"WE'VE HAD THREE OF THEM": ADDRESSING THE INVISIBILITY OF LESBIAN, GAY, BISEXUAL AND GENDER NON-CONFORMING YOUTHS IN THE JUVENILE JUSTICE SYSTEM

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Two researchers were speaking to a high-ranking probation officer from a large city, trying to convince her to participate in a project on lesbian, gay, bisexual and questioning ("LGB"), and gender non-conforming youths.[1] Her first response was, "I've worked in this system for

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[1] For the purpose of this paper, "lesbian" is defined as a girl or woman who primarily is emotionally, romantically, and sexually attracted to girls or women. "Gay" is defined as a person who is emotionally, romantically, and sexually attracted to individuals of the same sex, typically in reference to boys or men. "Bisexual" is defined as a person who is emotionally, romantically, and sexually attracted to both males and females. "Transgender" is defined as a person whose gender identity (their understanding of themselves as male or female) does not correspond with their birth sex. A transgender girl is a girl whose birth sex was male but who understands herself to be female. A transgender boy is a boy whose birth sex was female but who understands himself to be male. For the purpose of this paper, "gender identity" is defined as a person's internal sense of being a man, boy, woman, girl, or somewhere in between. "Gender expression" is defined as the physical manifestation of one's gender identity, usually through clothing, mannerisms, and chosen names. The term "gender non-conforming" refers to youths who have gender identities or gender expressions that break social norms. Youths with non-conforming gender identities have identities that are different than the genders they were assigned to at birth. For example, a person with male genitalia that identifies as a girl has a non-conforming gender identity. Youths with a non-conforming gender expressions act in ways contrary to gender norms. Such youths may express their gender by, among other things, wearing non-conforming hairstyles, choosing non-conforming names, or behaving in other ways that break social norms. For example, a girl with a non-conforming gender expression may still identify as a girl but choose to wear masculine clothing and hairstyles.

twenty-five years and in all of that time I think we've had three of [these types of youths]."[2]

This quote perfectly captures a prevalent myth: the juvenile justice system detains only very few LGB and gender non-conforming youths. Juvenile justice professionals believe this myth because only a handful of LGB and gender non-conforming youths disclose their sexual orientations, act in ways that do not conform to gender norms,[3] or have court cases linked to their sexual orientation, gender identity or gender expression.[4] However, many LGB youths, youths who are questioning their sexual orientations or youths who have non-conforming gender identities enter the juvenile justice system unnoticed.[5] The disproportionate incarceration of youths of color within the juvenile justice system further reinforces the invisibility of LGB and gender non-conforming youths.[6] Many juvenile justice professionals assume that LGB and gender non-conforming youths come from middle class, white families, and therefore, juvenile justice jurisdictions detaining large numbers of youths of color do not serve LGB and gender non-conforming youths.[7]

This Article shows that both assumptions are wrong. National survey data presented in this Article shows that fifteen percent of youths in

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[2] Interview with anonymous source, Juvenile Det. Alternatives Initiatives Conference, in Indianapolis (Sept. 23, 2008).

[3] Mary Curtin, *Lesbian and Bisexual Girls in the Juvenile Justice System*, 19 CHILD & ADOLESCENT SOC. WORK J. 285, 291 (2002); Meda Chesney-Lind & Michele Eliason, *From Invisible to Incorrigible: The Demonization of Marginalized Women and Girls*, 2 CRIME, MEDIA, CULTURE 29, 36 (2006), *available at* http://cmc.sagepub.com/cgi/reprint/2/1/29 (follow "Begin Manual Download").

[4] Sarah Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L. REV. 1053, 1087–1090 (2008). For the purposes of this paper, "sexual orientation" is defined as a person's emotional, romantic and sexual attraction to individuals of the same sex or of a different sex.

[5] *See* Curtin, *supra* note 3, at 290.

