



The Unfair Criminalization of Gay and Transgender Youth

An Overview of the Experiences of LGBT Youth in the Juvenile Justice System

By Jerome Hunt and Aisha Moodie-Mills June 29, 2012

Introduction

Gay, transgender, and gender nonconforming youth are significantly over-represented in the juvenile justice system—approximately 300,000 gay and transgender youth are arrested and/or detained each year, of which more than 60 percent are black or Latino.¹ Though gay and transgender² youth represent just 5 percent to 7 percent of the nation's overall youth population, they compose 13 percent to 15 percent of those currently in the juvenile justice system.³

These high rates of involvement in the juvenile justice system are a result of gay and transgender youth abandonment by their families and communities, and victimization in their schools—sad realities that place this group of young people at a heightened risk of entering the school-to-prison pipeline.

Despite the disproportionately high rates of gay and transgender youth entering the juvenile justice system, our nation's schools, law enforcement officers, district attorneys, judges, and juvenile defenders are not equipped to manage the unique experiences and challenges that these young people face. As a consequence, the system often does more harm by unfairly criminalizing these youth—imposing harsh school sanctions, labeling them as sex offenders, or detaining them for minor offenses—in addition to subjecting them to discriminatory and harmful treatment that deprives them of their basic civil rights.

Angela Irvine of the National Council on Crime and Delinquency in conjunction with the Equity Project, which works to ensure gay and transgender youth in the juvenile justice system are treated with fairness and respect, have both generated groundbreaking research on the experiences of these youth in the system over the past few years. This issue brief offers a high-level summary of some of their findings, as well as others, to explain the disproportionate pipelining of gay and transgender youth into the juvenile

justice system, the bias and discrimination they face once within the system, and the steps that the federal government and state and local juvenile courts can take to ensure that gay and transgender youth are treated with dignity and respect.⁴

Why gay and transgender youth end up in the juvenile justice system

Family rejection, homelessness, and failed safety nets

Research shows that gay and transgender youth entering into the juvenile justice system are twice as likely to have experienced family conflict, child abuse, and homelessness as other youth.⁵ This trend is partly due to the fact that youth today “come out” at younger ages, often to families that may not accept gay and transgender people. Since these youth still depend on their families to meet their material needs, family rejection can leave them emotionally and physically vulnerable, particularly if they find themselves cast onto the streets with nowhere to turn for support.

Many gay and transgender youth leave their homes of their own accord to escape the conflict and emotional or physical abuse that can ensue—26 percent report leaving their homes at some point—but more often, they are pushed out and into the juvenile justice system by their own families.

Interfamily conflicts stemming from parents’ refusal to accept a child’s sexual orientation or gender identity often result in the first contact these young people have with the justice system. According to the Equity Project, prosecutors frequently file charges against these youth for being “incorrigible” or beyond the control of their parents or guardians, based largely on the parent’s objections to their sexual orientation.⁶ This practice unfairly criminalizes gay and transgender youth because of their identity rather than because of their behavior.

Further, family discord that casts these youth from their homes can send them cascading through social safety nets not adequately equipped to support them. Programs designed to keep children and youth off the streets, such as foster care, health centers, and other youth-serving institutions, are often ill-prepared or unsafe for gay and transgender youth due to institutional prejudice, lack of provider and foster-parent training, and discrimination against gay and transgender youth by adults and peers.⁷ As a result, many youth run away from these placements, actions that could also land them in the custody of the juvenile justice system.

