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NOTES

THE KIDS ARE NOT ALRIGHT: ADDRESSING DISCRIMINATORY TREATMENT OF QUEER YOUTH IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES

When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.¹

I. INTRODUCTION

Queer² youth face homophobia in every aspect of our culture, from routine epithets flung in school hallways³ to omnipresent assumptions concerning traditional marriage.⁴ Children in the juvenile justice system⁵ are not immune from the heterosexism, harassment, and institutional prejudices perpetuated by the sexual majority. Documented experiences of children and adult staff within juvenile

¹ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

² “Queer” is used in this Note as an umbrella term encompassing a class of sexual minorities defined by sexual identity and gender expression. This class is often meant to include gay men, lesbians, bisexuals, and transgendered individuals. *E.g.*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1435 (4th ed. 2000) (“queer” described as a word once used to denigrate homosexuals and now reclaimed by sexual minorities in defiant pride of past prejudice).

³ In a 2003 survey, the Gay, Lesbian and Straight Education Network (GLSEN) found that 84% of queer high school students reported being verbally harassed because of their sexual orientation, and 91.5% reported hearing homophobic remarks frequently or often in school. GLSEN, *The 2003 National School Climate Survey: The School Related Experiences of Our Nation’s Lesbian, Gay, Bisexual, and Transgendered Youth* (2003), available at www.glsen.org.

⁴ *See, e.g.*, President George W. Bush, State of the Union Address (Jan. 20, 2004) (emphasizing his belief that marriage is reserved for the union of a man and woman), available at <http://www.whitehouse.gov/stateoftheunion/2004/index.html> (last visited Oct. 7, 2004).

⁵ For the purposes of this Note, the juvenile justice system is meant to primarily include the network of detention and correctional facilities, probation programs, courts, and state agencies that serve detained youth and youth determined to be juvenile delinquents.

detention and correctional facilities⁶ (“juvenile facilities” or “facilities”) bear out this truth.

Girl in juvenile facility:

Then (staff) asked me: “Are you a lesbian? Because if you are, we are going to put you in a room by yourself.” It was so I wouldn’t try to get at anyone else. Just because I like girls, I ain’t going to go try to get at every single one of them!⁷

Staff worker in residential juvenile detention center:

The attitude of “Why can’t you just act straight while you are here?” . . . It is like, “Wait a minute, you are punishing the wrong person here.” Instead of working with the attitudes of homophobia and bigotry, it just further isolates the kid in a situation where they are already pretty scared.⁸

In a system already rife with injustice, young men and women who find themselves in the sexual minority must also deal with widespread ignorance and intolerance of their identity in juvenile facilities. Many queer youth already encounter obstacles that trouble varying overlapping populations in the juvenile justice system,⁹ including the overrepresentation of youth of color¹⁰ and the increasingly severe punishment and stigmatization of girls who commit gender transgressive criminal acts.¹¹ But a queer child has an additional characteristic trapping her in another unfortunate structural bias when placed in the physical custody of the state. Qualitative evidence¹² shows that such youth encounter

⁶ Juvenile detention and correctional facilities include any facilities in which the state has physical custody of juveniles pursuant to delinquency matters or status offenses. Such facilities include locked units and group homes.

⁷ Mary Curtin, *Lesbian and Bisexual Girls in the Juvenile Justice System*, 19 CHILD AND ADOLESCENT SOC. WORK J. 285, 291 (Aug. 2002).

⁸ *Id.* at 293-94.

⁹ *Id.* at 296.

¹⁰ According to the 1997 Census of Juveniles in Residential Placement done by the Office of Juvenile Justice and Delinquency Prevention, ethnic minority youth represented 62% of youth in detention facilities and 67% in correctional facilities but represented only 34% of the juvenile population ages 10 through 17 in the United States. The group most overrepresented in the custody population was black youth. Non-Hispanic black youth were 40% of juveniles in residential placement in 1997, but they made up just 14% of juveniles ages 10 through 17 nationwide. Office of Juvenile Justice and Delinquency Prevention, *Disproportionate Minority Confinement: 2002 Update* (Sept. 2004), available at <http://www.ojjdp.ncjrs.org/publications/index.html> (last visited Nov. 1, 2004).

¹¹ See Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, 14 BERKELEY WOMEN’S L. J. 40, 51-52 (1999).

¹² See generally Curtin *supra* note 7; Schaffner *supra* note 11; Elvia R. Arriola, *The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429 (1998); Colleen A. Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*,

challenges that their straight counterparts need not worry about. For example, queer youth may be more likely to be funneled into the juvenile justice system because of their sexual identity.¹³ Once in the system, their needs often go unnoticed, are actively ignored or suppressed by administrators and staff, or lead to more severe treatment.¹⁴ Ultimately, these at-risk children are likely to be worse off from their delinquency experience simply for being queer instead of being rehabilitated as mandated by state law.¹⁵

This situation cannot be ignored. Systemic change is necessary to ensure the proper care of one of society's most vulnerable populations. These children likely come under the watch of the state due to their sexual status for one reason or another, and now the system is using that same status to punish them again. Queer youth should not be forced to attend juvenile detention and correctional facilities where they will be subject to the indecent and unforgiving actions of peers or facility staff. The system must not remain unregulated by state agencies' own unspecific guidelines¹⁶ or nonexistent legislative enforcement.¹⁷ As custodians of delinquent children, states have a responsibility to identify and address the factors pushing children into delinquency.¹⁸ If a child's sexual minority status is playing a major role in destructive behavior, then this trait, one that strikes at the core of his identity, needs to be accessed and addressed – not trampled upon, ignored, and derided. When a queer delinquent is placed in a facility, she must find a protective atmosphere and know how to seek out appropriate assistance. These are not only moral responsibilities but statutory ones.

6 Law & Sexuality 31 (1996); Randi Feinstein et al., Urban Justice Center, *justice for all? A report on lesbian, gay, bisexual and transgendered youth in the New York juvenile justice system* (2001) [hereinafter *justice for all?*]; Coalition for Juvenile Justice, *CJJ 2000 Annual Report: An Overview* (2000), available at <http://www.juvjustice.org/publications/overview.pdf> (last visited Nov. 1, 2004); Quang H. Dang, San Francisco Human Rights Commission, *Investigation into the Needs of Lesbian, Gay, Bisexual, Transgender, Queer and Questioning Youth*, 10-15 (1997).

¹³ See *infra* Part II.A.

¹⁴ See *infra* Part II.B.

¹⁵ All states have laws elucidating the responsibilities of state agencies involved in the juvenile justice system. These laws typically include prevention of delinquency and rehabilitation of delinquent youth by providing services and facilities to “promote and safeguard the social well-being and general welfare” of youth. *E.g.*, ALA. CODE § 44-1-1 (2004).

¹⁶ Currently only San Francisco has a detailed anti-discrimination policy for queer youth accompanied by a specific complaint process. SAN FRANCISCO JUVENILE PROBATION DEPARTMENT ANTI-HARASSMENT POLICY FOR YOUTH (2002) (on file with Center for Young Women's Development, San Francisco, CA, and Office of the City Attorney, San Francisco, CA).

¹⁷ No state has a law dealing with safeguards for queer youth in the juvenile justice system. Only in New York has such legislation been proposed. See A. 7199 Assem., Reg. Sess. (N.Y. 2003), available at <http://assembly.state.ny.us/leg/?bn=A07199&sh=t> (last visited Nov. 1, 2004).

¹⁸ See, *e.g.*, MASS. GEN. LAWS ch. 119 §§ 53, 58, 67, 68, 84 (2004).

Those pushing for reform of the juvenile justice system's approach to queer youth must use the available options under the law to effect necessary change.¹⁹ There are many avenues into federal and state courts, where youths may seek remedies for their plight and to help restructure flawed facilities.²⁰ State agencies²¹ that oversee the function of the juvenile detention and correctional facilities are not free from judicial regulation. Neither are the employees and administrators who work within them. Under legislative mandates and agency rules, the ultimate goal of the system is to transform juveniles into future adults who will be able to function capably and lawfully in society. But by turning a blind eye and condoning discrimination or actively allowing it to occur, state agencies are doing the ultimate disservice to these already battered children. These agencies, and local facilities, have the option of instituting internal reform of their own policies and regulations. Legislatures must also take up the cause and fight to protect the abused and neglected in the system. All of these measures can achieve a goal rarely embraced: both to recognize the problems in juvenile facilities *and* to remedy them. Children in the foster care system have achieved a modicum of reform.²² Youth in the juvenile justice system are no less deserving.

