lation and the foster-care system are both disproportionately comprised of LGBTQ young people.[74] On the street, LGBTQ youth have next to nowhere to turn. New York City, by one estimate, is home to nearly 7000 homeless LGBTQ youth; only twenty-six beds are allocated specifically to LGBTQ individuals, a small number that is problematic because the NYC public shelter system is historically unwelcoming and hostile to LGBTQ individuals.[75] Studies document some of the other effects of mistreatment. Lesbian and gay youth were found by one researcher to be more likely to attempt suicide than other young people.[76] Another study reported higher rates of substance abuse for lesbian and gay youth than for their heterosexual peers.[77] One state-wide study found that students who either identified as gay, lesbian, or bisexual or reported any same-sex sexual contact were significantly more likely than other students to have been involved with gangs.[78] For youth of color, these issues are compounded because they also face race-based discrimination and marginalization.

Schools can be equally difficult. A 2003 national survey of self-identified LGBTQ youth ages thirteen through twenty found that ninety percent of respondents heard homophobic remarks in their schools frequently or often; nearly twenty percent heard homophobic remarks from faculty or staff at least some of the time; three quarters of youth reported feeling unsafe in their schools, primarily because of their sexual orientation or gender expression; nearly twenty percent reported some experience of physical assault because of sexual orientation; more than ten percent describe physical assault because of their expressed gender identity; and over half of the students surveyed reported that their property had been deliberately damaged or stolen in the past year.[79]

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[74] *See, e.g.*, SULLIVAN ET AL., *supra* note 65 (summarizing research on LGBTQ homeless youth and youth in foster care); Casciano et al., *supra* note 5, at 231 ("Of the nearly 20,000 kids who are living on the streets of New York, who sleep under the bridges and on the piers and on the subways every night, between forty and fifty percent of them self-identify as lesbian, gay or bisexual. That is a statistic . . . that is repeated in every city that has ever done such a study."); National Radio Project, Queer Youth Challenges, April 6, 2005, http://www.radioproject.org/archive/2005/1405.html; The Safe Schools Coalition, Homeless LGBT Youth And LGBT Youth in Foster Care, http://www.safeschoolscoalition.org/RG-homeless.html#STATISTICS (last visited Feb. 12, 2006) (summarizing studies showing that, in major urban areas, the percentage of the homeless/runaway population is between twenty-five and forty percent LGBTQ).

[75] Deena Guzder, *Gay, Young and Homeless*, N.Y. BLADE, July 8, 2005, *available at* http://nyblade.com/2005/7-8/locallife/main/.

[76] PAUL GIBSON, US DEP'T OF HEALTH & HUMAN SVCS., REPORT OF THE SECRETARY'S TASK FORCE ON YOUTH SUICIDE: PREVENTION AND INTERVENTIONS IN YOUTH SUICIDE (1989).

[77] *See, e.g.*, Michael Resnick et al., *Protecting Adolescents From Harm: Findings from the National Longitudinal Study on Adolescent Health*, J.A.M.A. 823, 823-832 (Sept. 1997). One researcher critiques much of the research cited in this section for its focus on the "dramatic, rather than the normative" and concentration on problems rather than the capacity to remain resilient, recounting the story of a young man he interviewed in the 1990s, who questioned whether he qualified to participate in the research, because, as he said, "I don't think I'm gay. . . . I haven't tried to kill myself yet." SAVIN-WILLIAMS, *supra* note 1, at 68.

[78] ELIZABETH SPINNEY, EXEC. OFFICE OF PUB. SAFETY, MASSACHUSETTS JUVENILE JUSTICE DATA AND INFORMATION (2004), http://www.burnsinstitute.org/dmc/ma/massdata.pdf.

[79] GAY, LESBIAN & STRAIGHT EDUC. NETWORK, 2003 NATIONAL SCHOOL CLIMATE SURVEY, http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/300-3.PDF.

HeinOnline -- 6 Nev. L.J. 789 2005-2006

Transgender youth face harassment and hostile questions when trying to use public restrooms.[80] Almost half of those who experienced harassment or assault never reported the incidents to anyone.[81] Of those students who reported difficulties to their parents or guardians, twenty percent reported that their parents or guardians had not intervened on their behalf with school officials.[82] Not surprisingly, the National Mental Health Association reports that nationwide, twenty-eight percent of lesbian and gay teens drop out of school annually—three times the rate of heterosexual students.[83]

Things are improving for some LGBTQ students, particularly those in urban areas and on both coasts. "Gay-Straight Alliances" (GSAs), the first of which was formed in a Massachusetts private school in 1989,[84] now provide forums in nearly 3000 schools nationwide in which students who identify as LGBTQ or are LGBTQ allies come together for mutual support.[85] Under federal law,[86] if a school maintains any student groups unrelated to the curriculum, it must also provide equal access and treatment to student groups created for LGBTQ students.[87] These school-based groups supplement the many commu-

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[80] *See, e.g.*, Emily Grossman, *Transgender Bathrooms* (Columbia Radio News, Radio Workshop broadcast Mar. 3, 2003) (transcript *available at* http://www.jrn.columbia.edu/studentwork/radio/261/2003-03-28/1981.asp) (quoting female-to-male transgender lawyer and activist Dean Spade: "I have been kicked out of both men's and women's rooms, leaving me with the idea, that I look, whatever my appearance is, at least at some points in my life, has clearly been to a lot of people, not sufficiently male or female to use a bathroom.").

[81] *Id.*

[82] *Id.* For every GLBT youth who reported being targeted for anti-gay harassment, four heterosexual youth reported harassment or violence for being perceived as gay or lesbian.

[83] National Mental Health Association, *Bullying in Schools: Harassment Puts Gay Youth At Risk*, http://www.nmha.org/pbedu/backtoschool/bullyingGayYouth.cfm (last visited Feb. 12, 2006). In Massachusetts, a state with a relatively large number of services for LGBTQ students and legal rights and protections for queer adults, students who self-identified as LGBTQ were five times more likely to have attempted suicide in the past year, three times more likely to have missed school in the past month because they felt unsafe, and three times more likely to have been injured or threatened by a weapon at school. THE MASS. GOVERNOR'S COMM'N ON GAY AND LESBIAN YOUTH, THE 2003 MASSACHUSETTS YOUTH RISK BEHAVIOR SURVEY, http://www.mass.gov/gcgly/yrbs03.pdf.

[84] Carol A. Snively, *Gay-Straight Alliances*, http://www.glbtq.com/social-sciences/gay_straight_alliances.html (last visited Feb. 12, 2006).

