. REV. STAT. § 51:2232 (10)

based on affectional or sexual orientation, gender identity or expression, and AIDS and HIV status.⁶⁸ Even New Jersey's statute however, which is far more inclusive than that of many other states, currently regards only adult jails and not juvenile detention centers as public accommodations.⁶⁹

Statutes prohibiting discrimination in housing may cover LGBT wards in states in which the facilities are considered public housing. In 2003, a New York Court recognized a residential foster care facility as a "publicly-assisted housing accommodation" relevant to a disability discrimination claim under New York's Human Rights Law.⁷⁰

Given the limited applicability of specific state statutes, courts have relied on due process, equal protection, and cruel and unusual punishment provisions of United States and state constitutions. In 2006, the United States District Court for the District Hawaii decided the landmark case, R.G. v. Koller. The ACLU of Hawaii and the ACLU Lesbian Gay Bisexual Transgender Rights Project represented three minors, a 17-year-old male-to-female transgender girl, an 18-year-old lesbian, and an 18-year-old boy perceived to be gay, in a federal civil rights lawsuit against the Hawaii Youth Correctional Facility (HYCF), the state's juvenile correctional facility.⁷¹ The plaintiffs claimed that they were abused and harassed while at HYCF because of their sexual orientation and gender identity.⁷² The Court noted,

The record before the court is replete with documents and testimonial evidence demonstrating verbal harassment and abuse....The casual use of the word "butchie" during courtroom testimony by defendants' witness YCO Lawrence Alvaro reinforces plaintiffs' testimony that the word is used commonly at

⁶⁸ State of New Jersey, Division of Law and Public Safety, *About the NJ Law Against Discrimination*, 2013, available at <http://www.nj.gov/lps/dcr/law.html> (last visited on May 10, 2013).

⁶⁹ *Chisolm v. McManimom*, 275 F.3d 315, 325

⁷⁰ *Doe v. Bell*, 754 N.Y.S.2d 846, 850 (N.Y. Sup. Ct. 2003)

⁷¹ 415 F.Supp.2d 1129 (2006)

⁷² *Id.*

HYCF...On a regular basis, other wards called J.D. names such as..."faggot"...Wards at HYCF routinely called C.P. derogatory names...in the presence of staff. Staff testified that such name-calling was a daily occurrence. The record before the court establishes that verbal abuse and harassment of LGBT wards is commonplace at HYCF.⁷³

Based on this record, the Court granted a preliminary injunction to force HYCF to establish policies, procedures, and training to prevent further abuse of LGBT wards.⁷⁴ The court prohibited the youth correctional facility from discriminating against, harassing or abusing, physically or verbally, any individual because of actual or perceived status as lesbian, gay, bisexual, or transgender.⁷⁵ Further, the State of Hawaii was ordered to appropriately counsel or discipline employees who violated this provision⁷⁶, and the defendants were enjoined from the use of isolation, except for temporary emergency protective segregation, as a means to keep safe a ward who was perceived to be LGBT.⁷⁷

Moreover, the United States District Court for the District of Hawaii ordered the State to institute policies and procedures to help the administration and staff of the correctional facility meet their obligation to intervene in instances of discrimination, abuse, or harassment of any ward who was perceived to be LGBT.⁷⁸ As a result, Hawaii became the first state to institute safety policies for LGBT youth in juvenile correction facilities.⁷⁹

Currently, Hawaii is also the only state to have such comprehensive policy changes ordered by a court, federal or state. According to John Mikytuck, court directives in this area are

⁷³ Id.

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ ACLU, *Hawai'i - R.G., et al. v. Koller, et al. Case Profile*, 2006, available at http://www.aclu.org/lgbt-rights_hiv-aids/hawaii-rg-et-al-v-koller-et-al-case-profile (last visited on May 10, 2013).

limited, at least in part, because advocacy organizations have settled lawsuits at earlier stages in order to hasten system-wide reforms and help individual clients.⁸⁰

However, LGBT youth can and should take advantage of the rights afforded them by the United States Constitution and the constitutions of their respective states. LGBT youth in detention have a constitutional right to safety because they are in state custody. As wards of the state, they have a substantive due process and a liberty interest in safety conferred upon them by the Due Process Clause of the Fourteenth Amendment. In turn, states have an affirmative duty to protect those in their custody from harm.⁸¹

While LGBT youth may look to this right to safety at a minimum, they are entitled, as minors, to greater protection than incarcerated adults. The First, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts have held that the appropriate standard to apply to youth in detention is the due process clause. Most courts consider youth claims of federal due process violations under the Bell v. Wolfish⁸² and Youngberg v. Romeo⁸³ framework and their progeny.