Part II of this Note discusses the plight of queer youth involved in the juvenile justice system, from how they get pulled into the system to how they fare inside detention and correctional facilities. The published material on the subject is limited, both in amount and by its qualitative nature. However, what is available is quite instructive as a foundation, and shows the need for comprehensive change and more investigation and analysis of the problem. Part III proposes methods to ameliorate the system through the courts, legislatures, state agencies, and local departments. Federal claims under the Civil Rights Act of 1964 (42 U.S.C. § 1983) and the Civil Rights of Institutionalized Persons Act of 1980 (42 U.S.C. § 1997) are highlighted. Judicial review of administrative decisions is also discussed. State agencies and their local counterparts are encouraged to remodel regulations and internal policies. State legislatures could use their guiding hands to achieve the same result.

Regardless of how fundamental change eventually occurs, whether forced internally or by the legislature or courts, the juvenile justice system must address

¹⁹ At the outset, advocates must recognize that queer youth in the juvenile justice system are often twice ignored by the people who should be championing them. First, authorities in the system often presume heterosexuality and deny the presence of children having a sexuality differing from the norm. Second, organizations devoted to queer youth tend to advocate for the issues most important to the white, middle class, well-educated queer kids who tend not to end up in the delinquency system. These miscalculations leave the generally poor queer kids of color doubly silenced despite being the population that most needs a voice. See Mary Curtin, *The Damn System Is Forty Years Behind: The Experience of Lesbian and Bisexual Girls in the Juvenile Justice System* (2000) (unpublished thesis, Smith College) (on file at Smith College Library).

²⁰ See *infra* Part III.

²¹ Typically a Department of Youth Services or Department of Juvenile Justice.

²² See *infra* Part II.C.

the specific needs of queer youth in its ward. Facilities must be properly equipped to deal with the unique issues of its sexual minorities. The state must show all children that they are valued – and that queer kids are no different.

II. THE INTERSECTION OF QUEER YOUTH AND THE JUVENILE JUSTICE SYSTEM

Although no large-scale, comprehensive survey to determine the number or typical plight of queer youth in the juvenile justice system has been done, there is empirical evidence that children in the sexual minority may be at a greater likelihood of ending up delinquent and being treated more harshly while in detention and correctional facilities.²³ This is not because queer children have a predisposition for unlawful behavior or are inherently more restive. Rather, society and its institutions, laced with misunderstanding, prejudice, and ignorance, force unnecessary burdens on these children. Instead of lightening or extinguishing these pressures, juvenile facilities more deeply impress them, further scarring these already vulnerable children.

A. *Shoehorned Into the Juvenile Justice System*

Despite the incremental rise in tolerance and acceptance of homosexuality, queer youth still face many challenges at home, in their families, at school, and in society. The resulting pressures may position these children for lifestyles leading to delinquency.

Rejection by family is a major factor pushing kids toward destructive behavior. Studies and articles that discuss queer youth in the juvenile justice system all discuss issues at home.²⁴ In general, queer youth who come out to their parents often receive a negative response. One study found that 43% of male teenagers reported strong negative reactions, such as anger and disgust, when disclosing their homosexuality to parents.²⁵ Another study found that 28% of fathers and 20% of mothers were rejecting or completely intolerant of their children when they came out.²⁶ Juvenile defense attorneys report that, although all of their clients generally

²³ As early as 1985, a major American newspaper profiled a gay juvenile and his experience of mistreatment in a California detention center. *County Has Problems In Housing Runaways; Gay Teens Complain of Treatment*, L.A. TIMES, Jan. 13, 1985, §2 at 11.

²⁴ See, e.g., Curtin *supra* note 7, at 286-87, 295; Schaffner *supra* note 11, at 60-62; Arriola, *supra* note 12, at 454-55; Sullivan, *supra* note 12; Abby Abinati, *Legal Challenges Facing Gay and Lesbian Youth*, in HELPING GAY AND LESBIAN YOUTH: NEW POLICIES, NEW PROGRAMS, NEW PRACTICE 149, 156-57 (Teresa DeCrescenzo ed., 1994); *justice for all?*, *supra* note 12, at 13-14; Dang, *supra* note 12.

²⁵ Gary Remafedi, *Male Homosexuality: The Adolescent's Perspective*, 79 PEDIATRICS 326, 326 (1987).

²⁶ Ellen & Tobias Cahill, National Lesbian and Gay Task Force, *Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgendered Families*, 102 (Jan. 2003), available at <http://www.thetaskforce.org/reslibrary/familypolicy.cfm>, citing A. R. D'Augelli, *Enhancing*

have parents who are uninvolved, their cases with queer clients had particularly poor parental involvement or no involvement at all.²⁷ Further exacerbating the situation, judges are less likely to release juveniles if there is no parent present in court or no parental involvement in the case.²⁸ If a youth is not released, then the alternative is a detention facility, whose conditions can be worse than at home.

Queer kids do not fare any better in our nation's educational system. Homophobic slurs are rampant in American schools, and students routinely harass other students for their actual or perceived queer identity.²⁹ A 2001 Massachusetts study of high school students found that gay, lesbian, and bisexual students were more than twice as likely than other students to be threatened or injured with a weapon at school in the past year and more than twice as likely to skip school in the past month because of feeling unsafe at or on route to school.³⁰ The study also showed that gay, lesbian, and bisexual students were over three times as likely to be in a physical fight resulting in treatment by a doctor or nurse.³¹

The invisibility and isolation forced upon queer youth by this homophobia and heterosexism affect their social development, self-esteem, and mental health.³² If no constructive outlet is found for these pressures, queer children look for other ways to alleviate their pain and shame. The worst case scenario is suicide. The same 2001 Massachusetts study found that 32.7% of gay, lesbian, and bisexual students attempted suicide in the past year, which was almost four times as great as the 8.7% of other students who had made such an attempt.³³ Additional published data support these findings.³⁴ Other self-destructive behavior may ultimately lead these disaffected children into the juvenile justice system. Queer youth may strike out against themselves and others when they are miseducated about their desires, have internalized homophobia, or defend against threats.³⁵ Many children become homeless; several studies have shown that up to half of all homeless youth are

the Development of Lesbian, Gay and Bisexual Youths, in *Prevention of Heterosexism and Homophobia* (E. Rothblum & L. Bonds eds., 1996).

²⁷ See *justice for all?*, *supra* note 12, at 13.

²⁸ See *id.*

²⁹ GLSEN *National School Climate Survey*, *supra* note 3.

³⁰ Massachusetts Department of Education, *2001 Massachusetts Youth Risk Behavior Survey* (2002) (where 17.7% of gay, lesbian, and bisexual youth answered affirmatively compared to 7.8% of other students for both behaviors), *available at* <http://www.doe.mass.edu/hsss/yrbs/01/results.pdf> (last visited Nov. 4, 2004).

³¹ *Id.* (10.8% for gay, lesbian, and bisexual youth compared to 3.2% for other students).

³² See Curtin, *supra* note 7, at 286-87 (reviewing the literature on the subject).

³³ See Massachusetts Youth Risk Behavior Survey, *supra* note 30.

³⁴ See, e.g., Curtis D. Proctor & Victor K. Groze, *Risk Factors for Suicide among Gay, Lesbian, and Bisexual Youths*, 39 SOCIAL WORK 504 (1994); Remafedi et al., *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 PEDIATRICS (1991). Recently, some have questioned whether this data actually shows a significant discrepancy in suicide attempts by queer youth. See, e.g., Ritch Savin-Williams, *A Critique of Research On Sexual Minority Youths*, 24 JOURNAL OF ADOLESCENCE (2001) (questioning whether previous studies were based on *reported* suicide attempts and not *actual* attempts).