[85] *See* Gay, Lesbian & Straight Education Network, http://www.glsen.org/cgi-bin/iowa/student/student/index.html (last visited Feb. 12, 2006). In recognition of the difficulty that openly LGBTQ students traditionally have in schools, the Institute for the Protection of Lesbian and Gay Youth formed in New York City in 1979. It operates the Harvey Milk School, a specialized school focused on youth at risk because of their sexual orientation or gender identity. *See* The Hetrick-Martin Institute, Home of the Harvey Milk High School, http://www.hmi.org (last visited Feb. 12, 2006).

[86] 20 U.S.C. §§ 4071-4074 (2000).

[87] *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990) (where public secondary school maintains any non-curriculum related student group, it has created a limited open forum under the Equal Access Act and may not deny recognition to other non-curriculum related groups without running afoul of the provisions of the Act); Colin v. Unified Orange Sch. Dist., 83 F. Supp. 2d 1135 (C.D. Cal. 2000). For a helpful overview of legal issues pertaining to LGBTQ students and teachers, see NAT'L SCH. BD. ASS'N, DEALING WITH LEGAL MATTERS SURROUNDING STUDENTS' SEXUAL ORIENTATION AND SEXUAL IDENTITY, http://www.nsba.org/site/docs/34600/34527.pdf.

HeinOnline -- 6 Nev. L.J. 790 2005-2006

nity-based organizations that have sprung up in the last twenty-five years.[88] Additionally, some students who have faced abuse and harassment based on their sexual orientation, gender identity, or perceptions of their orientation or identity, have successfully sued their school districts under section 1983,[89] Title IX,[90] and the First Amendment,[91] where they have been able to show that the abuse and harassment occurred with the knowledge and tacit approval or indifference of school administrators.

In spite of the advent of LGBTQ youth organizations in some areas, and the possibility of raising legal claims to combat school-based abuse and discrimination, the overall state of legal protections for LGBTQ youth in schools is dismal. Alabama,[92] Arizona,[93] South Carolina,[94] and Texas[95] have laws that specifically prohibit any positive portrayal of LGBTQ people or issues in schools. Mississippi requires that its schools "teach[ ] the current state law related to . . . homosexual activity."[96] Oklahoma law requires that HIV educa-

[88] *See* National Youth Advocacy Coalition, http://www.nyacyouth.org/nyac/programs.html (last visited Feb. 12, 2006). The National Youth Advocacy Coalition is a national organization that advocates for LGBTQ youth; its website links to some of the many LGBTQ-youth-serving organizations around the country.

[89] Flores v. Morgan Hill Unified Sch. Dist., 324 F. 3d 1130 (9th Cir. 2003) (denying summary judgment to school administrators in claim by students that they were discriminated against because they were, or were perceived to be, gay, lesbian, or bisexual); Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (denying summary judgment to school administrators in gay student's equal protection claim that school administrators failed to follow their non-harassment policy because of his gender and sexual orientation).

[90] Vance v. Spencer County Pub. Sch. Dist., 231 F.3d 253 (6th Cir. 2000) (affirming damages award by jury against school district where it acted with deliberate indifference to pervasive student-on-student sexual harassment); *see also* NAT'L SCH. BDS. ASS'N, *supra* note 87, (citing U.S. DEPT. OF EDUC, OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001) (stating that "sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX")).

[91] Henkle v. Gregory, 150 F. Supp. 2d 1067 (D. Nev. 2001) (holding that a student states a claim under the First Amendment where he was repeatedly harassed by other students and, when he complained, was told by school administrators to keep his sexual orientation to himself).

[92] ALA. CODE § 16-40A-2(c)(8) (1992) ("Course materials and instruction that relate to sexual education or sexually transmitted diseases should include all of the following elements: . . . An emphasis, in a factual manner and from a public health perspective, that homosexuality is not a lifestyle acceptable to the general public and that homosexual conduct is a criminal offense under the laws of the state.").

[93] ARIZ. REV. STAT. ANN. § 15-716(C) (1991) ("No district shall include in its course of study instruction which . . . (1) [P]romotes a homosexual life-style; (2) [p]ortrays homosexuality as a positive alternative life-style; (3) suggests that some methods of sex are safe methods of homosexual sex.").

[94] S.C. CODE ANN. § 59-32-30 (1988) (describing health education program and ordering that "[t]he program of instruction provided for in this section may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases").

[95] TEX. HEALTH & SAFETY CODE ANN. § 85.007 (Vernon 1991) ("The materials in education programs intended for persons younger than 18 years of age must . . . state that homosexual conduct is not an acceptable lifestyle.").

[96] MISS. CODE ANN. § 37-13-171 (1998).

HeinOnline -- 6 Nev. L.J. 791 2005-2006

tion include a declaration that homosexual activity is primarily responsible for contact with the HIV virus.[97] Only a handful of states provide any legal protections for students based on their sexual orientation.[98] A smaller number include protections based for students based on their gender identity.[99] The absence of LGBTQ-friendly organizations, policies and laws in most areas makes life more difficult for LGBTQ students. A 2004 state-by-state study[100] revealed that LGBTQ students who either did not have access to, or did not know of, policies protecting them from violence and harassment were forty percent more likely to report skipping school out of fear for their safety.[101]

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[97] OKL. STAT. ANN. tit. 70, § 11-103.3 engaging in homosexual activity, promiscuous sexual activity, intravenous drug use or contact with contaminated blood products is now known to be primarily responsible for contact with the AIDS virus").

[98] *See, e.g.*, CAL.WELF. & INST.CODE § 14504.1 (2003) ("School-based programs that include sexuality education shall comply with the requirements of Section 220 of the Education Code, which prohibits discrimination in schools based on sexual orientation."); CAL. EDUC. CODE § 233.5 (2003) ("Each teacher is . . . encouraged to create and foster an environment that encourages pupils to realize their full potential and that is free from discriminatory attitudes, practices, events, or activities, in order to prevent acts of hate violence."); MD. CODE ANN., EDUC. § 7-424 (West 2005) (Department of Education required to maintain and report statistics on school-based intimidation or harassment "[m]otivated by an actual or a perceived personal characteristic such as . . . sexual orientation"); MASS. GEN. LAWS ANN. ch 76, § 5 (1993) ("No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of . . . sexual orientation."); N.J. STAT. ANN. § 18A:37-14 (West 2002) (proscribing harassment, intimidation or bullying "motivated by any actual or perceived characteristic, such as . . . sexual orientation"); R.I. GEN. LAWS § 28-5-14 (2004) ("In order to eliminate prejudice among the various ethnic groups in this state and to further good will among those groups, the commission and the state department of elementary and secondary education are jointly directed to prepare a comprehensive educational program, designed for the students of the public schools of this state and for all other residents of the state, calculated to emphasize the origin of prejudice based on . . . sexual orientation."); 16 VT. STAT. ANN. tit. 16, § 11 (2003) (proscribing harassment "based on or motivated by a student's or a student's family member's sexual orientation"); WIS. STAT. § 118.13 (1997) ("No person may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's . . . sexual orientation.").