While these cases did not themselves pertain to incarcerated youth, courts have looked to them to specify the protections afforded to youth by the due process clause, including the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, freedom from conditions that amount to punishment, access to treatment of mental and physical illnesses and injuries, and minimally adequate rehabilitation.⁸⁴ In Milonas v. Williams for example, the

⁸⁰ Interview with John Mikytuck on April 9, 2013.

⁸¹ Rudy Estrada, *The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working with LGBT Youth*, 2006, available at http://www.nclrights.org/site/DocServer/LegalRights_LGBT_State_Custody.pdf?docID=1741 (last visited on May 10, 2013).

⁸² 441 U.S. 520 (1979).

⁸³ 457 U.S. 307 (1982).

⁸⁴ See Estrada, *supra* Note 81 at 5.

10th Circuit held that, “...because the state has no legitimate interest in punishment, the conditions of juvenile confinement...are subject to more exacting scrutiny than conditions imposed on convicted criminals.”⁸⁵

The conditions imposed on LGBT youth in juvenile detention include how they are treated by facility staff. Unsurprisingly, courts have held against the use of physical force outside of situations involving a juvenile who poses a violent and immediate physical danger to himself or another or who is physically resisting facility rules. As a result, juvenile correctional staff have a duty to protect juveniles from harassment and violence at the hands of other youth in detention. This duty is not met when detention center officials or other juvenile justice system staff ignore a substantial risk of harm to an individual, especially if he or she is particularly vulnerable.⁸⁶ Juvenile justice officials must ensure that they maintain reasonably safe conditions of confinement, which is aided by adequate numbers of qualified staff who are sufficiently trained on issues of safety and establish policies and procedures that address youth safety. In order to protect LGBT youth from harassment and harm, it may be necessary to have non-discrimination policies and staff training that specifically addresses the needs of these youth.

Non-physical mistreatment is more likely to trigger a violation of the due process or even cruel and unusual punishment standards, yet there is little case law beyond R.G. v Koller to apply when the claimed misconduct takes the form of verbal or physiological abuse. Due process has been a useful tool though in restricting isolation as a means to address peer-to-peer abuse in state facilities. As a result of the 1970s case Santiago v. City of Philadelphia, Philadelphia agreed to discontinue segregating gay youth. The settlement provided:

⁸⁵ *Milonas v. Williams*, 691 F.2d 931, 942, n. 10 (10th Cir. 1982)

⁸⁶ *A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d at 579 *R.G. v. Koller*, 415 F. Supp 2d 1129

Homosexuals shall be protected from harassment, and shall not be stigmatized by putting them in isolation, segregating them by unit or otherwise discriminating against them....Attorneys representing gay or lesbian juveniles should be aware of the possibility that a youth's homosexuality itself may be perceived as a danger to others, rather than the individual circumstances of the specific child. They should, of course, vigorously oppose any attempts by the institution to characterize gay or lesbian youths as dangerous or potential rapists.⁸⁷

Three decades later, a court had to make a similar statement in R.G v. Koller,

After examining expert opinions and case law regarding the use of isolation on children, the court concludes that the defendants' use of isolation was not within the range of acceptable professional practices and constitutes punishment in violation of the plaintiffs' Due Process rights...The likely perception by teenagers that isolation is imposed as punishment for being LGBT only compounds the harm...Consistently placing juvenile wards in isolation, not to impose discipline for violating rules, but simply to segregate LGBT wards from their abusers, cannot be viewed in any reasonable light as advancing a legitimate nonpunitive governmental objective.⁸⁸

As courts have employed the Due Process Clause to combat isolation, they have also looked to the Eighth Amendment's cruel and unusual punishment prohibition to address insufficient healthcare for transgender youth. Courts have held that juvenile justice officials must treat in some capacity youth diagnosed with Gender Identity Disorder. In 2001 in Allard v. Gomez, the Ninth Circuit held that transexualism is a serious medical need and denying transgender-related health care for prisoners constitutes a violation of the Eighth Amendment of the U.S. Constitution.⁸⁹

In 2003, in Doe v. Bell, a New York case, a female transgender youth sued the New York City Administration for Children's Services (ACS) for not allowing her to wear women's attire in her male group home. She was prohibited from expressing her gender identity despite the fact that she had been previously diagnosed with Gender Identity Disorder. Rather than addressing