³⁵ See Schaffner, *supra* note 11, at 62.

queer.³⁶ Once on the street, the avenues of self-support and survival can turn criminal,³⁷ including prostitution,³⁸ theft, trespass, and others. These choices become commonplace when all other self-affirming curatives are cut off.³⁹ Additionally, queer youth have been shown to be substance abusers in alarmingly higher percentages than youth in the general population,⁴⁰ which makes them more likely to commit other crimes because of impaired judgment or to support a habit.⁴¹ Even queer youth who are comfortable enough to explore their sexuality have been criminalized where consensual expression of their sexual identity has been construed as sexual assault or statutory rape.⁴²

Queer children may enter the court system for reasons other than delinquency and still end up in a detention or correctional facility.⁴³ If a child is abused or neglected, possibly as a result of negative parental reaction to a son or daughter's coming out, that child may end up in state-sponsored foster care. In foster care, queer children typically suffer unwelcoming placements and subsequently run away.⁴⁴ Homelessness is then not far off. Another avenue into the court is through a state supervision petition.⁴⁵ Triggered by a status offense, such as truancy,

³⁶ See, e.g., Remafedi, *supra* note 25; Abinati, *supra* note 24, at 164 n.22; The National Network of Runaway and Youth Services, *To Whom Do They Belong?: Runaway, Homeless and Other Youth in High-Risk Situations in the 1990's* (1991).

³⁷ See Arriola, *supra* note 12, at 453; Abinati, *supra* note 24, at 164; Sullivan, *supra* note 12, at 41; Dang, *supra* note 12, at 61; National Coalition for the Homeless, *NCH Fact Sheet #11: Homeless Youth* (Apr. 1999), available at <http://www.nationalhomeless.org/youth.html>.

³⁸ See Gary Yates et al., *A Risk Profile Comparison of Homeless Youth Involved in Prostitution and Homeless Youth Not Involved*, 12 J. ADOLESCENT HEALTH 545, 547 (1991) (youths involved in prostitution were more than five times as likely to report homosexual or bisexual identities); Savin-Williams, *Theoretical Perspectives Accounting for Adolescent Homosexuality*, 9 J. ADOLESCENT HEALTH CARE 95 (1988).

³⁹ See Curtin, *supra* note 7, at 295 (youth interviewed had charges related to substance abuse, assault, homelessness, depression, family issues, dropping out of school, selling drugs, survival sex, and theft); Schaffner, *supra* note 10, at 62 (interview with delinquent girl who was on drugs when charged with assault with a deadly weapon against her bisexual prostitute partner).

⁴⁰ See R. Garofalo et al., *The Association Between Health Risk Behaviors and Sexual Orientation Among A School-Based Sample of Adolescents*, 101 PEDIATRICS 895 (1998); Gary Remafedi, *Adolescent Homosexuality: Psychological and Medical Implications*, 79 PEDIATRICS 331 (1987).

⁴¹ See Sullivan, *supra* note 12, at 41.

⁴² See Curtin, *supra* note 7, at 290; Sullivan, *supra* note 12, at 38-40.

⁴³ See Curtin, *supra* note 7, at 296; *justice for all?*, *supra* note 12, at 15.

⁴⁴ See *justice for all?*, *supra* note 12, at 16, citing Joint task Force of New York City's Child Welfare Administration and the Council of Family and Child Caring Agencies, *Improving Services for Gay and Lesbian Youth in NYC's Child Welfare System* (1994) (in survey of queer youth in New York City's child welfare system, 78% were removed or ran away from unwelcome foster care placements, 100% reported verbal harassment, and 70% reported physical abuse).

⁴⁵ Usually termed a Persons In Need of Supervision (PINS) or Child In Need of Services (CHINS) petition.

uncontrollable behavior, or running away, the state may intervene and assume some responsibility for a child.⁴⁶ A parent's disapproval of her child's sexuality or a youth's self-destructive response to his own identity make queer youth vulnerable to state supervision.⁴⁷ Supervision petitions highlight children who are at danger of becoming delinquent. Yet these children are being allowed to slip further into the shadows of the system, when the supervision should instead include preventative measures unique to queer children.

With such a hostile environment in which to develop, kids who find themselves in the sexual minority are saddled with issues that translate into risk factors for delinquent behavior. Even worse, the pervasive prejudices and homophobia at home and school do not stop at the doors of the courtroom or facility.

B. Mistreated in Juvenile Detention and Correctional Facilities

Only estimates of the percentage of queer youth in the juvenile justice system are available. One small-scale study of girls in juvenile facilities approximated the percentage of girls who mentioned involvement or interest in same-sex relationships at 35%.⁴⁸ Another study by the same researcher looked at a larger sample of 150 girls and found that between one-fifth and one-third were bisexual or lesbian identified.⁴⁹ A 2001 assessment of the New York City juvenile justice population qualitatively estimated the number at 4-10% based on attorney and facility staff estimates.⁵⁰ The range potentially could be an underestimate since queer youth who do not fit into common stereotypes may go undiscovered and remain invisible or simply go undetected by staff who don't consider the possibility.⁵¹ Also, statistics based on youth asked to identify themselves as queer may underrepresent the population since the system is perceived as an unsafe place for those who come out.⁵² Admittedly, these studies are inadequate. But they point out the need for more comprehensive evaluations on a larger scale, possibly by state administrative agencies themselves. With more data compiled, there could be a better understanding of the magnitude of this population in the system.

Despite the lack of comprehensive evidence, there is no denying that queer youth in detention and correctional facilities routinely experience harassment, discrimination, and abuse.⁵³ Usually, issues of the sexual minority are ignored by the system or not appropriately responded to when recognized.⁵⁴ In one study, one

⁴⁶ *E.g.*, MASS. GEN. LAWS ch. 119, § 39E (2004).

⁴⁷ *See justice for all?*, *supra* note 12, at 17 (describing truant children who avoided school because of the harassment encountered there, and parents who filed PINS petitions because they resented their children for being gay).

⁴⁸ *See Schaffner*, *supra* note 11, at 62.

⁴⁹ Curtin, *supra* note 7, at 288 (citing a study by Laurie Schaffner).

⁵⁰ *justice for all?*, *supra* note 12, at 6, 11, 26.

⁵¹ *Id.* at 6, 27, 34.

⁵² *See Dang*, *supra* note 12, at 61.

⁵³ *See, e.g.*, CJJ 2000 Annual Report, *supra* note 12.

⁵⁴ *See Curtin*, *supra* note 7, at 290-91.

bisexual girl stated: “[T]he staff don’t know we are here. They think we are all straight.”⁵⁵ Published material concerning queer youth in the juvenile justice system consistently reference verbal harassment from peers and staff as a significant problem.⁵⁶ Physical abuse has also been cited, including the disclosure from a juvenile client to his lawyer that he was hit and spit on by a staff member because of his sexuality.⁵⁷

The overall culture of the system works against queer youth. Many facilities lack sensitivity trainings about sexual minorities, generally leaving workers unbounded by administrative regulation and free to act according to their own mores and prejudices.⁵⁸ These beliefs may include unjustified assumptions that queer youth are sexual delinquents who pose a physical danger to their peers.⁵⁹ In one instance, a transgendered girl sentenced on robbery charges was arbitrarily labeled a sex offender by staff.⁶⁰ Hampering reform is the state of facilities as unwelcoming workplaces for queer adults; consequently, such employees are either not out or simply underrepresented.⁶¹ All of these factors contribute to an environment where there is little or no restraint of peer abuse or staff abuse of queer youth⁶² and where staff actually use slurs targeting queer youth.⁶³

Another result is the unequal enforcement of general policies on queer youth.⁶⁴ In New York City, a facility counselor petitioned to extend a lesbian’s placement based on her alleged expressions of attraction toward another girl.⁶⁵ In California, a girl caught having sexual contact with another girl received six months added to her sentence, whereas a peer’s sexual contact with a boy resulted in a three month extension.⁶⁶ When protective regulations are available, they may serve to stigmatize queer youth instead of safeguarding them. Some policies appear to be in place and enforced to protect heterosexual girls from perceived sexual predators.⁶⁷

Peers can be just as unrelenting as the overall system. One report found that many children entering the system for hate-related crimes committed offenses against queer people,⁶⁸ furthering the inevitability of harassment for queer kids. Youth housed in these facilities are known to target their queer counterparts with

⁵⁵ *Id.*, at 288.