[99] *See, e.g.*, CAL. EDUC. CODE § 233.5 (2003) ("Each teacher is . . . encouraged to create and foster an environment that encourages pupils to realize their full potential and that is free from discriminatory attitudes, practices, events, or activities, in order to prevent acts of hate violence."); MD. CODE ANN., EDUC. § 7-424 (2005) (Department of Education required to maintain and report statistics on school-based intimidation or harassment "[m]otivated by an actual or a perceived personal characteristic such as . . . gender identity"); N.J. STAT. ANN § 18A:37-14 (2002) (proscribing harassment, intimidation or bullying "motivated by any actual or perceived characteristic, such as . . . gender identity"); R.I. GEN. LAWS § 28-5-14 (2004) ("In order to eliminate prejudice among the various ethnic groups in this state and to further good will among those groups, the commission and the state department of elementary and secondary education are jointly directed to prepare a comprehensive educational program, designed for the students of the public schools of this state and for all other residents of the state, calculated to emphasize the origin of prejudice based on . . . gender identity or expression.").

[100] Gay, Lesbian & Straight Education Network, http://www.glsen.org/cgi-bin/iowa/all/about/index.html (last visited Feb. 7, 2006).

[101] Gay, Lesbian & Straight Education Network, *2004 State of the States Report*, http://www.glsen.org/cgi-bin/iowa/chapter/library/record/1687.html. (last visited Feb. 7, 2006).

HeinOnline -- 6 Nev. L.J. 792 2005-2006

Running away from home, dropping out of school and other adaptive—if sometime self-destructive—behaviors render LGBTQ youth vulnerable to involvement in the child welfare and juvenile justice systems. These systems are ill-equipped to address the underlying bias and hostility that create conflicts at home and at school. For example, a transgender girl whose parents refuse to support or even acknowledge her gender identity may stay away from home as much as possible—missing curfew, spending the night with friends—because home is a site of misery for her. Fed up, her parents may turn to the local juvenile or family court, where they will be counseled by the probation department on how to bring a petition to have her adjudicated as a "stubborn" or "incorrigible" child—one of the status offenses that can subject children to the jurisdiction of a family or juvenile court.[102] Courts have a variety of options for handling status offenders—they can order individual counseling for the child, family counseling, or removal of custody from the parents.[103] However, because the typical response of the family or juvenile court is to treat the symptom, rather than the cause, of misbehavior or defiance by a child,[104] courts are extremely unlikely to directly engage with the families on their negative feelings toward their openly transgender—or gay, lesbian, or bisexual—child. Against a jurisprudential backdrop of near-complete deference to the right of parents to inculcate their values in their children,[105] courts have little incentive to create sensitivity and tolerance in parents for sexual-minority issues. While they could in theory provide home-based, preventive services to a family experiencing conflict over a child's sexual orientation or gender identity, they are powerless to restrict the ability of parents with financial means to send their

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[102] The New York and Massachusetts statutes regulating status offenses are illustrative. In New York, a "person in need of supervision" ("PINS") is defined as a "person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority, or who [unlawfully possesses marijuana for the first time]." N.Y. FAM. CT. ACT § 712 (a) (McKinney 1999). *In re* Lori M., 496 N.Y.S.2d 940 (N.Y. Fam. Ct. 1985) is a PINS case that was initiated by a mother for the sole reason that her daughter was associating with a twenty-year-old lesbian. *See generally* Ruthann Robson, *Our Children: Kids of Queer Parents and Kids Who are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 915 (2001); Sullivan, *supra* note 5. In Massachusetts, a "child in need of services" ("CHINS") is defined as "a child below the age of seventeen who persistently runs away from the home of his parents or legal guardian, or persistently refuses to obey the lawful and reasonable commands of his parents or legal guardian, thereby resulting in said parent's or guardian's inability to adequately care for and protect said child, or a child between the ages of six and sixteen who persistently and wilfully fails to attend school or persistently violates the lawful and reasonable regulations of his school." MASS. GEN. LAWS ANN. ch. 119, § 21 (2003).

[103] *See, e.g.*, MASS. GEN. LAWS ANN. ch.119, § 39G (2003).

[104] For a critical appraisal of the status-offense jurisdiction of the juvenile and family court, see generally ABA & NAT'L BAR ASS'N, *supra* note 4, at 83.

[105] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (in holding that an Amish father may withdraw his fifteen-year-old daughter from school notwithstanding the state's compulsory education law, the Court relied on Yoder's religious liberty as well as the primary role of the parents in raising children, which the Court found to be an indisputable part of tradition); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down Oregon statute requiring children to attend public schools).

HeinOnline -- 6 Nev. L.J. 793 2005-2006

children to a psychoanalyst who practices reparative therapy or to a "gender clinic" for treatment of a child's "gender identity disorder."[106] They can, of course, remove a child from the home when a parent's phobias and fears result in abuse that imperils the child's safety.[107] But a legal process that terminates in being removed from home is not an empowering one. The child attempting to negotiate an LGBTQ identity feels herself, rather than the prejudice, to be the problem.

Many LGBTQ youth who find themselves in foster care—whether for reasons directly related to their sexual orientation or gender identity or not—face intolerance, abuse and violence as bad as or worse than that which they faced at home.[108] While federal law requires that states develop for every child in state custody a plan to assure "safe and proper care consistent with the child's best interest and special needs,"[109] child-welfare agencies typically have not explicitly considered the best interest and needs of LGBTQ youth.[110] Studies document instances of staff in group-care settings belittling and mistreating LGBTQ youth based on their sexual orientation or gender identity and failing to intervene to stop harassment and abuse of LGBTQ youth by their peers.[111] When they do step in, their response is often to place LGBTQ youth in isolation, without their request or consent,[112] rather than confronting the abusive behavior and creating policies that would foster tolerant and safe environments. They also do not honor the requests of LGBTQ youth to be housed in units where they would feel most comfortable, typically insisting that transgender youth be placed with those whose gender matches their biological sex rather than the gender with which they identify.[113]

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[106] For an argument that the state should intervene when parents attempt to change a child's sexual orientation or gender identity, see Feder, *supra* note 60, at 172-76; Sonia Renee Martin, *A Child's Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167 (1996).

[107] *See, e.g.*, *In re* Shane T., 453 N.Y.S.2d 590 (N.Y. Fam. Ct. 1982) (where father repeatedly called his son a "fag," "faggot," and queer, resulting in the son suffering severe stomach pains, son was an abused child under New York law and was remanded to the state child protective agency).