Gay and transgender youth who flee hostility and abuse at home and in temporary placements are most likely to end up homeless, which is the greatest predictor of involvement with the juvenile justice system.⁸ Gay and transgender youth represent

up to 40 percent of the homeless youth population even though they only compose 5 percent to 7 percent of the youth population overall, and 39 percent of homeless gay and transgender youth report being involved in the juvenile justice system at some level.⁹

Out of despair and a need for survival, homeless gay and transgender youth are more likely to resort to criminal behaviors, such as drug sales, theft, or “survival sex,” which put them at risk of arrest and detainment.¹⁰ These youth are also at an increased risk of detainment for committing crimes related to homelessness, such as violating youth curfew laws and sleeping in public spaces.¹¹

Family rejection, which sets off a tragic chain of events for many gay and transgender youth, is at the core of these issues. Caitlin Ryan of the Family Acceptance Project at San Francisco State University, whose research has brought to light the negative impacts that family rejection can have on gay and transgender youth, emphasizes the need to provide opportunities to help support and strengthen families in order to promote nurturing environments for gay and transgender children.¹² Early intervention can help families and caregivers reduce the risk of these youth entering the juvenile justice system. It is important that law enforcement officials, district attorneys, judges, and juvenile defenders seek ways to keep gay and transgender youth and their families together, rather than pushing for incarceration.¹³

Biased school discipline policies

Unfortunately, schools do not always provide a reprieve for youth experiencing family rejection. According to the Gay Lesbian and Straight Education Network’s School Climate Survey, 84 percent of gay and transgender students report being verbally harassed, 40 percent physically harassed, and 19 percent physically assaulted.¹⁴

What’s more, gay and transgender students report astonishingly low levels of confidence in their school administrators and often do not report incidents because they expect the situation will not improve or fear it might even become worse. This is not surprising considering that one-third¹⁵ of bullied gay and transgender students who reported bullying to school officials said the administrators did nothing to address the issue.¹⁶

In fact, school officials in many ways exacerbate these problems and place further stress and burden on gay and transgender youth by disproportionately doling out harsh school sanctions against them for minor disciplinary infractions. The school and juvenile justice systems have become inextricably linked in recent years with schools relying heavily on law enforcement to manage what in the past were school discipline issues.¹⁷ The consequence of this conflated discipline system is that it unduly criminalizes youth of color and gay and transgender youth.

School discipline policies across the United States are under heightened scrutiny because of the disparate impact they have on youth of color, particularly black boys. Data released this spring¹⁸ from the U.S. Department of Education's Office of Civil Rights show that harsh school sanctions—such as zero-tolerance policies, which lead to suspensions and expulsions of students for even the most minor offenses—perpetuate a school-to-prison pipeline that disproportionately criminalizes youth of color.

Hidden among these school discipline data are thousands of gay and transgender youth who bear a double burden of disparate impact. A groundbreaking study published in 2010 in the medical journal *Pediatrics* revealed that gay and transgender youth, particularly gender nonconforming girls, are up to three times more likely to experience harsh disciplinary treatment by school administrators than their heterosexual counterparts.¹⁹

As with the racial disparities in school suspensions and expulsions, these higher rates of punishment do not correlate to higher rates of misbehavior among gay and transgender youth. What the research suggests is that gay and transgender youth actually face harsher sanctions by school administrators even when committing similar offenses.

Surely bias and discrimination among teachers, staff, and administrators contributes to the unfair treatment of gay and transgender youth in schools. Adults in schools often draw assumptions of guilt based on a student's physical characteristics, demeanor, dress, or mannerisms, deeming those deviating from an accepted gender norm to be agitators. Such assumptions are not only misguided, but biased against gay and transgender students who do not fall within rigid stereotypes of expression.

Moreover, studies reveal that gay and transgender youth are often the victims, rather than the aggressors in school conflicts, which stem from bullying and harassment. Consider, for example, a gender nonconforming girl exhibiting masculine traits, who is disciplined for fighting but may be defending herself from peers' taunts. Yet more often than not, school administrators will consider her the aggressor based solely on her physical demeanor and will suspend or expel her despite the defensive nature of her actions.

For many students, suspension and expulsion are the first steps toward time behind bars. This is equally true for gay and transgender youth.²⁰ Black boys and gender nonconforming girls similarly experience disproportionately harsh punishments and juvenile justice system referrals in schools, but the latter are rendered all but invisible because sexual orientation and gender identity are not included in the federal school discipline data cited earlier in this report. A first step in addressing the unfair punishment of gay and transgender youth in schools is to expand the research and collection of school discipline data to include gay and transgender youth, which will help policymakers and practitioners alike better understand the problem and formulate more supportive school discipline policies.