⁵⁶ See *id.*; *justice for all?*, *supra* note 12, at 32-33 (youth reporting that peers and staff used such terms as faggot, fag, gay, and queer in a derogatory manner).

⁵⁷ See *justice for all?*, *supra* note 12, at 33.

⁵⁸ See Arriola, *supra* note 12, at 453; Curtin, *supra* note 7, at 291-94; *justice for all?*, *supra* note 12, at 37, 39.

⁵⁹ See Curtin, *supra* note 7, at 294; *justice for all?*, *supra* note 12, at 28.

⁶⁰ *justice for all?*, *supra* note 12, at 7.

⁶¹ See Curtin, *supra* note 7, at 293; *justice for all?*, *supra* note 12, at 38.

⁶² See *justice for all?*, *supra* note 12, at 36.

⁶³ See Curtin, *supra* note 7, at 293.

⁶⁴ See *justice for all?*, *supra* note 12, at 39-40.

⁶⁵ *Id.*, at 7.

⁶⁶ See Curtin, *supra* note 7, at 292.

⁶⁷ *Id.*

⁶⁸ Dang, *supra* note 12, at 61.

homophobic slurs and threats of violence. Behavior such as baiting “butch” girls by falsely flirting with them or daring to out them in order to get them in trouble has been documented.⁶⁹ Such inappropriate behavior may go unpunished by staff disregarding internal policies⁷⁰ and ultimately encourage such behavior to continue. One girl complained: “(When other girls) see the staff treat us different . . . they think they can treat us different too.”⁷¹ Sanctioning the harassment further forces queer youth to veil their identity.⁷² For example, one lesbian reported that she consistently declared that she was straight in order to prevent being separated from the main population.⁷³ Such seemingly insurmountable obstacles make proper rehabilitation difficult to achieve.

While in custody, queer kids are singled out as different. They may be separated out of the general population and placed in protective custody away from peers, such as in solitary lockdown or the infirmary.⁷⁴ One report noted that a transgendered girl was placed in isolation at every facility she attended because staff believed she would inappropriately touch other youth.⁷⁵ Staff enforce physical separation for any number of reasons, including the safety of the targeted youth, the safety of other delinquents, or through the discretionary choice of staff.⁷⁶ Although judges may not want to use separation as a disposition, the lack of viable alternatives may influence them otherwise.⁷⁷ If not permanently ostracized, queer youth may also be separated from the group during other times, such as being forced to shower and dress alone, receiving less time out of their rooms, and having their conversation regulated more often than others.⁷⁸ Physical separation stigmatizes queer youth and is not the most beneficial long-term solution.⁷⁹ These children may also be forced into altering their appearance to match traditional gender roles, including changing hair and clothing styles.⁸⁰ One youth was required to respond to her given male name instead of the chosen female name she desired.⁸¹ Staff may monitor queer youth more closely or blame them for a conflict for being too flamboyant for no reason other than real or perceived sexual identity.⁸² Making matters worse, access to appropriate and affirming information or counseling is limited or nonexistent, and the available literature may even be

⁶⁹ See Curtin, *supra* note 7, at 292-93.

⁷⁰ See Curtin, *supra* note 7, at 293; *justice for all?*, *supra* note 12, at 39.

⁷¹ See Curtin, *supra* note 7, at 288.

⁷² See *justice for all?*, *supra* note 12, at 34-35.

⁷³ See Curtin, *supra* note 7, at 291.

⁷⁴ See *justice for all?*, *supra* note 12, at 29.

⁷⁵ *Id.* at 8.

⁷⁶ See *id.* at 29-31.

⁷⁷ See *id.* at 30.

⁷⁸ Curtin, *supra* note 7, at 291; Dang, *supra* note 12, at 10 (testimony of lesbian to San Francisco Human Rights Commission).

⁷⁹ See Dang, *supra* note 12, at 61; *justice for all?*, *supra* note 12, at 31.

⁸⁰ See Curtin, *supra* note 7, at 291.

⁸¹ See *justice for all?*, *supra* note 12, at 40.

⁸² See Curtin, *supra* note 7, at 293.

homophobic.⁸³ Sexual education for all youth in the system often does not address different sexual identities.⁸⁴ Queer children would instead benefit from dialogue with informed professionals and having access to varied viewpoints. To that end, one youth who had a positive counseling session in detention described the event as a “turning point” in her life.⁸⁵

Although appropriate dispositional alternatives must be available to protect queer youth from homophobia inherent in the justice system,⁸⁶ specialized sentencing options are rarely available. There are no residential placement options specifically designed for the specialized care of queer youth. In New York City, the Hetrick-Martin Institute is a professional provider of social support and programming for all youth that specializes in troubled queer children.⁸⁷ The Institute is not a placement option for children in the state Department of Juvenile Justice system, however. Also in New York City, the Gramercy Residence of Green Chimneys Children’s Services⁸⁸ is available to at-risk queer youth, but can only accept a very limited number of children and is not tailored to the unique needs of delinquents.⁸⁹

The plight of queer youth in juvenile detention and correctional facilities demands reform. These children were swept into the system because the usual support mechanisms in life – family, school, friends – were unavailable and disapproving. Shunned and sapped of self-worth, these youth now only have the juvenile justice system for support. But instead of providing even a minimally welcoming and rehabilitative atmosphere, the facilities that house queer delinquents victimize them all over again.

III. AVENUES FOR REFORM IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES

A. Reform Through the Federal Courts

1. Constitutional Violations and the Civil Rights Act of 1964 (42 U.S.C. § 1983)

42 U.S.C. § 1983 creates a cause of action under which queer youth may allege that certain administrators and employees acting under state law have subjected them to a deprivation of rights guaranteed by the Constitution or federal law.⁹⁰ The

⁸³ See *id.*, at 294-95.

⁸⁴ See *id.*, at 295.

⁸⁵ *Id.*

⁸⁶ See Abinati, *supra* note 24, at 165.

⁸⁷ The Hetrick-Martin Institute, at <http://www.hmi.org> (last accessed Oct. 7, 2004).

⁸⁸ Green Chimneys, at <http://www.greenchimneys.org/default.htm> (last accessed Oct. 7, 2004).

⁸⁹ See *justice for all?*, *supra* note 12, at 31-32.

⁹⁰ The applicable part of 42 U.S.C. § 1983 (2004) provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

focus in this section will be on possible constitutional violations relevant to youth detained in the juvenile justice system stemming from the Eighth and Fourteenth Amendments to the United States Constitution,⁹¹ although federal statutory laws that create applicable rights should also be considered.⁹² If a constitutional violation occurs, a wide range of actors may be sued in their individual or representative capacities, including state officials administering the juvenile justice system, administrators of individual systems, and facility employees. The person who brings the suit may request injunctive relief against officials or employees in order to improve the conditions of the system leading to the constitutional violation.⁹³ In some circumstances, a plaintiff may request damages, although there are several limitations on such relief under § 1983 case law.⁹⁴ Also, the Prison Litigation Reform Act of 1996 (PLRA)⁹⁵ imposes restrictions on filing a § 1983 claim challenging prison conditions, such as requiring administrative exhaustion.⁹⁶ If a plaintiff can overcome these hurdles, §1983 remains a viable, potent tool for seeking the ultimate goal of comprehensive reform.

a. Fourteenth Amendment

The primary basis for a § 1983 claim concerning harassing and discriminatory treatment in juvenile facilities is the Due Process Clause of the Fourteenth Amendment. Violations of due process may occur when juveniles experience such treatment during pre-trial detention prior to trial or during incarceration as a delinquent. The Supreme Court has only partially spoken directly on the issue of proper treatment for juveniles held in detention and correctional facilities. When lower federal courts seek guidance on these issues, they apply the few Supreme Court decisions on point⁹⁷ and use other Fourteenth Amendment cases that address different demographic groups in similar circumstances.⁹⁸ Regardless of the rationale in lower court rulings, undergirding many of the cases is the belief that juveniles in facilities deserve greater due process protections than adults based on

shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

⁹¹ See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment; applied to the states through the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962)); U.S. CONST. amend. XIV, § 1 (prohibiting states from depriving any person of life, liberty, or property, without due process of law).