[108] *See generally* TERESA DECRESCENZO & GERALD P. MALLON, SERVING TRANSGENDER YOUTH: THE ROLE OF CHILD WELFARE SYSTEMS (2000); TERESA DECRESCENZO & GERALD P. MALLON, CHILD WELFARE LEAGUE OF AMERICA, SERVING GAY AND LESBIAN YOUTHS: THE ROLE OF CHILD WELFARE AGENCIES (1991); GERALD P. MALLON, WE DON'T EXACTLY GET THE WELCOME WAGON: THE EXPERIENCES OF GAY AND LESBIAN ADOLESCENTS IN CHILD WELFARE SYSTEMS (1998) (study of fifty-four LGBTQ adolescents in foster-care placements); SULLIVAN ET AL., *supra* note 65.

[109] 42 U.S.C. §§ 671(a)(16), 675(1)(B), and 675(5)(A).

[110] The California legislature recently enacted an anti-discrimination law for LGBTQ young people in state child-welfare systems. CAL.WELF. & INST. CODE § 16001.9(22) (2001). There is no corresponding federal legislation. *See generally* Anne Tamar-Mattis, *Implications of AB 458 for California LGBTQ Youth in Foster Care*, 14 L. & SEXUALITY 149 (2005) (discussing first-of-its-kind legislation prohibiting discrimination on the basis of sexual orientation or gender identity).

[111] WILBER, *supra* note 5; *see also* The National Center for Lesbian Rights, *LGBTQ Youth in the Foster Care System*, http://www.nclrights.org/publications/lgbtqfostercare.htm (last visited Feb. 12, 2006).

[112] WILBER, *supra* note 5; *see also* The National Center for Lesbian Rights, *supra* note 111.

[113] National Center for Lesbian Rights, *Legal Translations: LGBTQ People and the California Foster Care System*, http://www.nclrights.org/publications/lgltrnsltnfostercare.htm (last

HeinOnline -- 6 Nev. L.J. 794 2005-2006

Furthermore, many child-welfare agencies do not work to cultivate foster homes that are welcoming to LGBTQ youth.[114] Without suitable placements, agencies sometimes inappropriately warehouse LGBTQ youth in psychiatric facilities. When they do place LGBTQ young people in private foster homes, they often fail to monitor them to ensure that foster parents are nurturing their healthy development. For example, foster parents sometimes force their LGBTQ charges to participate in "reparative" therapy, or to attend religious services designed to convince them to renounce their sexuality or gender identity.[115] Agency staff are not trained in the availability of community-based services and organizations that serve LGBTQ youth; or, if they do know about them, they do not refer the LGBTQ youth in their care to them. They place LGBTQ youth at risk—purposely or inadvertently—by revealing their sexuality or gender orientation to parents, other young people, or other staff without consulting with the youth first.[116]

Responding to these problems, several child welfare organizations have created specialized foster-care group homes that are geared to the LGBTQ youth population. Green Chimneys in New York City,[117] Gay and Lesbian Adolescent Social Services ("GLASS") in Los Angeles and Oakland,[118] and the Waltham House in Waltham, Massachusetts[119] feature sensitized workers and LGBTQ-friendly policies. These specialized foster group homes allow transgender youth, for example, to dress as they wish; the homes honor the gender identification of the young person.[120] While specialized programs provide an answer to some LGBTQ youth, they are insufficiently expansive to cater to the many thousands of foster-care youth who identify as LGBTQ or

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visited Feb. 12, 2006). When she objected to being placed on the boys' floor in a group home, one lesbian in Denver found herself relegated to sleeping on a couch on a landing, in between the girls' and boys' floor—the metaphor could not have been clearer to her. National Radio Project, Queer Youth Challenges, http: //www.radioproject.org/archive/2005/1405.html. (Lambda Legal Defense Fund attorney, Rudy Estrada, citing the experiences of one of the girls he interviewed for a foster-care project). One female-identified, transgender eighteen-year-old at Waltham House—a Massachusetts foster-care facility exclusively for LGBTQ youth—expresses gratitude for being able to live on the girls' floor and dress as she wishes: "So it's really accepting in that way and that's like the high point for me, is that it's really a place that I don't have to worry about residents making fun of me or staff saying, 'Oh well you're not really a girl, you're really just a guy in a dress,'" she says. "It's like a lot less that I have to worry about." Laura Kiritsy, *A Safe Haven for Gay Youth*, BAY WINDOWS, Nov. 21, 2002, http://www.baywindows.com/ME2/Default.asp (follow "Opinions/Columns" hyperlink; then follow "Archive" hyperlink; then follow "11/21/2002" hyperlink).

[114] SULLIVAN ET AL., *supra* note 65.

[115] At the 2005 National Juvenile Defender Summit in Los Angeles, CA., sponsored by the National Juvenile Defender Center, one attorney related that one of her gay young clients was anointed with oils by his foster mother in an attempt to "drive out" the forces that caused his homosexuality.

[116] WILBER, *supra* note 5; *see also* National Center for Lesbian Rights, *supra* note 111.

[117] *See* Green Chimneys, http://www.greenchimneys.org/our_programs/our_programs.html (last visited Feb. 12, 2006).

[118] *See* Gay and Lesbian Adolescent Social Services, http://www.glassla.org/ (last visited Feb. 12, 2006).

[119] *See* The Home for Little Wanderers, Waltham House, http://www.thehome.org/site/content/programs/waltham_house.asp (last visited Feb. 12, 2006).

[120] *See* Kiritsy, *supra* note 113.

HeinOnline -- 6 Nev. L.J. 795 2005-2006

who are grappling with sexual orientation and gender identity issues. Furthermore, LGBTQ activists and lawyers worry that the existence of separate LGBTQ homes relieves mainstream group-care facilities of their obligation to prevent harassment in the first instance and to create supportive environments, with immediate consequences for youth and staff who engage in homophobic and transphobic behavior and speech.[121]

Research consistently shows that youth who must contend with homelessness, family abandonment, school failure, and the child-welfare system are at risk for entanglement in the juvenile justice system. While no national studies have been conducted with respect to the experiences of LGBTQ youth,[122] one local study confirms that LGBTQ youth who face these adversities are similarly likely to become involved with the juvenile justice system.[123] For LGBTQ youth, leaving home is the greatest predictor of involvement in the juvenile courts. LGBTQ young people on the street may be forced to steal and work as prostitutes in order to support themselves. Additionally, a 2005 report by Amnesty International reveals that police officers target transgender youth and LGBTQ youth of color for selective enforcement of "quality of life" offenses and "morals" regulations.[124] These youth are vulnerable to such charges because of the dearth of age-appropriate organized activities and safe spaces for LGBTQ youth, which means that LGBTQ youth in many places are often forced to congregate in public spaces.[125]

Additionally, advocates argue that youth who violate age-of-consent laws with people of the same sex are criminally charged more often, and punished more harshly, than are youth who violate the same laws with people of the opposite sex.[126] The case of a seventeen-year-old self-identified lesbian

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[121] Interview with Jody Marksamer, Attorney, Nat'l Ctr. for Lesbian Rights, *Queer Youth Challenges* (Nat'l Radio Project, broadcast Apr. 6, 2005), *available at* http://www.radioproject.org/archive/2005/1405.html.

