

THE LINK



CONNECTING JUVENILE JUSTICE AND CHILD WELFARE

The Legal Rights of Young People in State Custody:

What Juvenile Justice Professionals Need to Know When Working with LGBT Youth

By Rudy Estrada and Jody Marksamer

In 2005, an openly gay young man sued the Hawaii Youth Correctional Facility (HYCF) after experiencing antigay abuse while in state custody. Like so many other lesbian, gay, bisexual, and transgender (LGBT) youth nationwide, he said he was verbally, physically, and sexually harassed and threatened while in the facility. Other young people in the facility regularly exposed themselves to him, pressured him for sexual favors, and acted out violently toward him whenever they had the opportunity. He eventually filed a written grievance.

As is a common response in these situations, the facility administrator moved him to a single cell but did nothing further to address the abuse. Not surprisingly, even after he was isolated, the attacks continued. After writing a second grievance and receiving no additional protection, he filed a lawsuit seeking an alternative placement. The judge who eventually heard his case was particularly concerned that HYCF was aware of the ongoing abuse he suffered because of his sexual orientation but took no adequate or reasonable steps to protect him. The court ordered HYCF to adopt policies and procedures to address this known problem, stating:

The Court is concerned that the problems raised by this case are systemic and must be addressed by the HYCF with the adoption, with deliberate speed, of policies and operation procedures that are appropriate to the treatment of lesbian, gay, and transgender youths, that set standards for the conduct of youth correctional officers and other staff, and that provide on-going staff training and oversight. ...[A]n effective start to protection of Minor could have been something as simple as having a policy that required staff to immediately provide verbal reprimands to offending wards whenever staff observed offending wards' verbal

and physical mistreatment of Minor. The court is also concerned that 'protective' actions such as placing Minor in 'isolation' is not 'protective,' but punitive" (Unpublished decision, Family Court of the First Judicial Circuit, Hawaii, Judge Wong, March 17, 2005. Hereinafter Hawaii case).

Thousands of LGBT youth are in the child welfare and juvenile justice systems nationwide. Unfortunately these youth routinely are left unprotected from violence and harassment, subjected to differential treatment, or denied appropriate services. An increasing number of advocates working with LGBT youth in state custody have brought this issue to light through lawsuits and system reform efforts. This article describes the legal rights of young people in the juvenile justice system, focusing on the particular scenarios that may arise when juvenile justice professionals work with LGBT youth.

The Right to Safety

Youth in juvenile detention and correctional facilities have civil rights derived from the 14th Amendment due process clause of the U.S. Constitution. Unlike adult inmates, children in the custody of the juvenile

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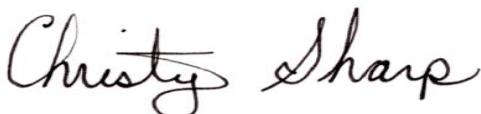
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DIRECTOR'S MESSAGE

The past few months have been busy ones for the Juvenile Justice Division at CWLA. We are preparing and planning for our 2006 Juvenile Justice Symposium: *Building Successful Alliances to Improve Outcomes*, to be held May 31–June 2 in San Francisco. The symposium will focus on multisystem alliances between juvenile justice and child welfare as a crucial part of better serving our nation's children. Through the combined efforts of direct-service practitioners, supervisors, senior management, executive leadership, board leaders, parents, and people like you we can ensure that America's children have the opportunity to succeed.

As some of you may know our former Program Coordinator, Danielle Mole, recently moved back to California. We are so thankful and appreciative for all her hard work. I am thrilled to announce our newest staff person, Kerrin Sweet. Kerrin brings a wealth of experience to the Program Coordinator role, including serving Florida's children and families as a family services counselor, representing the best interests of foster youth in court as a guardian ad litem, and advocating for equal rights for lesbian, gay, bisexual, and transgendered youth and families through a fellowship at the Human Rights Campaign. She is passionate about the needs of children and youth in both child welfare and juvenile justice. Please feel free to contact her at ksweet@cyla.org or 202/942-0276.



Christy Sharp
Director, Juvenile Justice

Dear Colleagues,

I am pleased to introduce myself. I would like to explain why I am delighted to be a part of CWLA's Juvenile Justice Division. During the three years I worked with youth involved in foster care, independent living, and protective services, I continuously observed the deep impact and long-term repercussions of the systems' inability to effectively and efficiently serve youth and their families. As a front-line worker, I knew my ability to collaborate and coordinate with various systems and service providers on my cases affected the youth's legal, familial, educational, and emotional outcomes.

My first months here have been exciting, educational, and very rewarding. I have been able to connect with many of you who are at the forefront of institutionalizing collaborative and coordinated child welfare and juvenile justice systems. It means so much to me to be a part of the advocacy and change taking place nationwide on behalf of dual jurisdiction youth and their families. As Christy said, please feel free to contact me. I am looking forward to working with you.

Kerrin Sweet
Coordinator, Juvenile Justice

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The Child Welfare League of America is the nation's oldest and largest membership-based child welfare organization. We are committed to engaging people everywhere in promoting the well-being of children, youth, and their families, and protecting every child from harm.

A list of staff in CWLA service areas is available online at www.cyla.org/whowhat/serviceareas.asp.

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justice system have not been "convicted" of crimes (*Kent v. United States*, 383 U.S. 541, 554 [1966]). They are also understood to be less mature and responsible for their behavior than adults (*Eddings v. Oklahoma*, 455 U.S. 104, 116 [1982]). The purpose and public policy of institutional confinement of children, therefore, emphasizes rehabilitation and treatment rather than punishment, making the constitutional rights of institutionalized juveniles broader than those of adult inmates (*Santana v. Collazo*, 714 F.2d 1172, 1180 [1st Cir. 1983]), and more like those of young people in the child welfare system, mentally retarded individuals who are institutionalized (*Youngberg v. Romeo*, 457 U.S. 307, 315-16 [1982]), and adult pretrial detainees (*Bell v. Wolfish*, 441 U.S. 520, 535 [1979]).