⁹² See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 8.8 (4th ed. 2003).

⁹³ Injunctive relief for §1983 suits is limited only by traditional equity principles and some limited jurisdictional doctrines. See *id.* at § 8.11.

⁹⁴ Qualified and sovereign immunity doctrines insulate some officials and employees from §1983 suits requesting damages. See *id.* at §§ 8.5-8.7, 8.11.

⁹⁵ Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321 (1996) [hereinafter PLRA].

⁹⁶ See 42 U.S.C. § 1997e (2004); CHERMERINSKY, *supra* note 91, at § 8.1.

⁹⁷ *E.g.*, *Schall v. Martin*, 467 U.S. 253, 269 (1984).

⁹⁸ *E.g.*, *Youngberg v. Romeo*, 457 U.S. 307 (1982) (dealing with institutionalized mentally retarded adults).

their different needs and capacities.⁹⁹ Some courts even extended these standards to establish that juveniles are entitled to rehabilitative treatment under the Constitution.¹⁰⁰

When courts evaluate standards for pretrial juvenile detainees, they can look to the United States Supreme Court decision *Bell v. Wolfish*,¹⁰¹ which was applied to juveniles in *Schall v. Martin*,¹⁰² as a guideline for minimum protections. In *Bell*, the Court stated that Fourteenth Amendment due process guarantees for pretrial adult detainees required that detainees not be punished since they have not been adjudged guilty of a crime.¹⁰³ The case evaluated several factors to determine whether or not the conduct involving pre-trial detainees in a particular facility is considered punishment is evaluated by several factors, including whether the sanction involved an affirmative disability or restraint, whether its operation promoted the traditional aims of punishment (retribution and deterrence), whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.¹⁰⁴ A condition or restriction of pretrial detention must be reasonably related to a legitimate governmental objective for it to survive this analysis.¹⁰⁵

For confined incarcerated delinquents, the legal doctrine is not as clear. In *Youngberg v. Romeo*,¹⁰⁶ the Supreme Court stated that institutionalized mentally retarded adults have the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate training of correctional employees because “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”¹⁰⁷ Liberty interests of the individual must be balanced with the legitimate needs of the institution.¹⁰⁸ Lower courts have relied on this opinion to evaluate facility conditions for incarcerated juveniles since, like the plaintiffs in *Youngberg*, delinquents have been deprived of their liberty by the state because of their

⁹⁹ See, e.g., *A.J. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995); *Bergren v. Milwaukee*, 811 F.2d 1139, 1143-44 (7th Cir. 1987).

¹⁰⁰ See, e.g., *Alexander S. v. Boyd*, 876 F. Supp. 773, 796 (D.S.C. 1995), *aff'd in part and rev'd in part on other grounds*, 113 F.3d 1373 (4th Cir. 1997); *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977); *Martarella v. Kelley*, 349 F. Supp. 575, 586, 600 (S.D.N.Y. 1972); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) *aff'd*, 491 F.2d 352 (7th Cir. 1974). *But see* *Santana v. Collazo*, 714 F.2d 1172, 1176 (1st Cir. 1983).

¹⁰¹ 441 U.S. 520 (1979).

¹⁰² 467 U.S. at 269.

¹⁰³ *Bell*, 441 U.S. at 535-36.

¹⁰⁴ *Id.* at 537-38.

¹⁰⁵ *Id.* at 538.

¹⁰⁶ 457 U.S. 307 (1982).

¹⁰⁷ *Id.* at 321-22.

¹⁰⁸ *Id.* at 322-23.

presumed incapacity.¹⁰⁹ Also, states have the responsibility of rehabilitating delinquents, not punishing them.¹¹⁰

Lower courts have utilized the Due Process Clause of the Fourteenth Amendment, sometimes with *Youngberg* and *Bell-Schall* as standards, for evaluating the challenged conditions of juvenile facilities in federal court. In *Alexander S. v. Boyd*, the District Court in South Carolina appropriated the *Youngberg* analysis for juvenile correctional facilities to hold that overcrowding violated the Due Process Clause of the Fourteenth Amendment.¹¹¹ The approach was affirmed by the Fourth Circuit.¹¹² In *H.C. v. Jarrard*, the Eleventh Circuit found due process violations where a correctional facility employee shoved a juvenile plaintiff into a wall for no proven rational reason and injured him, placed him in isolation for laughing at another detainee without informing him how long he would be there, and denied him medical treatment for an injured shoulder for several days.¹¹³ In *Santana v. Collazo*, the First Circuit considered the unconstitutionality of prolonged isolation of juveniles with mental, social, and extreme behavioral issues, remanding the case to determine whether there were sufficient countervailing administrative interests in the practice.¹¹⁴ In *Milonas v. Williams*, the Tenth Circuit affirmed the district court's determination that certain practices of a juvenile institution, including censoring mail, mandatory confinement, lie detector tests, and discouraging visitors, were unconstitutional under *Bell* and *Youngberg*.¹¹⁵ In *Gary H. v. Hegstrom*, the Ninth Circuit adopted the *Youngberg* analysis to find certain facility conditions unconstitutional, but rejected the district court judge's verbatim implementation of a professional organization's proposed model standards as an inappropriate remedy.¹¹⁶

With federal courts willing to examine the conditions of juvenile detention and correctional facilities under the Due Process Clause of the Fourteenth Amendment and enforce broad relief if necessary, queer youth should file proper § 1983 claims to protest any particularly harsh experience or litany of experiences. A compelling case could meet *Bell-Schall* for a pre-trial detainee or the *Youngberg* standard for delinquents committed to the custody of the state. Even with the minimal data available concerning the plight of queer juveniles in the justice system, there are enough documented cases of physical abuse and verbal harassment that are committed in facilities or that go unchecked by staff to warrant remediation pursuant to §1983.

Applying the *Bell* standard, there is no alternative rational purpose for physically isolating a lesbian for any reason because of her identity, labeling a transgendered

¹⁰⁹ See *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987); *Santana*, 714 F.2d at 1179; *Alexander S.*, 876 F. Supp. at 798.

¹¹⁰ See *Kent v. United States*, 383 U.S. 541, 554-55 (1966).

¹¹¹ *Alexander S.*, 876 F.Supp. at 795-800.

¹¹² *Alexander S.*, 113 F.3d at 1373.

¹¹³ *H.C. v. Jarrard*, 786 F.2d 1080, 1083-87 (11th Cir. 1986).

¹¹⁴ *Santana*, 714 F.2d at 1179.

¹¹⁵ *Milonas v. Williams*, 691 F.2d 931, 940-43 (10th Cir. 1982).

¹¹⁶ *Gary H.*, 831 F.2d at 1431-32.

child a sex offender only because of her status and then treating her more harshly, or applying internal regulations in an unfair way to a gay kid. Also, as *Bell* prohibits, the system embraces the retributive goal of punishment when it mistreats sexual minority youth simply because they are queer and by feeding off the perception that such delinquents are held because of their sexuality. The *Youngberg* factors are likewise met. Agencies must be aware that a significant percentage of the kids in their custody have a minority sexual identity. If not, the available studies should bring this information to light. As a result, staff must be educated to deal with any issue related to these identities, including curbing harassment by peers, being tolerant to different sexualities, and knowing where appropriate resources may be accessed. This is an essential part of minimum training as required by *Youngberg*. Moreover, a number of reported findings implicate conditions of confinement as not reasonably safe. Both isolation based on sexuality and the indifference of staff to harassment broadcast to queer delinquents that there is no one available for help when they find themselves in a dangerous situation. Any physical or verbal harassment, especially that which goes unchecked, would make any child feel unsafe. The situation is even worse for these children. The fear of abuse and discrimination is pervasive in these facilities. The overarching message is to conform, both physically and behaviorally, to the sexual norm. None of these characteristics represent a safe living environment.

b. Eighth Amendment

Arguably, forcing children to endure dehumanizing conditions ranks on the level of punishment by the state. With that in mind, another defensible § 1983 claim could be based on the cruel and unusual punishment proscription of the Eighth Amendment. The test established by the United States Supreme Court for evaluating prison conditions under the Eighth Amendment is whether a prison official was deliberately indifferent (under a subjective reckless standard)¹¹⁷ to a sufficiently serious deprivation or a substantial risk of serious harm (under an objective standard).¹¹⁸ This test, however, was established for convicted and incarcerated adult prisoners only and has not been applied to juveniles. Our nation's laws and courts traditionally regard children in the justice system differently than adults. Instead of being deemed guilty of a crime, a child is labeled delinquent for committing an offense.¹¹⁹ Also, the purpose of confinement for children compared to adults parallels this difference, with rehabilitation of the delinquent being the ultimate goal instead of punishment.¹²⁰ These separate systems call into question whether juvenile confinement is punishment at all and,

¹¹⁷ *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (requiring that the "official knows of and disregards an excessive risk to inmate health or safety[,] . . . be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . also draw the inference").