Unfair criminalization by the system

Once in the juvenile justice system, gay and transgender youth are too often denied basic civil rights, wrongly categorized as sexually deviant simply because of their sexual orientation, gender identity, or gender nonconformity, and even labeled as sex offenders. They are also subjected to the biases and discrimination of law enforcement agents, judges, and other justice system officials that leave them vulnerable to abuse and neglect.

Classification as sex offenders

Gay and transgender youth who end up in the justice system are at-risk of being labeled as sex offenders, regardless of whether they have actually committed a sexual crime. Gay and transgender youth “are more likely to be prosecuted for age-appropriate consensual sexual activity” than their heterosexual counterparts²¹—a lopsided application of the law, which has devastating consequences for gay and transgender youth who would be required to register as a sex offenders in 29 states if convicted. The stigma of being a registered sex offender could haunt them for the rest of their lives, negatively impacting their future employment and life opportunities and causing significant psychological distress.²²

Many gay and transgender youth charged with nonsexual offenses are also unfairly treated as sex offenders and ordered by the court to undergo sex offender treatment programs or sex offense risk assessments simply because of their sexual orientation or gender identity.²³ This misguided categorization by the courts has led gay and transgender youth, innocent of violent crimes or sex offenses, to be placed in restrictive punitive settings for high-risk youth and to be given longer stays in out-of-home placements.²⁴

These restrictive settings not only hinder rehabilitation efforts, they perpetuate the stigma that being gay or transgender is wrong. Additionally, extended stays in out-of-home placements prevent gay and transgender youth from reconnecting with their families, a critical step proven to stabilize their lives and reduce their risk of returning to the system. These unfair practices make gay and transgender youth susceptible to discrimination and harmful treatment while in the system.

Detention as a default

In most incidences juveniles who have been arrested or detained will only be released from custody under the supervision of a parent or guardian. Without someone to claim them, youth can be left to languish in detention centers with youth convicted of crimes, even if they have not been. Gay and transgender youth are most at-risk of detainment

by default by the juvenile justice system as they are more likely to be estranged from their families and lack parental support, which leaves them to fend for themselves. As a consequence, these youth are subjected to criminal incarceration while they await foster or group home placements.

Discriminatory and harmful treatment

Segregation and isolation of gay and transgender youth

From the moment gay and transgender youth enter a detention facility they are at risk of being inappropriately classified and housed. Transgender youth, for example, are often placed according to their birth sex rather than by their gender identity in an effort to force transgender youth to conform to societal norms. Doing so can be psychologically devastating and leave them vulnerable to physical and sexual abuse. Additionally, youth facility staff often view them as threatening or sexually predatory, harmful stereotypes that taint placement decisions and influence the treatment of transgender youth.²⁵

Some facilities will automatically segregate gay and transgender youth or place them in solitary confinement for their “own safety,” but this isolation perpetuates the stigmatization of gay and transgender youth, casts them as sexually deviant, and signals that they might be of threat to other youth.

According to the American Psychiatric Association,²⁶ isolation “is a form of punishment and is likely to produce lasting psychiatric symptoms.” Unwarranted segregation deprives gay and transgender youth of educational, recreational, and programming opportunities that they are otherwise entitled to receive, punishing them unfairly and at a particularly vulnerable time in their adolescent development.²⁷

Physical, sexual, and emotional abuse

A 2007 study funded by the California Department of Corrections and Rehabilitation found an astounding 67 percent of gay or transgender men have been sexually assaulted by another inmate—a rate 15 times higher than the overall inmate population.²⁸ Another study found that sexual assaults that occur are not just isolated events, but that 30 percent of all inmates have endured six or more sexual assaults.²⁹

Gay and transgender youth are particularly at risk for physical, sexual, and emotional abuse while in detention, by both staff and other youth. Eighty percent of those surveyed by the Equity Project believed a lack of safety in detention was a serious prob-

lem.³⁰ Some reports suggest that staff have turned a blind eye to incidents of rape and abuse against gay and transgender youth, confusing gay and transgender identity as an invitation for sex.³¹ Gay and transgender youth are not only subjected to abuse by their peers but by staff as well, particularly in the facilities that lack training and policies that promote inclusiveness and rely on biases rather than on best practices in treatment and placement decisions. This type of environment allows physical, sexual, and emotional abuse toward gay and transgender youth to happen without so much as a second thought and leaves them with nowhere to turn for help.