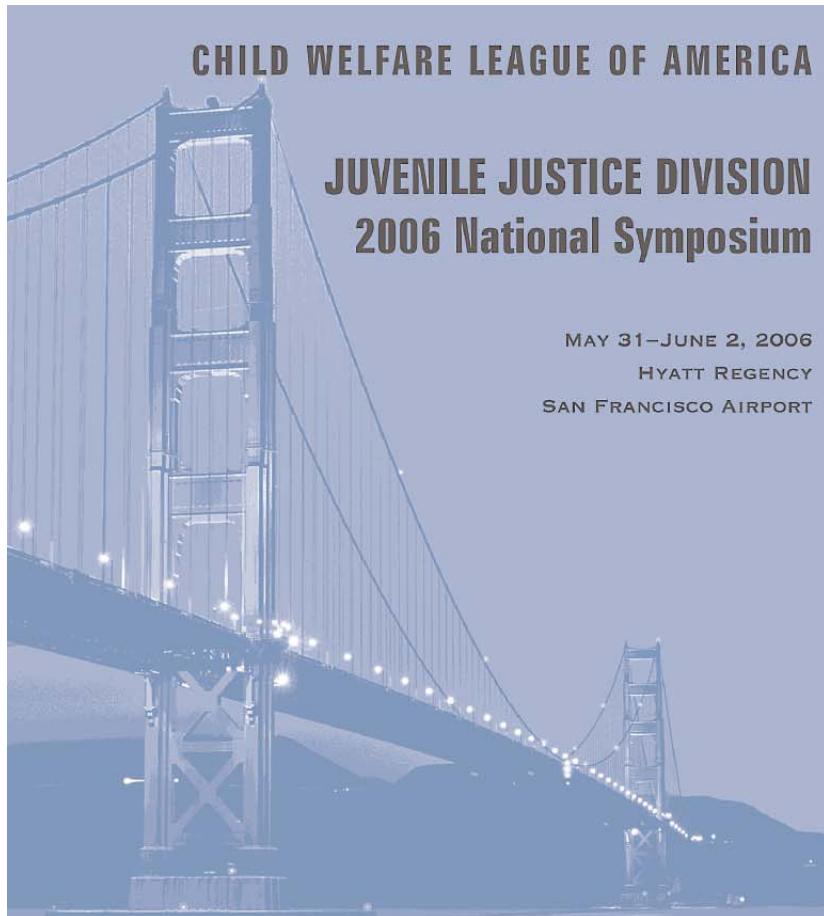
For convicted adults, conditions of confinement violate the Constitution when they amount to "cruel and unusual" punishment as proscribed by the 8th Amendment (*Whitley v. Albers*, 475 U.S. 312 [1986]). Although courts sometimes look to adult cases when deciding cases involving detained or incarcerated children, it is clearly established that children in state

custody are entitled to more protection than incarcerated adults, and most courts analyze their claims using the framework developed in *Bell v. Wolfish*, *Youngberg v. Romeo*, and related cases. These due process rights include the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, freedom from conditions that amount to punishment, access to treatment of mental and physical illnesses and injuries, and minimally adequate rehabilitation. These rights extend to children whether they are confined in juvenile detention centers, adult jails, training schools, or other secure institutions for delinquent children (See, e.g., H.C. ex rel. *Hewett v. Jarrard*, 786 F.2d 1080, 1084 -85 [11th Cir. 1986]).

Right to Safe Conditions of Confinement

Juveniles who are incarcerated or detained have the right to reasonably safe conditions of confinement, including the right to reasonable protection from the aggression of other juveniles or staff (See *Alexander S.*, 876 F. Supp. at 797- 798; *A.M.*, 372 F.3d at 787; *Guidry v. Rapides Parish Sch. Bd.*, 560 So.2d 125 [La. Ct. App. 1990]). Accordingly, juvenile correctional

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staff have a duty to protect youth from harassment and violence at the hands of other wards as well as staff. Staff cannot ignore a substantial risk of harm to a particular youth, especially if the youth is known to be vulnerable because he or she is young, has a mental illness, is openly LGBT, or is perceived to be LGBT (See, e.g., *A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 579 [3d Cir. 2004]).

In addition, juvenile justice administrators must ensure they maintain reasonably safe conditions of confinement. To avoid liability, they should have adequate numbers of qualified staff who are sufficiently trained on issues of safety and establish policies and procedures that address youth safety, including a written policy or procedure for reviewing and following up on incident reports, and an adequate classification system. To protect LGBT youth from harassment and harm, facilities may need nondiscrimination policies and staff training that specifically addresses the needs of these youth (See Hawaii case, *supra* note 4).

Juvenile detention and correctional facilities also must have a sound classification system to provide safety for youth, especially for LGBT youth, who are often vulnerable to attack if placed with aggressive juveniles. A facility should consider youth's age, size, and offense history, and other risk factors, including sexual orientation, in determining the appropriate level of confinement for a particular juvenile and whether that particular juvenile needs to be segregated from more vulnerable youth because he or she presents a threat (*Alexander S.*, 876 F. Supp. at 787). Classification of youth usually occurs at intake and requires periodic reviews to ensure safety is maintained. Individuals charged with making classification decisions in a juvenile facility must understand the safety risks LGBT youth face in detention and must take them into account when determining placements.