¹¹⁸ *Id.* at 834.

¹¹⁹ *E.g.*, MASS.GEN.LAWS ch. 119 § 52 (2004).

¹²⁰ *See Kent v. United States*, 383 U.S. 541, 554-55 (1966).

subsequently, whether the Eighth Amendment applies to juveniles in the custody of the state.¹²¹ This issue has been expressly left open by the Supreme Court.¹²² Only the Seventh Circuit Court of Appeals has directly applied the Eighth Amendment to confined juveniles,¹²³ with most federal circuits looking to the Due Process Clause instead. Since the current Eighth Amendment jurisprudence sets the constitutional bar high, using the Fourteenth Amendment is more favorable for prospective plaintiffs. With such a rigorous standard and the uncertainty of its application, the Eighth Amendment should only be used secondarily to support a § 1983 claim. If the harm endured by a queer child is especially egregious, however, asserting a cruel and unusual punishment violation may be warranted, at least to communicate to the court how serious the situation is.

Armed with the Fourteenth and Eighth Amendments, a queer juvenile who has been harassed or abused (or both) in the juvenile justice system will be able to state a valid, arguable § 1983 claim. With this entry into the federal courts, disadvantaged kids can fight for systemic reform. A federal judge may rule in favor of the claim and ameliorate the unfair conditions in the system. In addition, merely getting a nonfrivolous suit in court provides leverage for advocates to force a settlement that will guarantee change in the system. Ideally, any publicity garnered by a suit will draw needed attention to the issue. Ultimately, § 1983 is a legal tool that, if used correctly, can get the ball rolling in many ways.

2. Civil Rights of Institutionalized Persons Act of 1980

The Civil Rights of Institutionalized Persons Act of 1980 (CRIPA)¹²⁴ is another potent mechanism for those seeking systemic reform of the juvenile justice system. CRIPA's approach to remedying civil rights violations differs from a standard § 1983 claim. The law allows the United States Department of Justice (DOJ) to bring actions in federal court through the authority it specifically grants to the Attorney General.¹²⁵ CRIPA does not authorize the DOJ to represent individuals. The only remedy authorized is equitable relief.¹²⁶ Many of the PLRA's limitations imposed on § 1983 suits concerning prison conditions are inapplicable here since those requirements are only for suits filed by prisoners.¹²⁷ CRIPA is, therefore, very useful for structural change instead of merely providing remedies for an aggrieved

¹²¹ *Ingraham v. Wright*, 430 U.S. 651, 671, n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions").

¹²² *Id.* at 669, n.37.

¹²³ *See Nelson*, 491 F.2d at 355 (staff beatings of juveniles determined to be cruel and unusual punishment violative of the Eighth Amendment).

¹²⁴ 42 U.S.C. §§1997 - 1997j (2003) (some sections later amended by the Prison Litigation Reform Act of 1996).

¹²⁵ 42 U.S.C. §1997a(a).

¹²⁶ *Id.*

¹²⁷ 42 U.S.C. §1997e; PLRA, *supra* note 95.

individual. Although initially underutilized in the area of juvenile justice,¹²⁸ CRIPA has been used more recently by the Special Litigation Section of the Civil Rights Division of the DOJ to investigate over 100 juvenile facilities in sixteen states, Puerto Rico, and the Northern Mariana Islands.¹²⁹ The DOJ currently monitors conditions in more than sixty-five facilities that operate under settlement agreements.¹³⁰

The statutory language of CRIPA specifically applies to juveniles being held in public and private facilities under state control, who are awaiting trial or residing there for any state purpose other than solely for education.¹³¹ This includes youth placed in juvenile correctional and detention facilities, from pre-trial detainees to incarcerated delinquents. When the DOJ has reasonable cause to believe a state or local government is subjecting juveniles to “egregious or flagrant conditions” which deprive them of rights guaranteed by the Constitution or any other law (whether a certain practice or pattern of deprivation), and that these juveniles are suffering grievous harm, it may bring a civil action in the appropriate federal court.¹³² The Civil Rights Division relies on information compiled by other public agencies, such as the Department of Health and Human Services, and data from independent organizations, to decide to initiate an investigation into a certain institution or statewide system.¹³³ The DOJ also uses information from almost any source concerning mistreatment in the juvenile justice system, including reports from child advocacy organizations, general news stories, and testimonials from parents, current and former detainees, and facility staff.¹³⁴ CRIPA ensures that “no

¹²⁸ See AMERICAN BAR ASSOCIATION JUVENILE JUSTICE CENTER & OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody* (Jan. 1998), available at <http://ojjdp.ncjrs.org/pubs/walls/contents.html> (last accessed Oct. 7, 2004) [hereinafter *Beyond the Walls*].

¹²⁹ See “Juvenile Correctional Facilities,” U.S. Department of Justice, Civil Rights Division, Special Litigation Section, available at <http://www.usdoj.gov/crt/split/juveniles.htm> (last accessed Oct. 7, 2004) [hereinafter DOJ].

¹³⁰ See *id.*

¹³¹ 42 U.S.C. §1997 (1)(b)(iv). The pertinent sections of the statute read:

As used in this Act - (1) The term “institution” means any facility or institution - (A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and (B) which is . . . (iv) for juveniles - (I) held awaiting trial; (II) residing in such facility or institution for purposes of receiving care or treatment; or (III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped).

¹³² 42 U.S.C. § 1997a(a).

¹³³ See *Beyond the Walls*, *supra* note 128.

¹³⁴ See *id.*

person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting."¹³⁵

Once the DOJ is alerted to potentially unlawful conditions that could fall under CRIPA and is convinced that there is sufficient evidence of systemic violations of federal rights, it may launch an investigation after sending a notice letter to the state or municipality.¹³⁶ DOJ contacts the state or local government, arranges to tour the facility or facilities, and may request production of certain documents.¹³⁷ If a pattern or practice of civil rights violations is discovered, then a formal findings letter is sent to the jurisdiction in question.¹³⁸ The letter must include the alleged violations, supporting evidence, and minimum steps necessary to correct the violations.¹³⁹ Since Congress intended CRIPA to function as a legal impetus to negotiation and reform outside of the courtroom,¹⁴⁰ CRIPA requires the Attorney General to wait forty-nine days to file suit after issuing the findings letter, and to make a reasonable good faith effort to consult with officials of the offending institution on ways to correct the conditions.¹⁴¹ In most CRIPA actions, there is a settlement without a trial.¹⁴² This may take the form of states informally agreeing to improve the conditions in the institution or system. A court-endorsed consent decree may also be agreed upon, and then the decree is monitored by DOJ or an independent organization.¹⁴³

Consent decrees that have already been implemented by the DOJ have addressed violations in facilities that included abuse, mistreatment, physical injury, inadequate medical and mental health care, inhumane living conditions, and failure to prevent peer violence.¹⁴⁴ Thus, the essential civil rights safeguarded by actions initiated through CRIPA encompass the disparate and discriminatory treatment of queer youth in the juvenile justice system. Furthermore, past complaints filed by the DOJ stated certain factual allegations to support constitutional violations that

¹³⁵ 42 U.S.C. § 1997d.