[6] For a discussion of the disproportionate incarceration of youths of color, see RICHARD MENDEL, ANNIE E. CASEY FOUND., TWO DECADES OF JDAI: FROM DEMONSTRATION PROJECT TO NATIONAL STANDARD: A PROGRESS REPORT 6 (2009); *see also* James Bell, *Juvenile Justice and Race: An Uphill Climb to the Bottom*, THE HUFFINGTON POST, Nov. 18, 2009, *available at* http://www.huffingtonpost.com/james-bell/juvenile-justice-andrace_b_362283.html.

[7] Participant notes of Laura Garnette, Div. Dir. of Adult Prob. in Santa Cruz County, documenting her observation of an institutional staff training in San Francisco County, San Francisco, Cal. (Oct. 10, 2009).

the juvenile justice system are LGB, questioning their sexual orientation, transgender or express their gender in non-conforming ways. Moreover, the data shows that equal proportions of white, African American and Latino youths are LGB and gender non-conforming.[8]

Yet, myths around the nonexistence of LGB and gender non-conforming youths in the juvenile justice system persist, presenting numerous challenges to the equitable treatment of such youths. Juvenile justice professionals need to know that LGB or gender non-conforming youths exist within the system, and that LGB or gender non-conforming youths often enter the juvenile justice system for different reasons than straight youths. For example, the findings presented in this Article show that LGB or gender non-conforming youths are more likely than heterosexual youths to enter the juvenile justice system because they run away from home or placement or because of status offenses such as truancy.[9] Juvenile justice professionals need to know the underlying reasons for failure to remain at home, in placement or truancy in order to identify successful alternatives to detention and out-of-home placements or to assign appropriate terms of probation.

Yet, gathering information about clients' sexual orientation, gender identity and gender expression create a difficult conundrum for juvenile justice professionals. While juvenile justice professionals need to know the reasons that youths have entered the juvenile justice system, many youths do not disclose their sexual orientations or gender identities. Research that uncovers high levels of homophobic reprisal from peers, parents, institutional staff or judges provides one possible explanation for such lack of disclosure: youths may fear further victimization if they disclose their sexual orientation or gender identity.[10] The policy recommendations provided at the end of this Article can help create safe conditions that lead to disclosure about sexual orientation and gender identity, but there will always be youths who prefer to maintain their privacy.[11]

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[8] *See infra* Part I.D & I.E.

[9] *See infra* Part II.B.

[10] Anthony R. D'Augelli, *Mental Health Problems Among Lesbian, Gay, and Bisexual Youth Ages 14 to 21*, 7 CLINICAL CHILD PSYCHOL. AND PSYCHIATRY 433, 434–435 (2002) [hereinafter D'Augelli]; Anthony R. D'Augelli & Arnold H. Grossman, *Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Adults*, 16 J. INTERPERSONAL VIOLENCE, 1008, 1009-21 (2001).

[11] *See infra* Part III.

Faced with the need to serve LGB and gender non-conforming youths while respecting their privacy, national survey data can help inform practice even when the sexual orientation or gender identity of individual youths are not known in individual instances. By analyzing 2,100 surveys that have been collected from six jurisdictions across the country, this Article:

- provides the only existing estimates of the number of LGB and gender non-conforming youths who enter the juvenile justice system;
- describes patterns of incarceration for LGB and gender non-conforming youths compared with their heterosexual and gender conforming peers to help juvenile justice professionals understand the social context around the detention of many LGB and gender non-conforming youths; and
- offers suggestions to juvenile justice professionals on how to address the needs of LGB and gender non-conforming youths, whether visible or invisible within the juvenile justice system.