Unfortunately, in many instances, this understanding is sorely lacking. Due to misinformation and prejudice, staff in many detention and correctional facilities may erroneously assume gay youth are sexual predators or desire to have sexual relations with the other youth. As one youth explained, "The staff think that if a youth is gay, they want to have sex with all of the other boys, so they did not protect me from unwanted sexual advances" (Anonymous youth, personal interview, Model Standards Project, March 2003). These stereotypes are not only false, they are extremely dangerous to LGBT youth, who are at high

risk of being sexually and physically abused by other youth. Accordingly, LGBT youth should not be placed in an aggressive population, with known sex offenders, or with other youth who display antigay or anti-transgender animus.

Right to Be Free From Unreasonably Restrictive Conditions of Confinement

Youth in juvenile justice facilities also have the right to be free from unreasonably restrictive conditions of confinement (See, e.g., *Alexander S.*, 876 F. Supp. at 798). Conditions that unduly restrict a youth's freedom of action and are not reasonably related to legitimate security or safety needs of the institution are unconstitutional (See *Id.*). A restriction violates this standard if it is arbitrary, discriminatory, or purposeless, or if it is a substantial departure from accepted professional judgment.

The use of isolation for more than short periods may violate a youth's right to be free from unreasonably restrictive conditions of confinement and constitute impermissible punishment (See *H.C ex rel. Hewett v. Jarrard*, 786 F.2d 1080 [11th Cir. 1986]). Although institutions generally are permitted to use isolation briefly to remove disruptive or out-of-control individuals from the general population, the courts closely scrutinize use of isolation as a form of punishment for breaking facility rules, or for any other purpose (See *Santana v. Collazo*, 714 F.2d 1172, 1179 [1st Cir. 1983]). One reason for this is that isolation can have damaging psychological effects on children, including extreme loneliness, anxiety, rage, and depression, because children have a very different perception of time and a lower capacity than adults to cope with sensory deprivation.

LGBT youth should never be placed in isolation because of their sexual orientation or gender identity or as punishment for expressing their identities (*Santiago v. City of Philadelphia*, Civ. Act. No. 74-2589 [E.D. Pa. 1978]). The following statement provides an example of improper treatment: "I was put in a room by myself because I was gay. I wasn't allowed to be around anyone else" (Anonymous youth participant at a CWLA/Lambda Regional Listening Forum, "Addressing the Needs of LGBT Young People and Adults Involved in the Child Welfare System"). It is a myth that LGBT youth are a danger to other youth and should therefore be isolated (*Santiago* stipulation, *supra* note 38).

In light of the well-known adverse psychological and physical effects isolation has on young people, such

misplaced stereotypes, whether for administrative convenience or even a desire to protect LGBT youth from harassment and abuse, would be an insufficient basis to subject an LGBT youth to extended periods of isolation. If, on the other hand, an LGBT youth is harassed in a detention facility, it is constitutionally appropriate to segregate his or her harassers because they pose a known threat to the safety of others.

But, a facility should never punish the victim of harassment with isolation simply because doing so is cheaper or more convenient than providing adequate staffing, supervision, or training. Although an LGBT youth may be vulnerable while in detention, automatically placing all LGBT youth in segregation “for their own safety” is unconstitutionally punitive, especially if a more effective and less stigmatizing and isolating response is available (See Hawaii case, *supra* note 4).

Right to Mental and Physical Health Care

Juveniles confined in institutions have the right to adequate medical and mental health care. A juvenile detention or correctional facility has a duty to provide or arrange for treatment of mental and physical illnesses, injuries, and disabilities (See A.M., 372 F.3d 572, 585 n.3; Jackson v. Johnson, 118 F. Supp. 2d 278 at 289; Alexander S., 876 F. Supp. at 788). An act or omission that constitutes a knowing disregard of a ward’s health interests can be a constitutional violation. For example, if juvenile justice facility professionals know of a transgender youth’s significant mental or medical health needs, such as those that may accompany a diagnosis of Gender Identity Disorder, but do not take the steps necessary to address them or ignore the instructions of the treating physician, the facility is violating the youth’s right to medical care (See A.M., 372 F.3d at 584-85). Facilities must provide appropriate treatment and accommodation for LGBT wards, or risk liability.

In addition, a facility must have appropriate mental health screening and sufficient mental health services. It must also have adequate policies governing the supervision and treatment of suicidal wards (See Viero v. Bufaro, 925 F. Supp. 1374 [N.D. Ill. 1996]; see also Dolihite v. Maughon, 74 F.3d 1027 [11th Cir. 1996]). LGBT youth, especially those facing extreme forms of discrimination, abuse, and harassment, may be at an increased risk for suicide. Individuals who conduct mental health screenings must be aware of this increased risk to ensure LGBT youth who are suicidal receive the constitutionally required mental health services they need. They must also ensure that anti-LGBT harassment and abuse that could exacerbate suicidal feelings are prevented.

Right Not to Be Placed in Conditions That Amount to Punishment

Youth in juvenile detention or correctional facilities should not be placed in conditions that amount to punishment or be stigmatized or humiliated as part of their treatment (Bell v. Wolfish, 441 U.S. 520, 539. See also Milonas v. Williams, 691 F.2d 931, 942 [10th Cir. 1982]). Measures that may violate a youth’s constitutional rights include punishing a youth with degrading or humiliating tasks, restricting their personal appearance in ways that are unrelated to legitimate penological interests, or otherwise singling them out from the rest of the population for ridicule (See, e.g., Gerks v. Deathe, 832 F. Supp. 1450 [W.D. Okla. 1993]; Gary W. v. Louisiana, 437 F. Supp. 1209, 1230 [E.D. La. 1976] [addressing types of work performed by youth]).