Unsafe reparative or conversion therapy

Gay and transgender youth have been subjected to reparative or conversion therapy to change their sexual orientation by both social workers and the courts,³² even though so-called reparative or conversion therapy has been condemned by every major health organization, including the American Medical Association, American Psychological Association, and the American Academy of Child and Adolescent Psychiatry.³³

Sadly, the juvenile justice system is rife with examples of misguided interventions. One judge hospitalized a gay youth to stop his same-sex attraction, while another judge with the parent's approval, had a young lesbian who was caught in a sexual act with another girl placed in a private hospital to be "treated and diagnosed for this behavior."³⁴ These examples may be the extreme, but instances such as a 15-year-old boy being given a women's lingerie catalogue with the purpose of teaching him "appropriate" sexual desires and a male-to-female transgender youth, who was detained in a boy's facility, being placed on "treatment plan" to "help with gender confusion and appropriate gender identity," are more common examples of unsafe reparative therapy.³⁵

The inclination to change a youth's sexual orientation or gender identity or force him or her to conform to "social norms" hinders general mental health and causes severe psychological distress. This type of "counseling and other services are virtually worthless [for gay and transgender youth] because they either ignore or criminalize the youth's sexuality."³⁶

Conclusion and recommendations

Gay and transgender youth are pipelined into the juvenile justice system at disproportionate rates, often stripped of their basic dignity and civil rights, and treated in a harmful and discriminatory manner once in the system. The current policies and practices of schools and the juvenile justice system overlook gay and transgender youth and perpetuate stigma and bias that can lead to their unwarranted criminalization and unfair treatment.

Some of the issues discussed in this report stem from the lack of cultural competency on the part of school officials, law enforcement officers, district attorneys, judges, and juvenile defenders. The individuals who interface directly with these youth must be better equipped to provide respectful, culturally appropriate interventions in order to reduce the number of gay and transgender youth unfairly and unnecessarily pipelined into the juvenile justice system and to improve conditions for them once in the system. A first step toward improving the system will be to institute training standards across the board for all agents of the court.

Moreover, institutional bias is at the heart of the mistreatment of gay and transgender youth by schools and the juvenile justice system, and we recommend broad policy suggestions to address them. The following recommendations are adopted in part from the National Juvenile Justice and Delinquency Prevention Council and the Equity Project. These recommendations are by no means the only recommendations for improvement, but instead offer a start to address the serious issue of the criminalization of gay and transgender youth.

Practical recommendations

- **Promotion of family center interventions**

Family rejection drives many gay and transgender youth from their homes and perpetuates negative coping behaviors and unlawful activities, heightening risk of entering the juvenile justice system. Gay and transgender youth who feel a sense of family acceptance report better physical, mental, and educational outcomes all around. Yet families have largely been left out of the equation on reform. Interventions that reconnect youth with their families will reduce their susceptibility to involvement with the juvenile justice system. Moreover, schools and juvenile detention systems should engage in more supportive behaviors that reduce risk and promote the positive development of gay and transgender youth in custodial care.³⁷

- **Gay and transgender inclusive training for all juvenile justice professionals**

“Juvenile justice professionals must receive training and resources regarding the unique societal, familial, and developmental challenges confronting [gay and transgender] youth ... [T]rainings must be designed to address the specific professional responsibilities of the audience (i.e., judges, defense attorneys, prosecutors, probation officers, and detention staff).”³⁸ Furthermore, these professionals must ensure that they and others treat gay and transgender youth with dignity, respect, and fairness and avoid ridiculing or attempting to change their sexual orientation or gender identity.