[122] The U.S. Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), which keeps national statistics on juvenile delinquency trends, does not track sexual orientation or gender identity of offenders. *See* HOWARD SNYDER, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE ARRESTS 2002 1 (2004), http://www.ncjrs.gov/pdffiles1/ojjdp/204608.pdf (omitting LGBTQ youth as a category of defendants, while including girls and "minorities"); Office of Juvenile Justice & Delinquency Prevention, Juveniles in Corrections, http://www.ncjrs.gov/html/ojjdp/202885/contents.html (last visited Feb. 12, 2006) (omitting specific consideration of LGBTQ youth in analysis of young offenders in custody).

[123] RANDI FEINSTEIN ET AL., URBAN JUSTICE CTR., JUSTICE FOR ALL?: A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NY JUVENILE JUSTICE SYSTEM 15, 18 (2001), http://www.urbanjustice.org/publications/pdfs/lesbianandgay/justiceforallreport.pdf.

[124] AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 3 (2005), http://www.amnestyusa.org/outfront/stonewalled/report.pdf.

[125] *Id.* at 34 (quoting Gabriel Martinez, FIERCE!, N.Y. as saying "If there is a group of queer youth of color hanging out in front of the subway station on Christopher Street the police will tell them they are loitering, but if it's a group of white tourists blocking the subway entrance they don't say anything!").

[126] *See, e.g.*, Interview with Shannan Wilber, Attorney, Legal Servs. for Children, *Queer Youth Challenges* (Nat'l Radio Project, broadcast Apr. 6, 2005), *available at* http://www.radioproject.org/archive/2005/1405.html; *see also* FRANKLIN E. ZIMRING, AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 52-54 (2004) (arguing based on national data that police officers under-enforce age-of-consent laws, but not analyzing

HeinOnline -- 6 Nev. L.J. 796 2005-2006

recently reported on the National Juvenile Defender Center listserve is representative of this type of differential treatment.[127] At a "boot camp" program for young offenders, the girl had allegedly exhibited what her probation officer had termed "sexually predatory" behavior. The offense was that she had talked with some of the boys in the program about the breasts of one of the other girls. The probation officer sought to have her placed in a residential treatment program for female sex offenders. It is difficult if not impossible to imagine a similar response to a boy who ogled girls and bragged about it. In fact, none of the boys involved in this incident were charged with anything or even reprimanded.

The recently-overturned conviction of a young man named Matthew Limon[128] demonstrates this differential treatment in even more stark fashion. On February 16, 2000, one week after he turned eighteen, Matthew performed oral sex on a fourteen-year-old boy who was a month shy of his fifteenth birthday.[129] This boy initially consented to the sexual activity, but later asked Matthew to stop, which he did.[130] Both boys were mildly mentally disabled and resided at a specialized residential school in Miami County, Kansas.[131] The police learned of the incident, and Matthew admitted his participation. Because the other boy was under the age of sixteen, the sex between them violated the law, regardless of the fact that the younger boy had voluntarily participated.[132] The state charged Matthew with criminal sodomy.[133] Matthew's attorneys moved to dismiss the charge, arguing that the proper charge was unlawful voluntary sexual relations[134]—Kansas's so-called "Romeo and Juliet law"—which mandates a much less severe penalty for the same behavior in cases where the defendant is less than nineteen years old and is fewer than four years older than the victim. While the ages of Matthew and the other boy would have otherwise rendered Matthew eligible for prosecution under the unlawful voluntary sexual relations statute, the fact that Matthew is a male excluded him. The trial court rejected Matthew's motion to dismiss on equal-protection grounds, the case was tried on stipulated facts, and Matthew was convicted of criminal sodomy. Had the minor in the case been a girl, Matthew's sentence range would have been thirteen to fifteen months' imprisonment. Because the two were of the same sex, the sentence range was 206 to 228 months.[135] The court

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data based on the sex of the victim). There appear to be no data on arrest rates for violation of age-of-consent laws broken down according to the sex of the victim.

[127] This case was reported and discussed in July, 2005, on a listserve maintained by the National Juvenile Defender Center.

[128] State v. Limon, 122 P.3d 22 (Kan. 2005).

[129] *Id.* at 24.

[130] *Id.*

[131] *Id.*

[132] State v. Limon, 83 P.3d 229, 232-33 (Kan. Ct. App. 2004).

[133] KAN. STAT. ANN. § 21-3505(a)(2) (2005) ("Criminal sodomy is . . . sodomy with a child who is 14 or more years of age but less than 16 years of age.").

[134] *Id.* § 21-3522(a)(2) (2005) ("Unlawful voluntary sexual relations is engaging in voluntary . . . (2) sodomy . . . with a child who is 14 years of age but less than 16 years of age and the offender is less than 19 years of age and less than four years of age older than the child and the child and the offender . . . are members of the opposite sex.").

[135] Matthew had two previous adjudications for sexual relations with minors. Limon, 83 P.3d at 238.

HeinOnline -- 6 Nev. L.J. 797 2005-2006

imposed the minimum sentence of 206 months.[136] Matthew served over four years in prison before the Kansas Supreme Court ruled that the equal-protection principles articulated in *Lawrence v. Texas* invalidated the Kansas "Romeo and Juliet" statute and thus rendered his punishment excessive.[137]

Once arrested, LGBTQ youth are more likely to be detained than they would be if they had supportive parents—attorneys report that while parental involvement is lacking in most delinquency cases, it is almost nonexistent for LGBTQ kids in the juvenile justice system.[138] When adjudicated delinquent or convicted of a crime, LGBTQ youth may find themselves sentenced in ways more restrictive and punitive than their offenses warrant because of the dearth of LGBTQ-sensitive programs and facilities in the juvenile and criminal justice systems. When they report harassment and abuse from others based on sexual orientation or gender identity,[139] and sometimes even when they don't report it, LGBTQ youth may find themselves placed by staff in segregation—ostensibly for their own protection, but in some cases because of staff fears that LGBTQ young people are hypersexual and will prey on other residents.[140] Just as in the child-welfare system, staff in the juvenile and criminal justice system find it

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[136] *Id.* at 233. The Kansas Appeals Court denied Matthew's appeal, citing Bowers v. Hardwick, 478 U.S. 186 (1986), which was settled law at the time. State v. Limon, 41 P.3d 303 (Kan. Ct. App. 2002). The U.S. Supreme Court then granted Matthew's petition for certiorari, vacated the judgment of the Kansas Court of Appeals, and remanded the case to the Appeals Court for reconsideration in light of Lawrence v. Texas. Limon v. Kansas, 539 U.S. 955 (2003).