⁸⁷ Santiago v. City of Philadelphia, Civ. Act. No. 74-2589 (E.D. Pa. 1978)

⁸⁸ R.G. v. Koller

⁸⁹ Allard v. Gomez, 9 Fed. Appx. 793 (9th Cir. 2001)

the First Amendment freedom of expression claim, the court held that in order to avoid disability discrimination, the state was required to make reasonable efforts to account for her transgender status and allow her to dress as a woman.⁹⁰

Policy Recommendations for States

While LGBT youth and their advocates are increasingly successful in finding redress through the courts for abuse and mistreatment in the juvenile justice system, this path often necessitates harms to cure. There is much states can and should do to prevent the evils of discrimination in juvenile detention and to help LGBT youth avoid the system altogether. States must: 1) Recognize that LGBT youth are overrepresented in the juvenile justice system and they are at risk for discrimination within the system; 2) Reduce dependence on long-term youth correctional facilities; 3) Promote acceptance of LGBT youth or least discourage discrimination in schools and community-based organizations; 4) Utilize the child welfare system to provide early intervention to families in crisis struggling with LGBT youth; 5) Require training for all juvenile justice and child welfare professionals on LGBT youth; 6) Collect data on LGBT youth; 7) Pressure Congress to reauthorize the Juvenile Delinquency Prevention Act; 8) Adopt certain provisions of the Prison Rape Elimination Act.

As the saying goes, the first step is to admit there is a problem. Most states have to begin by acknowledging that LGBT youth are overrepresented in their juvenile systems and then recognize LGBT youth as a group in need of particularized services. For example, in New Jersey the Juvenile Justice Commission provides special needs services only to individuals who suffer from mental illness, have substance abuse problems, or have been classified as juvenile sex

⁹⁰ See Estrada, *supra* Note 81 at 172.

offenders.⁹¹ Further, the Juvenile Justice Commission's Manual of Standards for Juvenile Detention Facilities readopted in February 2011 does not even mention LGBT individuals.⁹²

Yet, indirectly, states are taking prophylactic steps to help LGBT youth avoid juvenile detention as part of larger efforts to reduce their overall dependence on youth detention facilities. A 2011 report issued by the New Jersey Juvenile Justice Commission, "Juvenile Detention Alternatives Initiative Data Report for 2011," shows a significant decline in youth held in detention centers. From 2010-2011, there was 54.8% decrease in the average daily population of the 15 county-operated centers and a 59.8% drop in the admittance rate.⁹³ This means that over 6,000 fewer juveniles were admitted into detention.⁹⁴ These reductions encompass alternate assignments for youth who have committed non-violent infractions.⁹⁵

For example, juveniles admitted for noncompliance with probation rules decreased by 65%, failing to appear in court by 53.7%, non-delinquency matters by 33.2%.⁹⁶ These vast improvements are the product of New Jersey's efforts to replicate, in partnership with the Annie E. Casey Foundation, the nationally recognized Juvenile Detention Alternatives Initiative. It was

⁹¹ The State of New Jersey, Department of Law and Public Safety, Office of the Attorney General, *Juvenile Justice Commission: Special Needs Services*, 2013, available at <http://www.nj.gov/oag/jjc/specialized.html#mental>, (last visited on May 10, 2013).

⁹² New Jersey Juvenile Justice Commission, *NEW JERSEY ADMINISTRATIVE CODE TITLE 13. LAW AND PUBLIC SAFETY CHAPTER 92. MANUAL OF STANDARDS FOR JUVENILE DETENTION FACILITIES*, 2011, available at http://www.nj.gov/oag/jjc/pdf/13-92_Standards-for-Juvenile-Detention-Facilities_Readopted-022311.pdf, (last visited on May 10, 2013).

⁹³ The State of New Jersey, *Juvenile Detention Alternatives Initiative Data Report for 2011*, 2011, available at <http://www.nj.gov/lps/jjc/pdf/JDAI-2011-Report-Annual.pdf>, (last visited on May 10, 2013).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Tom Hester Sr., *Detention of non-violent New Jersey juvenile delinquents saw over 50 percent decrease in 2011, 2012*, available at <http://www.newjerseynewsroom.com/state/detention-of-non-violent-new-jersey-juvenile-delinquents-saw-over-50-percent-decrease-in-2011>, (last visited on May 10, 2013).

created to address national trends showing high increases in the use of youth detention facilities even though juvenile arrests were down.⁹⁷