- **Development of gay and transgender inclusive policies, procedures, and programs**

All agencies involved with juvenile justice and all officers of the juvenile court should develop, adopt, and enforce policies that prohibit discrimination and mistreatment of any youth on the basis of their actual or perceived sexual orientation or gender iden-

tity at all stages of the process. Juvenile justice professionals should develop appropriate responses to the behavior of each gay and transgender youth that are tailored to address specific needs and to promote individual well-being by allowing gay and transgender youth to express themselves freely. This would include giving them the choice of name, clothing, hairstyle, or any other means by which they feel comfortable expressing themselves.³⁹

- **Gay and transgender inclusive data collection by the Office of Juvenile Justice and Delinquency Prevention**

Many states and localities are unable to achieve meaningful changes to their juvenile justice systems because the lack adequate data. Therefore, the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention should prioritize data collection that is disaggregated not only by race, ethnicity, and gender, but also by sexual orientation and gender identity. Through this type of robust data collection, communities will be better able to develop services that are culturally and linguistically appropriate for youth and their families,⁴⁰ especially for gay and transgender youth.

Policy recommendations

- **Dismantle the school-to-prison pipeline for all youth and for gay and transgender youth in particular**

As previously noted, gay and transgender youth are disproportionately pipelined into the juvenile justice system by their schools. Yet little data are available to quantify the problem and address it effectively. We can address this by including sexual orientation and gender identity questions in the Department of Education's school discipline data collection efforts. In addition, it is important that the Supportive School Discipline Initiative, a joint effort between the Department of Education and the Department of Justice aiming to dismantle the school-to-prison pipeline and currently focusing on race, provide guidance to school systems that bridges the gap for all youth, including those who are gay or transgender.

- **Pass the Safe Schools Improvement Act and the Student Nondiscrimination Act**

The Safe Schools Improvement Act would require kindergarten-through-12th-grade public schools that receive federal funding to implement policies prohibiting harassment and bullying based on gender identity and sexual orientation. The bill would also require states to report harassment and bullying data to the U.S. Department of Education. Passage of these two pieces of legislation by Congress would help ensure that gay and transgender students do not end up in the juvenile justice system for protecting themselves against discrimination they face on a daily basis at school.

- **Gay and transgender cultural competence in Safe Schools/Healthy Students**

The Department of Education's Safe Schools/Healthy Students program is widely recognized as a model of "effective collaboration across public education, local mental health, and juvenile justice."⁴¹ Therefore the evaluations of the Safe Schools/Healthy Students program should be inclusive of gay and transgender students needs, including cultural competency training for those who work in the juvenile justice system. Increased training focused on the needs of gay and transgender youth will help decrease arrest rates and referrals of these youth to the juvenile justice system. Currently, law enforcement is 50 percent more likely to stop gay youth than other youth, according to a recent study in the medical journal *Pediatrics*. Additionally, "girls who identified themselves as lesbians or bisexual reported twice as many arrests and convictions as other girls who had engaged in similar behavior."⁴² Gay and transgender youth in general experience high rates of school violence, which not only interferes with their ability to learn but also can affect their involvement with the juvenile justice system.⁴³

- **Amend the Sex Offender Registration and Notification Act**

Congress should amend the Sex Offender Registration and Notification Act, or SORNA, to exclude youth who are convicted of certain sex-based offenses from mandatory sex offender registration. The way the U.S. Department of Justice's SORNA program is currently set up can disrupt families because both the youth who has to register is stigmatized and the entire family. More importantly, SORNA can have lasting effects on a youth's identification and treatment. A parent, for example, may delay getting his or her child needed treatment and even go as far as hiding the child's problem after discovering that the child may have to register as a sex offender for life.⁴⁴ Thus, amending this law can help to alleviate the criminalization that is part and parcel of a gay or transgender youth being labeled as a sex offender.