[137] Limon, 122 P.3d at 24.

[138] FEINSTEIN ET AL., *supra* note 123, at 13.

[139] *See* American Civil Liberties Union, *ACLU Asks Court to Require Immediate Action to Stop Harassment of Gay and Transgender Youth at Hawaii Juvenile Detention Facility*, http://www.aclu.org//lgbt/youth/20123prs20051004.html (last visited Feb. 12, 2006). On September 2, 2005, the American Civil Liberties Union filed a lawsuit, R.G. v. Koller, No. 05-00566 (D. Haw.), on behalf of three young people at the Hawai'i Youth Correctional Facility (HYCF) alleging: (1) A male-to-female transgender student was repeatedly verbally abused and preached to by guards who called her "wrong" and "unnatural" and threatened to cut off her hair. After she was transferred to the boys' unit, she was physically assaulted and groped, often in front of guards who did nothing to protect her. Rather than attempting to ensure her safety, HYCF segregated her for almost two months, and did not allow her to interact at all with other wards. (2) Male wards in the facility relentlessly harassed a young man who was perceived to be gay, threatening him with rape, and once rubbed semen into his face. When the young man reported the incidents, HYCF did nothing. (3) In April, the head administrator at HYCF called a special meeting of all the girls and staff at one of the units in the facility for the specific purpose of singling out a lesbian couple to belittle them about their relationship. The administrator told the couple that their relationship was "disgusting," then required the other wards to create a list of rules for the couple; the wards decided that the girls shouldn't be allowed to even speak to each other under threat of disciplinary measures, including lockdown. (4) Youth correctional officers routinely told a lesbian ward and her girlfriend that their relationship was "bad" and that they were going to hell and referred to the couple's relationship as "this butchie shit." Other guards routinely made lewd and humiliating remarks to the couple, including, "You two eating fish earlier? At least you're not finger-banging yourselves in the TV room."

On February 7, 2006, a U.S. District Court judge found for the plaintiffs, issuing a preliminary injunction ordering the HYCF to refrain from harassing or abusing young wards who are or who are perceived to be LGBT and to refrain from failing to protect wards from anti-LGBT harassment and abuse. See R.G. v. Koller, 2006 U.S. Dist. LEXIS 21254 (2006).

[140] FEINSTEIN ET AL., *supra* note 123, at 30.

HeinOnline -- 6 Nev. L.J. 798 2005-2006

more convenient to isolate the LGBTQ young person than to confront the harassing individuals and work to ensure environments of safety, tolerance and respect.

IV. TOLERANCE IS NOT ENOUGH

By now, it should be clear that all lawyers representing children and adolescents will have on their caseloads young people who in one way or another are confronting the unique set of stressors that LGBTQ youth face, whether they are open and out as LGBTQ in all facets of their lives; experience same-sex desire, engage in same-sex sexual behaviors and diverge from, defy, and reject gender norms, but do not identify as LGBTQ; identify as LGBTQ but do not disclose those identities to their lawyers; come out as LGBTQ to their lawyers but ask that they not reveal those identities to anyone else; are not LGBTQ but are perceived by their peers, families, or communities to be so; or are questioning their sexual orientation or gender identity. It is essential, then, for lawyers to have the basic information about LGBTQ youth discussed in Part One; understand the ways in which LGBTQ youth are uniquely vulnerable to trauma, abuse, violence, and discrimination, as discussed in Part Two; and understand how to be respectful and supportive[141] of youth, however they define themselves. This Part offers specific suggestions for sensitive and supportive advocacy strategies.

First, and perhaps most radically, it is incumbent on us, as child-centered advocates, to respect the rights of our young clients to the expression of their sexual orientation and gender identity. For example, we should address our transgender clients with their chosen names, and use the appropriate pronouns in referring to them. In spite of civil-rights advances for lesbians and gay men, and burgeoning awareness in some areas of the existence and needs of transgender people, many of us are a long way from moving beyond tolerance to embrace all forms of gender diversity and non-heterosexual orientation, particularly in young people. And as a society, we do what we can to discourage the development of LGBTQ identities and associated behaviors.[142]

Selected court decisions in child-custody battles illustrate this tendency. Notwithstanding *Lawrence v. Texas*,[143] courts continue to decide custody cases

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[141] RYAN & FUTTERMAN, *supra* note 3, at 10 (stating that "[t]he need for support is particularly critical to avoid isolation when adolescents begin to question their sexual identity").

[142] *See, e.g.*, RICHARD POSNER, SEX AND REASON 308 (1992) ("[I]f [a] hypothetical cure for homosexuality were something that could be administered—costlessly, risklessly, without side effects—before a child had become aware of his homosexual propensity, you can be sure that the child's parents would administer it to him, believing, probably correctly, that he would be better off, not yet having assumed a homosexual identity."). For a thorough explication of Posner's views on the development of sexual identity, see Robson, *supra* note 102. *See also* Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, *in* TENDENCIES 161 (1993) ("[A]dvice on how to help your kids turn out gay, not to mention your students, your parishioners, your therapy clients, or your military subordinates, is less ubiquitous than you might think. On the other hand, the scope of the institutions whose programmatic undertaking is to prevent the development of gay people is unimaginably large.").

[143] Katherine Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COL. L. REV. 1399, 1399-1400, 1416-17 (2004) (arguing that the reach of *Lawrence* is limited because the

against lesbian and gay parents based on their sexuality, finding such discrimination furthers the "best interest" of their presumably proto-heterosexual children. In upholding a change of custody from a lesbian mother to a heterosexual father, an Alabama appeals court[144] affirmed an earlier case that had approvingly cited:

> evidence from which the trial court could have concluded that "[a] child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal individual growth and interpersonal development" and that "the degree of harm to children from the homosexual conduct of a parent is uncertain . . . and the range of potential harm is enormous."[145]

Similarly, in rejecting a post-*Lawrence* constitutional challenge to Florida's ban on adoption by gay and lesbian individuals and same-sex couples,[146] the Eleventh Circuit Court of Appeals endorsed the proposition that the state should sanction legislation designed to encourage a child to become a heterosexual, without questioning whether children may not in many cases experience such "encouragement" as coercion.[147]

Facing intense discrimination, LGBTQ parents, would-be parents, and supporters have often found themselves resorting to arguments in child-custody and adoption cases that undermine the right of youth to be LGBTQ. They have based their fitness as parents on the fact that children in LGBTQ-headed households are no more likely than children in other households to grow up to be lesbian, gay, bisexual or transgender.[148] Even if this claim is true, it is only

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Court relied on a "narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty." She describes *Lawrence* as a "project devoted to celebrating our relationships; it is not a project of sexual rights or the politics of sexuality." She questions whether, as some gay rights activists, lawyers and scholars have argued, it is accurate to think of the decision in *Lawrence v. Texas* as "our *Brown*.").