Reducing dependence on large-scale youth correctional facilities is a critical component of addressing discrimination and abuse of LGBT offenders. As the Casey Foundation noted,

The largest share of committed youth—about 40 percent of the total—are held in locked long-term youth correctional facilities operated primarily by state governments or by private firms under contract to states...[T]hese institutions have never been found to reduce the criminality of troubled young people. Quite the opposite: For decades now, follow-up studies tracking youth released from juvenile corrections facilities have routinely reported high rates of recidivism. Meanwhile, reports of pervasive violence and abuse have been regularly emerging from these facilities for as long as anyone can remember.⁹⁸

By housing offenders in smaller-scale residential programs, states could not only decrease the opportunity for discrimination and inappropriate treatment, but go the other way to provide beneficial and specialized services. It may be difficult for juvenile justice administrators to tailor the policies and procedures of a correctional facility housing 300 youth to meet the special needs of a single transgender offender, for example. However, state officials are likely to have an easier time, both in terms of resources and procedure, addressing special needs in a residential treatment center holding 30 individuals or a group home caring for 10.

New Jersey, Massachusetts, and Minnesota are currently the only states in the nation with group homes established specifically to serve the needs of LGBT youth. Each state has a single home. In New Jersey, Triad House, serves up to 12 LGBT youth at a time. The residents are usually shuffled through the child welfare and juvenile justice systems before obtaining

⁹⁷ Id.

⁹⁸ http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf pages 2-3

placement there.⁹⁹ States could better serve LGBT juvenile offenders, thereby moving them away from a criminal track, by funding more residences like Triad House and utilizing them as early intervention, rather than as a last resort.

Although efforts are improving to keep youth in general, and by default, LGBT youth out of juvenile detention, most states have few, if any, programs or policies in place specifically designed to serve gay and transgender individuals who are already in the child welfare and juvenile justice systems. There must be a concerted effort to recognize these issues as a state.

Martin Luther King Jr. said, “[i]t may be true that morality cannot be legislated, but behavior can be regulated.” First Amendment constraints may keep states from compelling their citizens to embrace LGBT youth, even in the context of the parent-child relationship. However, states do have the authority to prohibit discrimination. Two key avenues for this is to amend state laws against discrimination to include sexual orientation and gender identity and implement robust anti-bullying policies.

As of September 2011, 16 states prohibit discrimination based on both sexual orientation and gender identity, while another 5 make sexual orientation-based discrimination unlawful.¹⁰⁰ In states with broad anti-discrimination laws inclusive of sexual orientation and gender identity, LGBT youth have a viable path to legal remedy and a right to protection. This recognition by the state is also likely important psychologically for youth struggling with a lack of acceptance in their immediate communities.

Further, a state may not be able to change a family home environment, but it can certainly protect a student in school, making anti-bullying laws critical. New Jersey’s anti-bullying law is

⁹⁹ Interview with John Mikytuck

¹⁰⁰ ACLU, *Non-Discrimination Laws: State by State Information – Map, 2011*, available at <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>, (last visited on May 10, 2013).

considered the toughest in the nation because it requires school districts to respond to harassment, intimidation, and bullying that occur off-school grounds. This is critical in addressing the online harassment that has become prevalent in recent years. The law requires school officials to quickly and effectively respond to a report of bullying whether they believe it is bullying or not. The impact of this for LGBT students is that in less accepting communities, school districts are still forced to address bullying. If the issue remains unresolved, the law allows review by the state Commissioner of Education.¹⁰¹

It is also important for law enforcement, the child welfare system, and the legal system to help keep families together in order to keep youth out of the juvenile detention.¹⁰² However, encouraging family support and reunification should only go so far. When a family is unaccepting of an individual's sexual orientation or gender identity and shows little inclination towards a change in attitude, it may be best to remove these youth from the family home.¹⁰³

Making a best interest determination on behalf of a youth or adolescent in the child welfare system that conflicts with family reunification based on a youth's sexual orientation or gender identity requires that those making such decisions are adequately trained. In New Jersey, as a result of the Modified Settlement Agreement, the Department of Children and Families is required to develop and implement a plan for providing services to youth who identify as LGBT and are under DCF care.¹⁰⁴

¹⁰¹ Interview with Assemblywoman Valerie Vainieri Huttle, prime sponsor of Anti-Bullying Bill of Rights.

¹⁰² See Ray, *supra*, Note 24 at 3.

¹⁰³ John Mikytuck March 12, 2013 Budget Testimony and follow-up conversation.

¹⁰⁴ Memo in Response for Request for Information to New Jersey Office of Legislative Services, Human Services Section.