I. ESTIMATING THE NUMBER OF LESBIAN, GAY, BISEXUAL AND GENDER NON-CONFORMING YOUTHS IN THE JUVENILE JUSTICE SYSTEM

Collecting accurate data on the number of LGB and gender non-conforming youths in the juvenile justice system has been difficult to date. There are no federal or state agencies that require the collection of data on sexual orientation. As a result, we, at Ceres Policy Research, failed to identify any jurisdictions that collect formal data linking the sexual orientation and gender identity of an individual youth to his or her probation record.[12] Our own previous research provides some clues regarding the number of LGB and gender non-conforming youths in the juvenile justice system. Questions about sexual orientation and gender identity in two small

[12] National and state data collection requirements shape the collection of data on the local level. The Department of Justice does not require the reporting of sexual orientation or gender identity in their annual census. Nor is this data collected in any of the states with Juvenile Detention Alternative Initiative sites: CA, OR, WA, NV, ID, MT, AZ, NM, TX, LA, MS, AL, GA, FL, VA, DC, MD, DE, NJ, MA, NH, IN, IL, MO, IA, or MN. Colleagues in NY and UT report that jurisdictions in these states also do not collect data on sexual orientation or gender identity.

program evaluations for the Santa Cruz and Sonoma County Probation Departments in California provide two limited snapshots. We added questions about sexual orientation and gender identity to one needs assessment of 230 youths in Santa Cruz County, CA.[13] We found that fourteen percent of youths disclosed being LGB or questioning their sexual orientation.[14] No youths reported having gender identities other than male or female.[15] In Sonoma County, CA we asked questions about sexual orientation in surveys and interviews for an evaluation of a gender specific program for girls.[16] When we asked 176 participants about their sexual orientation on an anonymous survey, thirteen percent of girls disclosed having a lesbian or bisexual sexual orientation or being unsure.[17] When we asked a smaller sample of 26 girls about their sexual orientation during qualitative interviews, seven percent of participants disclosed bisexual sexual orientations.[18] Yet, the number of youths in each of these studies was small, making broad generalities about LGB and gender non-conforming youths in the juvenile justice system difficult.

Even if jurisdictions decided to collect system data on sexual orientation or gender identity, understanding exactly how many LGB and gender non-conforming youths enter the juvenile justice system as well as their detention patterns presents a unique challenge; youths can hide their gender identity and sexual orientation, making the accurate collection of data that links gender identity and sexual orientation to juvenile justice outcomes difficult.[19] At the same time, peers, family members, and juvenile

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[13] Angela Irvine, Laura Garnette, & Cynthia Chase, Ceres Policy Research, Healthy Returns Initiative: Santa Cruz County Update, PowerPoint slide #27 (2008) (on file with author).

[14] *Id.*

[15] *Id.*

[16] JESSICA ROA & ANGELA IRVINE, CERES POLICY RESEARCH, TITLE II SONOMA: GIRLS CIRCLE ANNUAL 2007–08 REPORT 4 (May, 2008).

[17] *Id.*

[18] JESSICA ROA, ANGELA IRVINE & CHRISTINE KALINOWSKI, CERES POLICY RESEARCH, TITLE II SONOMA: CIRCLES ACROSS SONOMA QUALITATIVE RESULTS 3 (Apr. 2009).

[19] For a discussion of how LGB and gender non-conforming youths may hide their sexual orientations or gender identities, see KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN JUVENILE COURTS 131 (2009), *available at* http://www.equityproject.org/pdfs/hiddeninjustice.pdf; *see also* Stephen Tropiano, *Playing It Straight: Reality Dating Shows*

justice professionals often inaccurately make assumptions about youths' gender identities and sexual orientations based on social norms.[20] Researchers must rely on youths themselves to disclose their sexual orientation and gender identity. Unfortunately, youths often resist disclosing their sexual orientations or gender identities. One explanation for this resistance is fear of reprisal from parents, teachers, or juvenile hall staff. Researchers have documented that LGBT youths experience rejection, bullying and harassment from parents, teachers or juvenile hall staff when they disclose their sexual orientations or gender identities.[21]

Given the difficulty of tracking LGB and gender non-conforming youths, all three of the previous studies of LGB and gender non-conforming youths in the juvenile justice system have relied on convenience samples.[22] These researchers contacted LGB-and-gender-non-conforming-youth-serving agencies and conducted focus groups or interviews with youths who have disclosed being LGB or having non-conforming gender identities.[23] However, these findings fail to document the experiences of youths who choose to keep their sexual orientations or non-conforming gender identities hidden.