A youth in a detention or correctional facility should never be punished solely because he or she is openly LGBT. In addition, requiring LGBT youth to dress differently than the other youth in the facility, requiring LGBT youth to perform different chores, or singling out LGBT youth in any other way, are actions that are likely to be found to be unconstitutionally punitive. Staff and administrators also must refrain from violating an LGBT youth’s confidentiality by inappropriately revealing his or her sexual orientation or gender identity. In addition to being unethical, such conduct is unconstitutional and may place that young person at risk of serious harm.

LGBT youth also should not automatically be treated as sex offenders or housed with sex offenders simply because they are gay or transgender. In the adult context, the classification of an inmate as a “sex offender” has been found to affect a liberty interest (See Neal v. Shimoda, 131 F.3d 818, 830 [9th Cir.



Interested in submitting an article to an upcoming *Link*? Contact Kerrin Sweet at ksweet@cwla.org.

Adolescents, Maturity, and the Law

Why Science and Development Matter in Juvenile Justice

By Jeffrey Fagan

Anthony Laster was a 15-year-old eighth grader with an IQ of 58. His relatives said he had the mind of a 5-year-old. One day in 1998, shortly after his mother died, Anthony was hungry, so he reached into the pocket of another student in his Florida middle school and took \$2 in lunch money. The boy's family reported the crime to the authorities, and the local prosecutor decided to prosecute Anthony as an adult. It was Anthony's first arrest. He spent the next seven weeks, including his first Christmas since his mother died, in an adult jail waiting for his court date.

Anthony's story, reported by *60 Minutes II*, is sadly familiar. Every day, judges and prosecutors make complex decisions about whether young offenders should be tried as juveniles or adults. Sometimes the choice is made in a retail process repeated daily in juvenile courts or prosecutors' offices. At other times, the choice is made wholesale by legislative fiat in a process far removed from the juvenile courts.

These choices reflect deeply held assumptions about the nature of teen crime, how society should react to it, and adolescence itself. The two court systems reflect sharply contrasting ideas about adolescents who break the law—their immaturity and culpability, whether they can be treated or rehabilitated, the security threats they pose, and the punishments they deserve. Sending a youth to adult criminal court usually is irreversible, and it often exposes young law-breakers to harsh and sometimes toxic forms of punishment, not to mention more unsavory peer influences that often increase criminal activity.

In the original juvenile court reform movement, as historian David Tanenhaus has noted, there was a presumption of "childhood." Only the most incorrigible youth were transferred to the adult criminal court, and that decision was made by the judge. Had Anthony's case arisen during the first three-quarters of the 20th Century, he would almost certainly have remained in the juvenile court. But in the past 30 years, our assumptions have come nearly full circle,

as states have decided that more adolescents like Anthony belong in adult criminal court.

This push to treat more kids as adults, however, is contradicted by new behavioral and biological research about maturity and criminal culpability, as well as evidence from the criminal justice system about how adult court affects children. Brain development and the social psychological skills that it controls suggest that kids are actually immature far longer than we previously thought. My own research, and that of others, suggests that kids put into the adult system are likely to have worse outcomes.

Crime, Law, and Maturity

Historically, the courts' algebra of maturity was based mainly on social norms and popular legal comfort zones for other adult functions, such as driving, voting, marrying, and signing contracts—typically 18, and occasionally 16. Juvenile courts assumed that young offenders were not fully responsible for illegal behaviors because they were immature and had "room to reform" before reaching adulthood. Juvenile courts also were designed to avoid both the stigma of a criminal conviction and exposure to the toxic influences of adult punishments. They emphasized treatment and education more than punishment and attempted to act "in the best interests of the child."

Until recently, judges decided which youth were immature and "amenable to treatment" on a case-by-case basis, applying a series of criteria elevated from the norms of everyday practice to a set of constitutionally sanctioned standards identified in *Kent v. U.S.*, the landmark 1966 Supreme Court case that grappled with the concepts of "maturity" and "sophistication." Judges relied heavily on the evaluations of social workers whose recommendations were usually persuasive to the juvenile court. Repeated appearances in juvenile court signaled to the judge that a child needed tougher punishment or stronger treatment than the juvenile court could provide. Judges usually waived high-profile cases into adult criminal court, in part to avoid political criticism of the juvenile court itself.

As fears of a juvenile crime epidemic rose in the 1970s, state legislatures across the country started to take away judicial discretion by carving out large sectors of the juvenile court population—as young as 13—and removing them to the criminal court. In some states, the power to send a teenager to the criminal court was transferred from juvenile courts to prosecutors, and several states changed the rules to make juveniles show why they should not be transferred.

Development, Immaturity, and Culpability

The recent push to lower the age threshold for treating juvenile offenders as adults assumes that adolescents are no different from adults in the capacities that comprise maturity and hence culpability, and that they have adult-like competencies to understand and meaningfully participate in criminal proceedings.

The science reliably shows, however, that adolescents think and behave differently from adults, and the deficits of teenagers in judgment and reasoning are the result of biological immaturity in brain development. The adolescent brain is immature in precisely the areas that regulate the behaviors that typify adolescents who break the law. Studies of brain development show that the fluidity of development is probably greatest for teenagers at 16 and 17 years old, the age group most often targeted by laws promoting adult treatment.

Teens at these ages tend to be poor decisionmakers when it comes to crime. They often lack several elements of psychosocial development that characterize adults as mature, including the capacity for autonomous choice, self-management, risk perception, and the calculation of future consequences.