¹³⁶ 42 U.S.C. § 1997b(a)(2) (requiring the letter to be sent seven days in advance). *See also Beyond the Walls*, *supra* note 128.

¹³⁷ *Cf. United States v. Michigan*, 868 F.Supp. 890, 902 (W.D. Mich. 1994) (concluding that CRIPA does not go as far as granting plenary pre-litigation investigative powers to the Attorney General).

¹³⁸ 42 U.S.C. § 1997b(a)(1).

¹³⁹ *Id.*

¹⁴⁰ *See* 1980 U.S.C.N. 783, 814.

¹⁴¹ 42 U.S.C. § 1997b(a)(2).

¹⁴² DOJ, *supra* note 129.

¹⁴³ *See Beyond the Walls*, *supra* note 128.

¹⁴⁴ *See, e.g., United States v. Louisiana*, (M.D.La. 2003), *available at* http://www.usdoj.gov/crt/split/documents/us-v-lu/louisianasettle_2003.htm; *United States v. Commonwealth of Puerto Rico* (D.P.R. 1997) (consent decree covering eight juvenile detention and correctional facilities ordered on Oct. 6, 1994, settlement agreement covering an additional 12 detention and correctional facilities filed on Oct. 7, 1997), *available at* <http://www.usdoj.gov/crt/split/documents/prsa.htm>; *United States v. Commonwealth of Kentucky* (W. D. Ky. 1995) (consent decree covering 13 juvenile treatment facilities), *available at* <http://www.usdoj.gov/crt/split/documents/kysa.htm>.

could be used to describe the harassment and abuse of queer youth. One case in Georgia alleged, among other issues, that the system did not adequately classify, house, and supervise youth to protect them from harm, did not provide appropriate care and treatment, allowed staff to abuse youth through arbitrary disciplinary practices, and failed to meet the basic care needs of juveniles.¹⁴⁵ A CRIPA action in Louisiana alleged failure to provide juveniles with reasonably safe conditions by subjecting confined juveniles to a substantial risk of serious harm resulting from juvenile-on-juvenile assaults, the use of excessive force and abuse by staff, inadequate suicide prevention measures, use of unreasonable isolation, and inadequate rehabilitative services.¹⁴⁶ When lesbian and bisexual girls who have sexual contact get longer extended sentences than their heterosexual counterparts,¹⁴⁷ there is unequal treatment based simply on sexual identity. Youth who are intentionally isolated based solely on their sexual identity, or not given adequate mental health counseling for a deeply personal issue that could have life-threatening consequences, are being denied their civil rights. There is no question that physical, verbal, and emotional harassment facing queer youth in the justice system ranks on the level of violations the DOJ has sought to eradicate from detention and correctional facilities. DOJ has a growing history of getting involved to force systemic change. Involving the government in this type of reform is a unique opportunity to fold the issue of queer rights into this movement. Advocacy organizations, detainees, and system staff also have a duty to get involved by informing the DOJ of the harsh and unfair experiences of queer children in these facilities. By working together, change is possible.

B. State Court Review of an Agency Decision

Typically when a person associated with a state administrative agency, such as a Department of Youth Services, has a grievance with a decision or rule of that agency, there is a process by which the agency will hold a hearing and issue a decision on the matter within a certain length of time afterward.¹⁴⁸ If the aggrieved person is not satisfied with the outcome of the administrative hearing, there is usually a statutory right to appeal that decision in state court.¹⁴⁹ This process may apply to state agencies that administer juvenile justice systems, although not every jurisdiction may have such a right provided by statute. Massachusetts does have such a system, and that will be used as an illustration here.

¹⁴⁵ See Complaint from United States v. State of Georgia, the Georgia Board of Juvenile Justice, and the Georgia Department of Juvenile Justice (filed Mar. 18, 1998), available at <http://www.usdoj.gov/crt/split/documents/gacompl.htm>.

¹⁴⁶ See Amended Complaint from United States v. Louisiana (filed Mar. 30, 2000), available at <http://www.usdoj.gov/crt/split/documents/lamendc.htm>.

¹⁴⁷ See *supra* note 66.

¹⁴⁸ E.g., MASS. GEN. LAWS ch. 30A § 14 (2004) (a provision of the State Administrative Procedure Act, a law that exists in most states).

¹⁴⁹ *Id.*

In Massachusetts, the agency that maintains the state juvenile justice system is the Department of Youth Services (DYS). DYS was created by the state legislature in M.G.L. c. 18A §1 in 1969.¹⁵⁰ The statutory duties of DYS, typical of other such agencies across the country, are instructive in terms of what is expected from the agency:

The department shall provide a comprehensive and coordinated program of delinquency prevention and services to delinquent children and youth referred or committed to the department by the courts; . . . and services and facilities for the study, diagnosis, care, treatment, including physical and mental health and social services, education, training and rehabilitation of all children and youth referred or committed. The department shall maintain a program of research into the causes, treatment and prevention of juvenile delinquency, including new methods of service and treatment. The department shall cooperate with other state and local agencies, both public and private, serving children and youth.¹⁵¹

The commissioner of youth services is given the responsibility to establish rules and regulations, and to ensure each institution is conducting itself according to these rules.¹⁵² The purpose of the regulations “shall be to restore and build up the self-respect and self-reliance of the children lodged therein and to qualify them for good citizenship and honorable employment.”¹⁵³ The legislature also requires DYS to examine and investigate all pertinent circumstances of the life and behavior of a child committed to DYS.¹⁵⁴ The law even allows a child in DYS to petition the committing court for an order of discharge if DYS fails to examine him.¹⁵⁵ At its statutory core, DYS has hefty responsibilities for the children in its custody, and is under the command of the legislature to carry them out.

Under its own agency regulations, DYS is mandated to provide for an administrative hearing for “[a]nyone aggrieved by actions of a Departmental or vendor employee.”¹⁵⁶ DYS must then issue a written decision within seven business days of the hearing.¹⁵⁷ If the aggrieved person is left unsatisfied by the administrative decision, the legislature allows for an appeal in the state trial court.¹⁵⁸ The standard of review that the court must use in evaluating the agency’s decision is whether the substantial rights of the party may have been prejudiced by an agency decision.¹⁵⁹ The statute sets out several factors to consider under this

¹⁵⁰ MASS. GEN. LAWS ch. 18A § 1 (2004).

¹⁵¹ MASS. GEN. LAWS ch. 18A § 2 (2004).

¹⁵² MASS. GEN. LAWS ch. 120 § 4 (2004).

¹⁵³ *Id.*

¹⁵⁴ MASS. GEN. LAWS ch. 120 § 5(a) (2004).

¹⁵⁵ MASS. GEN. LAWS ch. 120 § 5(d) (2004).

¹⁵⁶ 109 C.M.R. 2.04 (2004).

¹⁵⁷ *Id.*

¹⁵⁸ MASS. GEN. LAWS ch. 30A § 14.

¹⁵⁹ MASS. GEN. LAWS ch. 30A § 14(7).

standard; those most applicable to the mistreatment of queer youth are whether there was a violation of constitutional provisions, or whether the agency's decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.¹⁶⁰ If no constitutional violation is involved, the appealing party's burden is very heavy and the court traditionally gives great deference to the department's experience in matters in which it specializes.¹⁶¹

A queer delinquent has many opportunities throughout this process to make a call for reform. First, the initial internal complaint with the state agency may at least garner some attention internally and externally. These complaints must be heard by the agency, and also provide a documented record. If the youth supports the complaint with facts at the administrative hearing and is denied relief, then the youth should appeal in state court. Since courts are traditionally deferential to administrative decisions, these cases may be difficult to win. However, the increased pressure on the agency may encourage a favorable settlement and provide a motivation for change regardless of whether a trial may ultimately succeed. Also, the two standards previously mentioned are not impossible hurdles to clear. Whether a juvenile experienced a constitutional violation here dovetails with the aforementioned discussion for possible § 1983 and CRIPA relief in the federal courts. If facility treatment rises to that level, then the state court will likely not rubber stamp an administrative decision. The arbitrary or capricious/abuse of discretion standard is satisfied by any rational explanation for the agency's behavior. Successful plaintiffs must make sympathetic arguments that show no valid alternative reason for the agency's decision to abuse, harass, and ignore. For example, corroborating evidence showing nonenforcement of internal regulations prohibiting verbal abuse would be persuasive. A delinquent who could prove both her obedience in a facility and unfounded violent physical or verbal punishment based on her sexual identity would also have a valid claim.