[144] L.A.M. v. B.M., 906 So. 2d 942, 947 (Ala. Civ. App. 2004).

[145] *Ex parte* J.M.F., 730 So. 2d 1190, 1196 (Ala. 1998).

[146] FLA. STAT. ANN. § 63.042(3) (1973) ("No person eligible to adopt under this statute may adopt if that person is a homosexual."). The statute was passed in the wake of Anita Bryant's anti-gay 1977 "save the children" campaign. While no other state maintains a similar blanket ban, same-sex couples may adopt a child openly and as a couple in only a handful of states. State adoption law explicitly permits second-parent or stepparent adoption by same-sex couples in California, Connecticut and Vermont; high courts in the District of Columbia, Illinois, Massachusetts and New Jersey have ruled that state adoption law permits second-parent or stepparent adoption by same-sex couples. *See, e.g.*, SEAN CAHILL ET AL., FAMILY POLICY: ISSUES AFFECTING GAY, LESBIAN, BISEXUAL AND TRANSGENDER FAMILIES 80 (2003), http://www.thetaskforce.org/reslibrary/familypolicy.cfm.

[147] Lofton v. Sec. of Dept. of Children and Family Servs., 358 F.3d 804 (11th Cir. 2004). In the opinion, the court conceded that the premise that a heterosexual nuclear family is superior to other arrangements is "unprovable" but ruled it "nevertheless to be a legitimate basis for legislation." *Id.* at 819-20. The court was persuaded by the state's emphasis on the "vital role that dual-gender parenting plays in shaping sexual and gender identity and in providing heterosexual role modeling." *Id.* at 818. Much research supports the proposition that children in gay- and lesbian-headed households fare as well or better than those in more traditional homes. *See, e.g.*, SEAN CAHILL ET AL., *supra* note 146 (citing studies by the American Psychological Association, the National Association of Social Workers, the American Psychoanalytic Association, and the American Academy of Family Physicians).

[148] *See, e.g.*, ACLU LESBIAN AND GAY RIGHTS PROJECT, TOO HIGH A PRICE: THE CASE AGAINST RESTRICTING GAY AND LESBIAN PARENTING (2004), http://www.buddybuddy.com/adoption.html (noting studies that prove that children of gay and lesbian-headed households

HeinOnline -- 6 Nev. L.J. 800 2005-2006

persuasive to those who believe that acting on same-sex desire and claiming an LGBTQ identity is bad.[149]

No matter how progressive and open-minded we believe ourselves to be, the transgender girl may make us—even us lesbians and gay men—uncomfortable, because we want to protect her from herself. Doesn't she know that kids will pick on her for wearing dresses? And why does she think she is a girl? What went wrong with her upbringing? Isn't this just a phase? We must confront the fact that, in a delinquency case, a transgender girl will possibly face detention, where she is likely to be placed with biological males; advise her of the realities of confinement, allow her to make her own decisions about how to dress and express herself; and then do everything possible to ensure that she is safe. Similarly, the gay youth, who may be the same age as one's own child, may make us squeamish because he forces us to acknowledge that kids are sexual beings and may make choices that make us worry for their safety. Yet, as LGBTQ youth-serving organizations make clear, it is damaging for us to try to persuade our clients that they are not gay or lesbian but are instead simply going through a phase.[150] It is equally problematic to try to convince our transgender clients that they are not "really" the gender with which they identify.[151]

Second, we should make sure that our clients know that we will work hard for them no matter what their sexual orientation or gender identity, and no matter how open they are about it. Instead of asking a teenaged boy whether he has a "girlfriend," we can ask if he is romantically involved with anyone. We should eliminate anti-LGBTQ slurs; we might display visible signs—like posters, stickers or books—that demonstrate acceptance of and respect for LGBTQ people.[152] An affirmative statement from us that we do not judge our clients no matter what they tell us will go a long way. We don't need for our LGBTQ

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are no more likely to be gay or lesbian than children of other households); CHARLOTTE J. PATTERSON, AM. PSYCHOLOGICAL ASS'N, LESBIAN AND GAY PARENTING (1995), http://www.apa.org/pi/parent.html (summarizing studies of children of gay and lesbian-headed households).

[149] *See* Robson, *supra* note 102, at 924 ("The belief that exposure to homosexuality breeds homosexuality provokes several responses . . . I believe the correct response is a resounding 'so what'? As a lesbian myself, I am unwilling to engage in an argument that assumes that my sexual desires are pathological.").

[150] LAMBDA LEGAL DEF. FUND, GETTING DOWN TO BASICS ABOUT LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ("LGBTQ") YOUTH IN FOSTER CARE, http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/124.pdf; *see also* SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, LISTENING TO GENDER-VARIANT CHILDREN: A HUMANISTIC STRATEGY FOR ADVOCATES, http://www.nclrights.org/publications/pubs/gvchildren.pdf ("[I]t is very damaging for a young person to be told by a parent, 'you are not really a lesbian,' or 'you are not really gay.'").

[151] MARKSAMER & VADE, *supra* note 5.

[152] For examples of LGBTQ youth-focused brochures, booklets, and signs, see National Center for Lesbian Rights, //www.nclrights.org/publications/#youth (last visited Feb. 8, 2006). *See also* LAMBDA LEGAL DEF. FUND, STOPPING THE ANTI-GAY ABUSE OF STUDENTS IN PUBLIC SCHOOLS: A LEGAL PERSPECTIVE (1998), http://www.lambdalegal.org/cgi-bin/iowa/news/publications.html?record=124; LEGAL SERVS. FOR CHILDREN, SAFETY FIRST!: A SURVIVAL GUIDE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH UNDER 18 (2004), http://www.lsc-sf.org/publications/safety_first.pdf; Gay, Lesbian & Straight Education Network, http://www.glsen.org/cgi-bin/iowa/educator/library/record/1641.html (last visited Feb. 8, 2006); National Youth Advocacy Coalition, http://www.nyacyouth.

HeinOnline -- 6 Nev. L.J. 801 2005-2006

clients to come out to us in order to effectively represent them. At the same time, some clients will want to talk about their sexual orientation or gender identity, and we should be willing to do so in the same way that we would discuss with them any other issues important to them.