For example, in laboratory experiments and studies across a wide range of adolescent populations, developmental psychologists show that adolescents are risk-takers who inflate the benefits of crime and sharply discount its consequences, even when they know the law. Adolescents take more risks with health and safety than do older adults, such as having unprotected sex, driving drunk, and engaging in other illegal behaviors. Adolescents are more impulsive than adults and insensitive to contextual cues that might temper their decisions. They lack the capacity for self-regulation of either impulses or emotions, and their tendency toward sensation seeking often trumps both self-regulation and social judgments or risks and consequences.

Adolescents also are far more prone to peer influence, often burying considerations such as legality, consequences, or risk. Their desire for peer approval can shape their behavioral decisions even without direct coercion. Peer influence interacts with risk taking and impulsivity to compound bad decisions: Recent studies have shown that people generally make riskier decisions in groups than they do alone. In a new study by psychologists Margo Gardner and Laurence Steinberg, teenagers took far more risks in a simulated-driving game called "Chicken" compared with persons over 18. Risk taking was even greater

when peers were present. Adolescents typically overstate rewards and underestimate risks. Imagine how this plays out in the decision to commit crimes, especially among peers.

Teen Brains

Advances in neuropsychological research have produced a new body of knowledge showing that teen brains remain immature through early adulthood. These studies have zeroed in on the areas of the brain where impulsivity, risk taking, and poor social judgment are regulated.

Beginning in the early 1990s, new forms of brain scans called "functional" MRIs provided images of brain functioning during tasks such as speech, perception, reasoning, and decisionmaking. In one study, Dr. Jay Giedd, a neurologist at the National Institute of Mental Health, used this type of MRI to track the individual brains of 145 children and adolescents over a 10-year period into young adulthood. These studies showed that the frontal lobe, especially the prefrontal cortex, is maturing and developing dramatically during the teen years. Dr. Elkhonon Goldberg of the New York University School of Medicine shows that this is the region of the brain associated with decisionmaking, planning, cognition, judgment, and other behavioral skills associated with criminal culpability. Dr. Nitin Gogtay, a psychiatrist at the National Institute of Mental Health, and his team used longitudinal MRI studies with subjects from ages 4–21 to show that the frontal lobe is one of the last areas of the brain to reach maturity.

It is not just brain or lobe size that matters. Using MRIs with groups of young people over time, professor Elizabeth Sowell of the University of California, Los Angeles, and her colleagues have shown that during the period when cognitive functioning is improving in the frontal lobe, gray matter thins in a process of "pruning" that allows for tight connections to be built among the remaining neurons, in effect completing the circuitry that ties together impulsivity, control, and judgment. This pruning, which begins around age 11 in girls and 12 in boys, continues into the early or mid-20s, particularly in the prefrontal cortex, an area associated with higher functions such as planning, reasoning, judgment, and impulse control.

This evidence was an important part of the U.S. Supreme Court's 2005 decision in *Roper v. Simmons* to ban executions of offenders who were younger than 18 when their crimes were committed. The science was presented to the court in a brief from the American Psychological Association, which showed

maturity continued through late adolescence in the brain regions that control essential behavioral functions linked to legal and popular conceptions of culpability. The court ruled it is cruel and unusual punishment to execute persons whose capacity for control and deterrence is compromised. Neither side in Roper challenged the scientific evidence, as they had in earlier decisions on the juvenile death penalty.

Immaturity, Public Safety, and Courtroom Competence

Adult court places juveniles in a different legal context, and some of the developmental deficits of immaturity that make teens less culpable may also make them less competent defendants and unreliable witnesses. Their immaturity makes them less likely to understand their rights and less able to make meaningful, informed decisions to help in their defense. Immature decisionmakers are vulnerable to waiving their rights or to making statements without a lawyer present, even when they know their rights.

Experimental evidence and case autopsies show adolescents may be prone to false confessions owing to their immaturity and collateral factors, such as their suggestibility and vulnerability to coercion. It's no surprise, then, that adolescents are overrepresented among defendants who give false confessions during police interrogation, including the five young defendants in the Central Park jogger case. In one study, 15- and 16-year-olds were far more likely, compared with young adults 18–26, to confess to a mock crime when presented with false evidence of their guilt.

To some observers, the evidence of developmental psychology and brain science is less than conclusive. Few people doubt that the brains of 13-year-olds differ from the brains of 25-year-olds, but the research doesn't make the types of age-graded distinctions that the new waiver laws make, especially in the critical age span of 14–19. For example, Sowell reports average results for groups that span a wide age range, comparing teens 12–16 with adults 23–30. The legislatures and the courts are much more concerned with the fine distinctions of 15 versus 16 versus 17 years of age. Nor are the results as reliable as advocates might wish. For example, we know next to nothing about how brains react under real-world conditions of threat, arousal, or peer provocation.

Still, the new developmental and neuropsychological research has strong value and importance for laws

that funnel adolescents wholesale into the adult courts. Some adolescent offenders may have reached a threshold of maturity by 17 consistent with recent legal conceptions of maturity-culpability, but many others won't. The answer to this dilemma is neither banning juveniles from ever facing adult courts nor unregulated prosecutorial discretion to get maximum punishments. The remedy is to rely on case-by-case assessments by judges, much as the early juvenile courts did in deciding which cases warrant expulsion from the juvenile court.

Although brain science does not tell us all we need to know about every case, the evidence of what happens to adolescents removed to the adult criminal-justice system is all too clear. Several studies in the past decade—in Florida, Idaho, Minnesota, New Jersey, New York, and other states—show that rearrest and reincarceration rates are significantly higher for adolescents tried and punished in the criminal court, compared with matched groups of teenage offenders who remained in the juvenile court.