Large anonymous surveys that target the general juvenile justice population can come closer to accurately measuring the number of LGB and gender non-conforming youths in the juvenile justice system, since youths may be more likely to disclose their sexual orientation or gender

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and the Construction of Heterosexuality, 37 J. OF POPULAR FILM AND TELEVISION 60, 69 (2009); Jay Clarkson, *The Limitations of the Discourse of Norms: Gay Visibility and Degrees of Transgression*, 32 J. OF COMM. INQUIRY 368, 369 (Oct. 2008).

[20] For a discussion how families, the child welfare system, the law, the media and the workplace inaccurately assume people are heterosexual unless they disclose their sexual orientation, see Gill Valentine, *Negotiating and Managing Multiple Sexual Identities: Lesbian Time-Space Strategies*, 18 TRANSACTIONS OF THE INST. OF BRITISH GEOGRAPHERS 237, 238 (1993).

[21] *See* D'Augelli, *supra* note 10.

[22] "Convenience samples" are a method of selecting samples for research. In contrast to random samples, convenience samples select people that are readily available. Convenience samples are used when populations are difficult to identify or contact. There have only been three previous studies of LGBT youths in the juvenile justice system: *see* RANDI FEINSTEIN ET AL., THE LESBIAN & GAY YOUTH PROJECT OF THE URBAN JUSTICE CENTER, JUSTICE FOR ALL? A REPORT ON LESBIAN, GAY, BISEXUAL AND TRANSGENDERED YOUTH IN THE NEW YORK JUVENILE JUSTICE SYSTEM 57 (2001); MAJD ET. AL., *supra* note 19; Curtin, *supra* note 3, at 288.

[23] *See* MAJD ET. AL., *supra* note 19; *see also* Curtin, *supra* note 3, at 288.

identity if this information will be kept from parents, peers and juvenile justice staff members.[24] By surveying youths within the juvenile justice system, researchers can also link sexual orientation and gender identity to detention patterns. Previously, juvenile justice systems did not collect or analyze data about the sexual orientations or gender identities of individual youths, making statistical disaggregation along these two variables impossible. By sampling the general population in the juvenile justice system, researchers ensure the inclusion of LGB and gender non-conforming youths who have not disclosed their sexual orientations or gender identities or who have not accessed LGB-and-gender-non-conforming-youth-serving agencies.

This Article presents the findings of such a large national survey. Contrary to popular belief, survey results show that fifteen percent of youths being detained prior to adjudication are LGB, questioning their sexual orientation, transgender, have non-conforming gender identities or express their gender in non-conforming ways.[25] This is a significant number of LGB and gender non-conforming youths within the juvenile justice system each year.

A. Survey Methods

This Article presents findings from a survey of 2,100 youths in six juvenile justice jurisdictions across the country. The research sites were selected among jurisdictions receiving funds from the Annie E. Casey Foundation as part of their Juvenile Detention Alternatives Initiative.[26] Survey sites were selected to represent a range of jurisdictional size, youth demographics and geographic location. The final sites were Minneapolis,

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[24] *See* D'Augelli, *supra* note 10.

[25] *See infra* tbl.1.

[26] This initiative began in 1997 to create a systemic method for reducing the number of youths detained in the juvenile justice system. Participating sites first adopt structured decision-making programs for detention decisions. Subsequent reforms generally include the adoption of programs to reduce disproportionate minority contact and the unnecessary detention of girls. *See* DAVID STEINHART, ANNIE E. CASEY FOUND., PATHWAYS TO JUVENILE DETENTION REFORM: PLANNING FOR JUVENILE DETENTION REFORMS—A STRUCTURED APPROACH 41 (1999); FRANCINE T. SHERMAN, ANNIE E. CASEY FOUND., PATHWAYS TO JUVENILE DETENTION REFORM—DETENTION REFORM AND GIRLS: CHALLENGES AND SOLUTIONS 41 (2005).