- **Reauthorization of the Juvenile Justice and Delinquency Prevention Act**

The Juvenile Justice and Delinquency Prevention Act has not been reauthorized since 2002 and is in need of substantive changes to ensure that youth are put on a better path and that our communities are kept safe. In particular, the act should be reauthorized to include three key items that will help gay and transgender youth in the system. The first is to strengthen the Disproportionate Minority Contact core protections "by requiring states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system,"⁴⁵ rather than just issuing vague requirements with no clear guidance on how to reduce these disparities.

Second, the partnership between states and the Office of Juvenile Justice and Delinquency Prevention should expand training, technical assistance, and research and evaluation to include of gay and transgender needs and issues.

Third, incentives for the juvenile justice system to ensure that all policies, practices, and programs recognize the unique needs of gay and transgender youth, including account-

ability measures, expertise on the Juvenile Justice and Delinquency Prevention Act advisory groups, and increased research and information dissemination should be created.

- **Passage of federal legislation prohibiting gay and transgender discrimination in the juvenile justice system**

As this brief has shown, the juvenile justice system holds a disproportionately large number of gay and transgender youth, who experience high rates of discrimination and violence. Passage of federal protections that would ensure equality and the end of discrimination against gay and transgender youth is universal and should not be legislated on a state-by-state basis. Therefore, “Congress should pass federal protections against discrimination in all settings based on actual or perceived sexual orientation or gender identity and create incentives for States to appropriately and effectively respond to [gay and transgender] youth involved in the justice system.”⁴⁶

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Endnotes

- 1 Estimate drawn from National Juvenile Justice and Delinquency Prevention Coalition, "Recommendations for Juvenile Justice Reform: Opportunities for the Obama Administration" (2011), available at http://www.juvjustice.org/media/resources/public/resource_549.pdf, which states that 2.1 million youth are arrested nationwide. And, Angela Irvine, "We've had three of them: Addressing the invisibility of lesbian, gay, bisexual, and gender non-conforming youths in the juvenile justice system," *Columbia Journal of Gender and Law* 19 (3) (2010).
- 2 In this brief gay and transgender refers to lesbian, gay, bisexual, transgender, and gender nonconforming youth.
- 3 Katayoon Majd and others, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts" (The Equity Project, 2009).
- 4 See the Equity Project at <http://www.equityproject.org/>, which examines issues that impact LGBT youth during the entire delinquency process, ranging from arrest through post-disposition.
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- 7 Ibid.
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- 9 Jeff Krehely, Nico Sifra Quintana, and Josh Rosenthal, "On the Streets" (Washington: Center for American Progress, 2010); and Katayoon Majd and others, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
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- 20 Rachel Wilf, "Disparities in School Discipline Move Students of Color Toward Prison."
- 21 Katayoon Majd and others, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
- 22 Amanda Petteruit and Nastassia Walsh, "Registering Harm: How Sex Offenders Registries Fail Youth and Communities" (Justice Policy Institute, 2008), cited in "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts." See also, The National Center for Lesbian Rights, "The Legal Rights of Lesbian, Gay, Bisexual, and Transgender Youth in the Juvenile Justice System" (2006).
- 23 Ibid.
- 24 Katayoon Majd and others, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
- 25 Office of the Juvenile Defender, "Representing Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning (LGBTQ) Youth in Juvenile Court" (2011).
- 26 American Psychiatric Association, "New Release No. 09-12: Incarcerated Juveniles Belong in Juvenile Facilities" (2009), cited in "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
- 27 Just Detention International, "LGBT Detainees Chief Targets for Sexual Abuse in Detention" (2009).
- 28 Ibid.
- 29 Ibid.
- 30 Ibid.
- 31 Katayoon Majd and others, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
- 32 Just Detention International, "LGBT Detainees Chief Targets for Sexual Abuse in Detention."
- 33 Katayoon Majd and others, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
- 34 Ibid.
- 35 Ibid.
- 36 Equality Project interview with a juvenile defender (July 17, 2007), cited in "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts."
- 37 Minter and Krehely, "Families Matter."
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- 45 Ibid.
- 46 Ibid.