For example, comparing 15- and 16-year-old adolescents in the adult criminal court in New York with matched groups of comparable kids in the juvenile court in New Jersey, I showed, in two different studies 10 years apart, that the New York kids treated as adult criminals were rearrested faster, more often, and for more serious crimes, and more often were returned to prison. The evidence is most clear in the case of violent crimes—the very crimes that threaten public safety and erode confidence in the courts. These are robust findings, based on good science, that show consistent results across a variety of research settings.

As legislatures move toward placing increasingly younger teens in adult criminal court, social and biological evidence suggests moving in the other direction. It's time for the law to change course and follow the science.

Jeffrey Fagan is a professor at Columbia University, a member of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, and Vice Chair of the Committee on Law and Justice at the National Research Council.

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PUBLIC POLICY UPDATE

Proposed Budget for FY 2007 Signals More Cuts in Juvenile Justice

The President released his proposed federal budget for fiscal year 2007 on February 6. Overall funding for juvenile justice in FY 2007 would be cut 43% from FY 2006. This continues a trend in recent years of the Administration proposing deep cuts in juvenile justice. Congress has at least partially accepted these cuts, resulting in the steady erosion of federal support for juvenile justice and delinquency prevention programs. Funding for juvenile justice programs in FY 2006 is barely half of what was provided in FY 2002.

As has been the case in the last three years, this budget proposes eliminating the Juvenile Accountability Block Grant (JABG). Congress rejected the President's proposal for FY 2006, however, appropriating \$49.5 million for JABG. This program, created in 1998, provides funds for implementing graduated sanctions programs, establishing or expanding substance abuse programs, and promoting mental health screening and treatment.

The President's budget includes \$32 million for the U.S. Department of Justice's local delinquency prevention program (Title V). This is a reduction from \$64.3 million in FY 2006. Title V is the only federal funding source specifically targeted toward primary prevention. It provides funding for programs aimed at youth who have not had contact with law enforcement but are at high risk for engaging in unlawful activities. The budget does include funding for the Juvenile Delinquency Prevention Block Grant, which has never received funding since its creation in 2002. The budget proposes \$33.5 million in FY 2007.

Juvenile justice advocates are encouraged to contact their senators and representatives to urge them to support adequate funding levels. Restoring the cuts made in recent years would provide necessary resources for successful initiatives to reach more at-risk youth.

from *LGBT*, page 5

1997]). As one court explained in holding that an adult inmate has a protected liberty interest and is entitled to a hearing before being classified as a sex offender, "We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender" (*Id.* at 829).

Although no appellate decisions have addressed this issue in the juvenile justice context, juveniles are entitled to greater protections than are adult inmates, and branding a juvenile with a sex offender label clearly would have the same, if not an even greater, stigmatizing effect. Accordingly, a youth should not be labeled or treated as a sex offender without adequate due process protections, such as a hearing, an evaluation by a qualified mental health professional with expertise in juvenile sex offender issues, and an opportunity to appeal. For LGBT youth, this means that unless the youth has a history of sex-offense adjudications, he or she should never be arbitrarily labeled as a sex offender, sexually aggressive, or any other euphemism used to describe sex offender status simply because he or she is LGBT. This would result in a constitutional violation and could result in further physical harm, for which the institution would also be liable.

Other Constitutional Rights

In addition to the due process right to safety, LGBT youth in state custody enjoy other significant consti-

tutional rights, including the right to freedom of speech and expression and the right to equal protection under the law. Juvenile justice service providers should understand how these civil rights apply to LGBT youth in state custody.

Right to Equal Protection

All youth in state custody have a federal constitutional right to equal protection under the law. This means LGBT youth in the juvenile justice system must be treated equally in the provision of placements and services and must be protected from harassment on an equal basis with other youth (*Nabozny v. Podlesny*, 92 F.3d 446 [7th Cir. 1996]; See also *Flores v. Morgan High School District*, 324 F.3d 1130 [9th Cir. 2003]). In practice, however, this right to equal treatment is often breached, either because staff and administrators are callous or indifferent toward the mistreatment of LGBT youth, or because they wrongly assume that LGBT youth are responsible for bringing such mistreatment upon themselves, simply by existing. One gay youth described his experience as follows: "I got jumped by a bunch of guys in my group home, and when I told the director he said, 'Well, if you weren't a faggot they wouldn't beat you up'" (Anonymous youth participant at a CWLA/Lambda Regional Listening Forum, "Addressing the Needs of LGBT Young People and Adults Involved in the Child Welfare System").

see *LGBT*, page 10

If juvenile justice professionals fail to take action against anti-LGBT harassment because they believe LGBT youth in care should expect to be harassed, or because they believe LGBT youth bring such harassment upon themselves simply by being openly LGBT, or because the agency is uneducated about LGBT issues and is uncomfortable addressing the situation, there may be a violation of youths rights to equal protection, in addition to potential violations of the right to safety.

This was exactly the kind of failure alleged in a 1998 class action lawsuit brought against the City of New York's child protective services on behalf of LGBT youth in foster care (*Marisol A. v. Giuliani*, 929 F. Supp. 662 [S.D.N.Y. 1996]). The plaintiffs in that case, six LGBT foster youth, experienced severe abuse—including alleged harassment, physical violence, and rape—by peers, foster parents, and child welfare staff. These young peoples' appeals for protection were met with indifference, blame, or isolation of the victims rather than the abusers. The youth alleged they were denied equal protection on the grounds that, if the abuse was based on something other than their sexual orientation, the staff would have taken appropriate actions to protect them. The case ultimately settled out of court, resulting in monetary awards for damages and attorney's fees, as well as important policy and practice changes within the local child welfare system to improve the standard of care for LGBT youth.