MN, Albuquerque, NM, Las Vegas, NV, Santa Cruz, CA, Birmingham, AL and Portland, OR.

Institutional or health staff members surveyed the entire pre-trial detention population at each site. The survey included questions about demographics, histories of bullying and harassment, histories with the child welfare system, histories of suspension and expulsion from school and detention histories.[27]

We piloted the survey with youths who attend an alternative education high school in Santa Cruz County, CA, as well as youths who have been involved in the Santa Cruz County juvenile justice system. This process ensured that we had created an instrument with an appropriate reading level and culturally relevant vocabulary.

We also developed a data collection protocol that ensured confidentiality. Institutional or health staff members offered every youth a survey, a cover sheet explaining the purpose of the survey and an envelope. Youths could fill out the survey or leave the survey blank, place the survey sheet into the envelope, seal the envelope, and then place their envelope in a locked box. When the locked box was full, a research liaison at each site then placed the sealed surveys into a manila envelope and sent the completed surveys to the researchers.

Finally, we entered the data sent from each of the research sites into a spreadsheet and then analyzed it using Statistical Package for the Social Sciences statistics software (SPSS). We calculated the percentage of respondents falling into divisions based on the following categories: race/ethnicity, gender, age, sexual orientation and county of origin. We completed additional statistics tests in order to determine whether particular subsets of respondents were more likely to have histories of home removal, group or foster home placement or homelessness. Finally, we analyzed detention histories to determine whether LGB and gender non-conforming youths are more likely to be detained for violent offenses, weapon charges, property offenses, drug and alcohol offenses, running away, having sex with someone of the same gender, prostitution, warrants or probation violations.

B. Respondents' Ages, Races and Ethnic Identities

Survey respondents varied across age. The age of respondents ranged from eleven to twenty-one-years-old, with an average age of 15.7

[27] *See infra* app. A (containing the full instrument).

years old. Respondents also varied across race and ethnic identity. Within our sample, thirty-four percent (n=665) of respondents identified as African American, thirty percent (n=575) of respondents identified as Hispanic, Latino, Chicano, Mexican or Mexican American, eighteen percent (n=345) of respondents identified as white or Caucasian, four percent (n=76) of respondents identified as Native American, one percent (n=27) of respondents identified as Japanese, Chinese, Samoan or Pacific Islander, and thirteen percent (n=245) of respondents identified with multiple racial or ethnic categories or a racial or ethnic category other than those reported above.

C. Gender Identity and Expression

We asked respondents a series of questions about gender identity and expression. As discussed above, researchers face a number of challenges around the accurate collection of data on gender identity.[28] Some youths resist disclosing non-conforming gender identities. Other youths may not identify with distinct gender categories. Our survey question on gender identity provided the option of circling "boy," "girl," or filling in a blank field labeled "other." Eighty percent (n=1557) of respondents identified as boys, twenty percent (n=397) of respondents identified as girls, and three-tenths of one percent (n=5) of respondents identified as something other than boy or girl.[29]

We also wanted to identify youths who express their gender identities in a way that is non-conforming. In order to measure gender expression that falls outside societal norms, we asked whether the youths had ever been bullied or harassed for not being feminine or masculine enough. Ninety-four percent (n=1796) of respondents answered no, while six percent (n=117) of respondents said yes. Four of the five respondents who did not identify as girl or boy answered yes. Girls were more likely to answer yes than boys: eight percent (n=32) of girls reported that they had been bullied or harassed for not being feminine enough compared with five percent (n=79) of boys who reported that they had been bullied or harassed

[28] *See supra* Part I.

[29] These five youths did not specifically identify as transgender. Instead, two youths wrote "nothing," one youth circled both "boy" and "girl," one youth wrote "sex change" and one youth wrote "sometimes I wonder."