While seen by some as just a start, New Jersey is making strides in training child welfare staff. To reap the benefits of this progress though it is necessary for training to extend to administrators and staff in juvenile justice. According to the National Center for Lesbian Rights, “juvenile justice professionals desperately need more information, training, and resources to ensure that LGBT youth are treated fairly.”¹⁰⁵ In addition, the NCLR recommends that state bar associations host “...continuing legal education events and develop subcommittees to address issues related to LGBT youth in the juvenile justice system.”¹⁰⁶

According to John Mikytuck of LifeTies, data collection of LGBT youth in the child welfare and juvenile justice systems is vital to addressing this community’s needs. By knowing how many youth in these systems identify as LGBT, a state has the ability to allocate sufficient specialized resources, create tailored policies, and take an individualize approach when possible and appropriate.¹⁰⁷

While juvenile justice is mainly centered within states, the federal government has provided a framework. Congress passed the Juvenile Delinquency Prevention and Control Act in 1968, which was revised and renamed the Juvenile Delinquency Prevention Act in 1972. The Act defines juvenile delinquency as, “any act that is otherwise a crime, but is committed by someone under 18 years of age.”¹⁰⁸ The law provides funds to states that provide the “core protections” in an effort to improve the care and treatment of youth in the justice system. The four core protections of the Act are deinstitutionalization of status offenders, sight and sound separation,

¹⁰⁵ See National Center for Lesbian Rights, *supra* Note 10.

¹⁰⁶ *Id.*

¹⁰⁷ Interview with John Mikytuck of LifeTies

¹⁰⁸ http://www.law.cornell.edu/wex/juvenile_justice

meaning disallowing contact between juvenile and adult offenders, jail removal, meaning keeping youth out of adult jails, and reduction in disproportionate minority confinement.¹⁰⁹

Congress last reauthorized the Juvenile Justice and Delinquency Prevention Act in 2002. Since 2008, individual members of Congress, as well as national, state, and local advocates have lobbied for reauthorization of the Act. While the effort has not focused on LGBT youth in juvenile justice, Congress' reauthorization of the Act with provisions for LGBT offenders would benefit LGBT youth.¹¹⁰

When Congress reauthorized the Act in 1992, it included a provision for state plans to "...focus on educational needs, gender specific services, rural prevention and treatment, mental health services, and establishment of a comprehensive and coordinated system of services."¹¹¹ An updated version of the Act could include language for specific services for LGBT juvenile offenders, just as it did for gender. It could also include LGBT wards with the minority populations targeted for confinement reduction.

State compliance with another key federal legislative initiative, the Prison Rape Elimination Act (PREA), could also help LGBT youth in juvenile justice. PREA standards were established after the law was enacted in 2003 to prevent, detect, and respond to sexual abuse of individuals in confinement, which includes a juvenile facility. Any state that does not certify full compliance with the standards is subject to a reduction in U.S. Department of Justice grants. There are four distinct set of standards, each corresponding to a specific type of confinement facility, including juvenile facilities. The standards include guidelines on: prevention planning,

¹⁰⁹ Act for Juvenile Justice, *A Nationwide Initiative Addressing Reauthorization of the Juvenile Justice and Delinquency Prevention Act*, 2007, available at <http://www.act4jj.org/> (last visited on May 10, 2013).

¹¹⁰ Id.

¹¹¹ <http://ojjdp.gov/compliance/jjdpchronology.pdf>

supervision and monitoring staffing of juvenile facilities, juveniles in adult facilities, cross-gender searches and viewing training and education, screening for risk of sexual abuse, reporting, responsive planning, investigations, discipline, medical and mental health care, grievances, audits, and LGBTI and gender nonconforming inmates.

The standards addressing LGBTI and gender nonconforming inmates require training in effective and professional communication with this specific population, require a screening process to identify LGBTI and gender nonconforming inmates, and mandate that post incident reviews consider whether an incident of sexual abuse was motivated by an inmate's identification as LGBT.¹¹²

Conclusion

This paper has addressed the high incidence of LGBT youth in the juvenile justice system, the underlying causes, the effects on the individuals in the system, and what state and federal policy makers can do to make meaningful reforms in the system. It is the writer's hope that as LGBT rights are increasingly recognized, states and the federal government also acknowledge and address the overrepresentation of LGBT youth in juvenile detention and their disparate treatment in custody.

¹¹² Memo in Response for Request for Information to New Jersey Office of Legislative Services, Human Services Section