State Nondiscrimination Laws

In addition to the protections the Constitution provides for young people in state custody, depending on the state where the young person lives, additional protections may come from the states constitutions (See *Tanner v. Oregon Health Serv. Univ.*, 971 P2d 435 [Or. Ct. App. 1998] or state statutes.

Some states have nondiscrimination laws that explicitly protect LGBT youth in the juvenile justice system. For example, a number of states have laws that protect individuals from discrimination by governmental agencies, which would include juvenile detention and correctional facilities (See, e.g., R.I. GEN. LAWS § 28-5.1-7 [a]). Other states have nondiscrimination laws that protect children and adults who are living in "institutional settings," which may include juvenile justice facilities, treatment hospitals, group homes, and other such facilities that provide institutional care (See, e.g., IOWA CODE ANN. § 19B.12 [2]).

Still other states have nondiscrimination laws that apply to businesses and other facilities considered to be "public accommodations." Some of these laws explicitly include juvenile justice programs within the definition of public accommodation (See, e.g., LA. REV. STAT. § 51:2232 [10]), while in other states, courts have interpreted these laws to apply to these programs (*Chisolm v. McManimom*, 275 F.3d 315, 325 [adult jail, like a hospital, is place of public accommodation under New Jersey's Law Against Discrimination]; *Ortland v. County of Tehama*, 939 F. Supp. 1465, 1470).

Finally, juvenile justice facilities may be prohibited from discriminating against LGBT youth in residential care pursuant to state laws prohibiting discrimination in housing, since such facilities provide publicly assisted housing accommodations (See *Doe v. Bell*, 754 N.Y.S.2d 846, 850).

In sum, regardless of whether a facility is considered a governmental agency or a public accommodation, juvenile justice facilities may fall under a variety of state laws that prohibit sexual orientation or gender identity discrimination and require nondiscriminatory care.

Conclusion

All young people in state custody are entitled to equal protection of the law and have the right to safety while in care. These rights, as well as other well-established constitutional and statutory rights, apply to LGBT youth. If a juvenile justice facility violates the rights of a youth in its care, anyone involved in the violation may be held liable. Juvenile justice professionals must be aware of the constitutional and statutory rights of LGBT young people. They also must take these rights into consideration in both practice and policymaking.

LATEST DEVELOPMENTS

To keep up with the latest juvenile justice news, information, and policy developments, as well as the events, publications, and work being done by the CWLA Juvenile Justice Division, email ksweet@cwla.org and sign up for jjpolnet, the CWLA Juvenile Justice Division listserv.

As discussed above, some of the actions that may violate the civil rights of LGBT young people in care include

- failing to protect LGBT youth from harassment and violence at the hands of caretakers or other youth;
- requiring young people to participate in therapies intended to change their sexual orientation or gender identities;
- failing to help a LGBT young person in identifying community supports and resources to ameliorate feelings of isolation and depression;
- automatically classifying LGBT youth as sex offenders, or placing them in isolation;
- not providing appropriate medical care for transgender youth;
- punishing LGBT youth for behaviors for which non-LGBT youth are not punished;
- moralizing, ignoring, or pathologizing LGBT youth; and
- placing LGBT youth in humiliating, embarrassing, or dangerous situations.

In the last few years, legal advocates have begun to bring lawsuits to address the serious abuses faced by LGBT youth in state care, and courts have begun to hold state agencies and professionals responsible for these abuses. Inevitably, more such cases will be litigated in the years ahead and facilities that violate the rights of LGBT youth will be held accountable—thanks to increased advocacy on behalf of LGBT youth in state care and the development of national support networks, publications, and best practice guidelines. Courts can now look to these advocates and materials for additional guidance to determine

standards of care expected of professionals working with LGBT youth in state custody (Braam ex rel. Braam v. Washington, 81 P.3d 851 [Wash. 2003]).

Agencies and facilities that provide care to youth in state custody must educate themselves on the needs of LGBT youth and the scope of their civil rights. They also must train providers how to work with LGBT youth, enact nondiscrimination policies, and establish practices that deal effectively with anti-LGBT abuse. These actions should be taken proactively, before any abuses of LGBT young people, rather than in response to complaints or in the course of time-consuming, resource-intensive litigation. Professionals who work for juvenile justice agencies have a tremendous responsibility to protect the safety and well-being of all youth in their care, including those who are LGBT. Fortunately, these professionals now have access to a wealth of educational tools and materials to help them comply with professional standards of care for LGBT youth and ensure that the rights of these youth are protected.

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Adapted from "The Legal Rights of Young People in State Custody: What Child Welfare and Juvenile Justice Professionals Need to Know When Working With LGBT Youth" by Rudy Estrada Jody Marksamer, as published in the March/April 2006 issue of *Child Welfare* (Vol. LXXXV, No. 2).

JUVENILE JUSTICE NEWS AND RESOURCES

Accepting Applications for Tribal Victim Assistance Grants

A total of up to \$3.5 million is available to federally recognized American Indian and Alaska Native tribes, tribal organizations, nonprofit tribal organizations, and nonprofit organizations serving tribes to establish, expand, and improve direct service victim assistance programs.

An additional grant makes \$600,000 available to tribes, tribal organizations, and nonprofit organizations that have already received funding under the FY 2006 Tribal Victim Assistance Discretionary Grant Program. More information is available at www.ovc.gov/fund/dakit.htm#tribal.

Girls' Use of Illicit Substances Increases

Despite the common belief that boys are at higher risk for using illegal substances, data indicate that girls have caught up with boys in illicit drug and alcohol use and have actually surpassed boys in cigarette and prescription drug use. Also, more girls than boys are new users of substances. *Girls and Drugs: A New Analysis: Recent Trends, Risk Factors and Consequences* is available at www.mediacampaign.org/pdf/girls_and_drugs.pdf.