C. Legislative Reform

State agencies are beholden to the legislatures that have created them and given them regulatory authority. State legislatures have the power to specify what policies must be followed by juvenile justice agencies, and, presumably, have the duty to do so when those agencies are not serving the populations in a manner consistent with statutory responsibility. A legislature has the ability to affect policies of all local juvenile justice departments so that there is uniformity statewide in addressing the issues of queer youth. Bills need to be proposed on the matter and laws need to be passed, especially in the face of acquiescence on the part of the statewide agencies and local departments. Legislatures must heed the call for change and act upon it.

¹⁶⁰ *Id.*

¹⁶¹ *E.g.*, *Fitchburg Gas & Elec. Light Co. v. Dep't of Telcoms. & Energy*, 801 N.E.2d 220, 226 (Mass. 2003) (quoting *Massachusetts Inst. of Tech. v. Dep't of Pub. Utils.*, 425 Mass. 856, 867-868 (1997)).

No state has a law specifically guaranteeing protection from harassment or discrimination for youth in juvenile detention and correctional facilities based on sexual orientation or gender identity. In March 2003, the New York State Assembly became the first legislative body to address this issue when Bill A07199 was introduced.¹⁶² The bill proposes to require training for staff of facilities operated by the New York Office of Children and Family Services (OCFS), the statewide agency that maintains placement facilities for youth in the state custody, including from the child welfare and juvenile delinquency systems.¹⁶³ The proposed bill takes a positive step by thoroughly and clearly defining the issues that youth from a variety of sexual identities face.¹⁶⁴ But legislation needs to advocate for more than simply training for facility staff.¹⁶⁵ Although this targets one of the sources of harassment and the perpetuation of discriminatory treatment, the reform net should be cast farther. Also, the bill needs to be more than just proposed – it must be passed.

A 2003 California law¹⁶⁶ dealing with discrimination in the state foster care system serves as a better model for potential legislative reform in the area of juvenile justice. First, the law amends the policy of the state with regard to children in foster care to now include the right to “have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subjected to discrimination or harassment” on the basis of certain enumerated traits.¹⁶⁷ This language represents a specific vision that is essential to show the legislature’s intent to safeguard children in the state’s custody. Second, the traits listed, including race, religion, sexual orientation, gender identity, and HIV status, protect the most vulnerable children in the system.¹⁶⁸ Third, an extensive listing of new rights for children in the foster care system is explained unambiguously,¹⁶⁹ leaving no option for local agencies to deviate from these regulations. Fourth, the law extends the same protections to people engaged in providing care and services to foster children.¹⁷⁰ This demonstrates the legislature’s commitment to tolerance for everyone associated with the foster care system, which in turn affects the living environment for foster children. By amending the old law in such a thorough way, the California legislature forced the state foster care system into comprehensive reform when changes were necessary. Specific procedures and requirements are

¹⁶² See. A. 7199 Assem., Reg. Sess. (N.Y. 2003), available at <http://assembly.state.ny.us/leg/?bn=A07199&sh=t> (last visited Nov. 1, 2004)

¹⁶³ See *id.* See also New York State Office of Children and Family Services, <http://www.ocfs.state.ny.us/main/> (last accessed Oct. 7, 2004).

¹⁶⁴ N.Y. A. 7199..

¹⁶⁵ See Interview with Gerald Mallon, Associate Professor at Hunter College School of Social Work and Director for the National Resource Center for Foster Care and Permanency Planning (Dec. 30, 2003).

¹⁶⁶ A. 458, Assem., 2003 Reg. Sess. (Cal. 2003).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

nonnegotiable and constitute a bold statement of dedication to helping children in need.

If only California had made a similar effort for children in the state's juvenile justice system. Since many children experience both the child welfare and delinquency systems, there is no question that parallel protections should be made for similarly disaffected children. Maybe California will take the lead, or possibly New York will beef up its bill. Regardless, other states should spearhead their own efforts and not wait to follow the lead of others. The presence of queer youth in systems all over the country provides reason enough for any state to make new law.

D. Internal Reform of Administrative Policies

Local juvenile justice departments always have the opportunity to reform their own policies and regulations, as long as they fall within the legislative mandate controlling the state agency. As noted earlier, typically the stated statutory purpose of a juvenile justice agency is to intervene in the lives of juvenile delinquents to rehabilitate them and return them to the community as active, law-abiding citizens. There is no question that ensuring a safe, nonabusive, nondiscriminatory environment for all children, especially those in the sexual minority, promotes the broad statutory mandate enacted in every state.

Of all the local departments across the country, only the San Francisco Juvenile Probation Department has implemented a specific, comprehensive anti-harassment policy that includes sexual orientation and gender identity.¹⁷¹ The recently enacted Anti-Harassment Policy for Youth strictly prohibits harassment and discrimination on the basis of these and other factors (including race, HIV status, religion, and political affiliation), implements specific procedures for handling complaints made by youth, describes reconsideration and appeals processes, outlines remedial and disciplinary action for those found in violation of the policy, and requires age-appropriate training about the policy and issues of diversity for staff and youth.¹⁷² With such definitive policies, all youth in the San Francisco system will know that mistreatment of any kind will not be tolerated, especially abuse fueled by homophobia. Such protection also shows queer youth that their voices have been heard and that their issues are no longer being dismissed.

Although Massachusetts' Department of Youth Services (DYS) does not have such a comprehensive and conspicuous policy regarding queer youth, it does have a number of regulations that promote diversity and tolerance within the system. DYS' Code of Employee Responsibility, enacted in 1999, holds employees accountable for their personal demeanor and proscribes certain types of misconduct, including discrimination based on sexual orientation.¹⁷³ At the time of

¹⁷¹ SAN FRANCISCO JUVENILE PROBATION DEPARTMENT ANTI-HARASSMENT POLICY FOR YOUTH, *supra* note 16.

¹⁷² *Id.*

¹⁷³ See Massachusetts' Department of Youth Services, Code of Employee Responsibility, Policy 1.5.4(c) (effective date Mar. 14, 2000).

employment, all DYS staff receive training which addresses sexual harassment and diversity and are clearly told that harassment of youth in custody is not tolerated.¹⁷⁴ Issues of sexual identity may also be discussed in the initial clinical interview and during clinical group sessions.¹⁷⁵ Other states may look to Massachusetts for guidance in developing internal administrative and clinical policies, although all states should strive to be even more proactive and detailed in addressing queer youth issues. A distinct and comprehensive policy, like the one used in San Francisco, regarding the issues specific to queer youth in juvenile facilities is necessary to ensure that these children are fully protected.

IV. CONCLUSION

Unfortunately, many queer youth in juvenile detention and correctional facilities live in a system where their sexual identity is a cause for further harassment and punishment instead of a springboard for rehabilitation. The plight of these children is beginning to be heard by advocates willing to listen and investigate. But the next step is most important. The law must take notice and serve as a catalyst for change. Courts and legislatures must respond to this documented need. Queer children whose lives have intersected with the juvenile justice system may seek relief through state and federal courts, from administrative appeals to § 1983. The United States government should research these problems and request systemic reform through CRIPA. State legislatures have the ability – and responsibility – to make new law to safeguard this compromised population. Local departments and agencies cannot escape the scrutiny and should reevaluate the regulations that govern their staff and the children in their custody.

The avenues for reform are numerous, but the problems remain. Taking a stand against the discriminatory treatment will give a voice to queer children in juvenile facilities. This is a voice many of them need help finding, and it may be the first time many of them have ever had one.

Peter A. Hahn

¹⁷⁴ E-mail from Yvonne Sparling, Director of Clinical Services, Massachusetts Department of Youth Services (Jan. 19, 2004).

¹⁷⁵ *Id.*