Third, we can seek to identify whether the problems that have brought young people to our attention are related to their gender non-conformity, sexual behavior, or sexual identity, or others' perceptions of those things. The following anecdote exemplifies this kind of careful attention. An attorney was appointed as an educational advocate for a twelve-year-old boy living in a rural county, who was failing Physical Education and having tremendous behavioral problems. The school sought to suspend him. He was extremely "effeminate" in appearance. Upon inquiring, the attorney learned that he failed Physical Education because he refused to undress and change into athletic clothes in the locker room. The reasons for his apparent shyness she was able to surmise—he was afraid of being harassed or afraid that other boys would believe he was sexually interested in them. In any event, understanding without having to discuss his reluctance to be naked in the locker room, she was able to negotiate for him a switch into a music class from Physical Education. His behavioral problems abated. She did not engage with him on his sexual orientation, or his understanding of his gender identity, because he was either unable or unwilling to participate in such an inquiry. She understood that appearing to be gay, and being gender non-conforming, makes a young person a target for ridicule—whether or not s/he really "is" either of those things, and whether or not s/he is aware and comfortable enough to discuss it.[153] Accordingly, directly inquiring about a young person's sexual orientation or gender identity, especially early in the attorney-client relationship, is likely to be off-putting. But, where the issue of sexual orientation or gender identity appears relevant, one might, for example, gently ask whether a client's peers or family members believe that s/he is gay or lesbian.

Fourth, even when young clients do identify as LGBTQ and make those identities known to us, we should not assume that they are open and out in all areas of their lives. We must allow the child to be the gatekeeper of information about his or her sexuality or gender identity.[154] S/he may need us to protect that information from her parents or school. Similarly, while we may think a judge or detention facility should be informed of our client's sexual orientation or gender identity to protect her from harassment, many youth do not wish to disclose the information in court, believing it will result in them being placed in an isolated setting, or may open them to abuse from homophobic or transphobic staff.

Fifth, where our clients are victims of bias and discrimination at home, in school, in a foster placement, or while in the juvenile justice system, part of our work is to confront individuals who discriminate and seek the source of the

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org/nyac/publications.html (last visited Feb. 8, 2006); Transgender Law Center, http://www.transgenderlawcenter.org/ (last visited Feb. 8, 2006).

[153] Interview with Florida defender (Aug. 11, 2005); *see also* HUMAN RIGHTS WATCH, *supra* note 24 (noting that straight students are often targeted in schools for homophobic harassment when they appear to be gay).

[154] *See, e.g.*, VADE & MARKSAMER, *supra* note 5.

HeinOnline -- 6 Nev. L.J. 802 2005-2006

institutional bias. Unless it is what our client wants, it is not an adequate solution for our clients simply to be moved—to a different class, or school, or foster home, or to protective custody or the infirmary in a juvenile detention facility. Moving the client sends the message to the youth that something is wrong with her, and to the institution that it need not reform its practices.

Sixth, we also need to know that difference sometimes makes no difference. Some of our gender non-conforming clients are comfortable in their birth-assigned gender; some who are sexually attracted to same-sex peers identify as straight. Some of our lesbian and gay clients will need and want counseling as they deal with coming out; others will be insulted at the suggestion that they need help with something that is as basic to them as breathing. Some of our transgender clients will want to be in protective custody; others prefer to take their chances in the general population rather than endure the stigma associated with being in protective custody. Some of our clients who identify as LGBTQ may have other aspects to their identity that are more salient in our representation; for example, a young person whose entire community lives in a primarily Latino East Los Angeles neighborhood may feel tremendously uncomfortable in an LGBTQ specialized group home in a predominantly white West Hollywood neighborhood.

Seventh, we should maintain a network of local LGBTQ-sensitive providers to whom we can refer our LGBTQ young clients. If we practice in an area in which no such providers or organizations exist, we can learn what we can from on-line, national resources. Finally, while mental health services should be available to all kids who need them (particularly in the extreme conditions of congregate foster settings and juvenile detention and incarceration facilities), we need to ensure that our clients' sexualities and gender identities do not become conditions to be "treated," even by well-meaning mental-health practitioners, unless they need and want counseling and medical intervention as discussed *supra* in the discussion of gender identity disorder.

A final note on representing LGBTQ young people—the work of representing these young people cannot be the exclusive domain of LGBTQ lawyers. Many such lawyers are not out, and even those of us who are sometimes engage in a complicated dance—some judges may be homophobic, or uncomfortable around obviously LGBTQ, and we don't want to jeopardize our clients' chances by talking openly about our lives in a way that makes our sexuality clear. I've been in many casual conversations with clerks and other court personnel in which I deliberately didn't use pronouns when discussing how my partner and I spent our weekend. There is a way in which representing an out LGBTQ youth exposes us[155] and makes it difficult for us to downplay, or "cover," our non-mainstream identities.[156] Additionally, because the issues facing and circumstances surrounding today's LGBTQ youth bear little resem-

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[155] *See, e.g.*, Ruskola, *supra* note 6, at 313-14 (describing this phenomenon in the context of schools: "while gay and lesbian teachers are among the few adults in the school system who might be willing to help queer students, the hounding of gay teachers and students alike results in a reign of homophobic terror where both teachers and students become afraid of each other; those who should be natural allies become enemies in a struggle for survival.").

[156] Kenji Yoshino has brilliantly explicated this form of assimilation. *See* Yoshino, *supra* note 38, at 772 ("Covering means the underlying identity is neither altered nor hidden, but is

blance to those that we negotiated as young people, it is not immediately apparent that LGBTQ lawyers are uniquely qualified to represent LGBTQ youth.

V. CONCLUSION

IT'S HARD TO TALK ABOUT LIBERATION WHEN WE CANNOT SAFELY CROSS A PLAYGROUND, YET THAT IS EXACTLY WHAT WE MUST DO.[157]

Self-identified LGBTQ youth have arrived, notwithstanding the fact that parents, teachers, doctors, coaches, and clerics have for generations propagated the notion that same-sex desire and gender transgression in young people represent nothing more significant than a phase, a passing fancy. Zealous advocacy for children and adolescents mandates an acknowledgement of and explicit engagement with the realities of the lives of these young people, as well as those whose sexual behaviors and attractions, and/or feelings about their gender identity, place them outside the heterosexual and gender-conforming norm, no matter how they publicly identify. I have provided some thoughts on sensitive advocacy strategies, all of which are based on the notion that lawyers must move beyond tolerance toward acceptance and respect. Our work going forward is to insist that our LGBTQ clients be allowed to create their own paths—even when we can't be sure where that path is headed.[158] It is nothing less than the simple yet revolutionary task of making it safe for them to be who they are.

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downplayed. Covering occurs when a lesbian both is, and says she is, a lesbian, but otherwise makes it easy for others to disattend her orientation.").

[157] DUE, *supra* note 69, at 265.

[158] *See* SCHOLINSKI, *supra* note 61, at 194 ("I have made my own path and more often than not I walk in circles.").

HeinOnline -- 6 Nev. L.J. 804 2005-2006