How the Justice System Responds to Juvenile Victims: A Comprehensive Model Is Released

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) announces that this 12-page bulletin, written by David Finkelhor, Theodore Cross, and Elise Cantor, is now available at <http://ojjdp.ncjrs.gov/publications/PubAbstract.asp?pubi=210951>.

Judges Support Role of CASA Volunteers

The National Court Appointed Special Advocate (CASA) Association surveyed judges and juvenile court commissioners who hear juvenile dependency cases to solicit their views on the role played by CASA and guardian ad litem (GAL) volunteers in supporting judicial decisionmaking and court processes. Overall, respondents said court-appointed volunteers assist judicial decisionmaking and the children and families they serve. The survey results will be used to improve the services of CASA/GAL programs and volunteers. Findings are at www.casanet.org/programmanagement/evaluation/judges_survey_report.htm.

NIJ Seeks Proposals Evaluating G.R.E.A.T.

The National Institute of Justice is soliciting an independent process and outcome evaluation of the Gang Resistance Education and Training program (GREAT). This is a school-based classroom curriculum that uses law enforcement officers as instructors. Its purpose is to prevent delinquency, youth violence, and gang membership. For more information, visit www.ncjrs.gov/pdffiles1/nij/sl000743.pdf.

NIJ Addresses Rape Victimization

Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey (NCJ 210346) takes a detailed look at the survey findings and the recommendations for future research. Researchers found differences in rape prevalence relating to age, gender, and race/ethnicity, as well as such factors as whether victims were first raped as minors. The report is available at www.ncjrs.org/pdffiles1/nij/210346.pdf.

OJJDP Bulletin Introduces Juvenile Victim Justice System

How the Justice System Responds to Juvenile Victims: A Comprehensive Model (NCJ 210951) introduces the concept of a juvenile victim justice system. Part of OJJDP's Crimes Against Children Series, the bulletin reviews the case flow processes for the child protection and criminal justice systems and describes their interaction. Available at www.ncjrs.gov/pdffiles1/ojjdp/210951.pdf

Report Examines Indicators of School Crime and Safety

This joint effort by the Bureau of Justice Statistics and the National Center for Education Statistics examines crime occurring in school and on the way to and from school. It also provides current, detailed statistics on the nature of crime in schools, school environments, and responses to violence and crime at school. See www.ojp.usdoj.gov/bjs/abstract/iscs05.htm.

Probation Reform: Is Zero Tolerance a Viable Option? Examines Community Supervision

Can community supervision compete with incarceration as a means of crime control? NIJ-funded

researcher Mark Kleiman says yes: "If we get [community supervision] right, we could cut incarceration by 50 percent, have less crime rather than more crime, and spend the same amount of money." Read more from Kleiman's discussion with probation and parole practitioners at www.vera.org/publication_pdf/316_587.pdf.

ONDCP Releases *Cities Without Drugs: The 'Major Cities' Guide to Reducing Substance Abuse in Your Community*

This booklet is a guide for any U.S. city, county, or town that wants to implement an antisubstance abuse program based on the Major Cities model. It represents the lessons the Office of National Drug Control Policy and its partners have learned, and the knowledge they have gained in the course of administering the Major Cities project. It is a how-to manual for citizens anywhere who want to adopt the Major Cities model for their own communities. Read it at www.whitehousedrugpolicy.gov/publications/cities_wo_drgs/.

Conference Focuses on Services for Young Women

The Center for Human Development's second annual conference, *Through Her Eyes*, will take place in Springfield on April 26, 2006. In Western Massachusetts, similar to what is happening nationwide, there is increasing awareness that juvenile justice services developed for young men do not adequately meet the needs or address the issues of the young women flooding into the juvenile courts. Issues of trauma, prostitution, domestic violence, self-injury, gangs, truancy, victimization, mood disorders, aggression, and hopelessness affect these young women differently than young men. This conference will attempt to shine light not only on these issues and strategies for dealing with them, but to also spotlight the girls themselves so participants can hear their stories, share their victories, and listen to their view of what helps them and what does not. For more information, contact Tom Verdi at tverdi@chd.org.

Webcast Addresses Reentry Issues

NIJ collaborated with Harvard University's Government Innovators Network to produce the November 9 webcast, *Prisoner Reentry: Facing the Challenges of Returning Home*. The event addressed the challenges former prisoners face in reintegrating into society and finding adequate housing upon release from prison. Access the archive at www.innovations.harvard.edu/mmedia_preview.html?id=9506.

The Violence Against Women Act (VAWA) Is Reauthorized

Thanks to the hard work of Girls Inc. the reauthorization of the 2006 Violence Against Women Act included attention to the concerns of girls in the juvenile justice system. The Act amends the Juvenile Justice Delinquency Prevention Act so that the three-year plans states must submit to receive their federal funds now include, in addition to a plan for gender-specific services, "an analysis of gender specific services for the prevention and treatment of juvenile delinquency, including the types of such services available and the need for such services."

Helping this analysis is Fran Sherman's (Boston College Law School) new report, published through the Annie E. Casey Foundation (AECF), *Detention Reform and Girls: Challenges and Solutions*. The report is located on AECF's website: www.aecf.org/publications/data/jdai_pathways_girls.pdf.

The report details new findings about girls involved in the juvenile justice system. In particular, that domestic violence often leads to girls being detained, and girls are chronically returned to detention for technical violations, while boys are more likely to be returned on a new offense. The report recommends solutions that are both programmatic and policy related. Girls should be removed from detention, should have available a deep continuum of alternatives, and alternatives should be as close to home as possible. Girls also need comprehensive legal representation, and existing foster care biases need to be addressed.