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Salvaging "Safe Spaces": Toward Model Standards for LGBTQ Youth-Serving Professionals Encountering Law Enforcement

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SALVAGING "SAFE SPACES": TOWARD MODEL STANDARDS FOR LGBTQ YOUTH-SERVING PROFESSIONALS ENCOUNTERING LAW ENFORCEMENT

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I. INTRODUCTION

The concept of "safe space" for lesbian, gay, bisexual, transgender, and queer ("LGBTQ") young people is commonly associated with the responsibility of primary and secondary school educators to create safe havens for LGBTQ students from their age peers, by establishing educator-enforced space for dialogue and accountability around name-calling, bullying, and other forms of abuse.[1] The term is also applied in child welfare and juvenile justice reform efforts, particularly in the development of safer placement and housing classification protocols, as well as and in sensitizing youth-serving professionals to the needs of LGBTQ young people.[2]

Yet "safe spaces" reform efforts have failed to advance best practice guidelines for youth-serving professionals to ensure safety for LGBTQ youth from one of the primary perpetrators of violence and harassment against them: law enforcement. The oversight is a glaring one, given the wildly disproportionate rate of police encounters, arrest, secure confinement, and institutional placement faced by LGBTQ youth. Roughly 300,000 gay and transgender youth are arrested or detained each year in the United States.[3] Sixty percent of these youth are Black and/or Latino/a.[4]

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1. GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE SAFE SPACE KIT: A GUIDE TO SUPPORTING LESBIAN, GAY, BISEXUAL AND TRANSGENDER STUDENTS IN YOUR SCHOOL 2 (2003) [hereinafter GLSEN], (noting that LGBTQ youth with supportive educators feel safer at school, skip fewer classes, and earn higher grades than students without supportive educators).

2. *See id*; *see also* SHANNAN WILBER, CAITLIN RYAN & JODY MARKSAMER, CHILD WELFARE LEAGUE OF AM., CWLA BEST PRACTICE GUIDELINES: SERVING LGBT YOUTH IN OUT-OF-HOME CARE 41 (2006), http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf [hereinafter CWLA].

3. JEROME HUNT & AISHA C. MOODIE-MILLS, CTR. FOR AM. PROGRESS, THE UNFAIR CRIMINALIZATION OF GAY AND TRANSGENDER YOUTH: AN OVERVIEW OF THE EXPERIENCE OF LGBT YOUTH IN THE JUVENILE JUSTICE SYSTEM 1 (2012),

While LGBTQ youth represent 4-8% of young people in the United States, they make up as many as 13% of those currently in detention.[5]

The act of arrest is never just ink on a R.A.P. sheet for LGBTQ youth. It exposes youth to police encounters with a high incidence of discriminatory profiling, false arrest, illegal search, sexual harassment, verbal abuse, and physical brutality.[6] These youth are in fact much more likely to be verbally and physically assaulted by the police than their heterosexual age peers, and over twice as likely to report sexual misconduct by police in the prior six months.[7] This gratuitous violence is paired with the reality that LGB and gender non-conforming youth are twice as likely to be held in secure detention for truancy, warrants, probation violations, running away, prostitution, and are more likely than heterosexual youth to face detention for non-violent offenses.[8] Those young people who avoid detention face multiple court appearances, fines and surcharges, and intensive probationary supervision, often in institutional placements.[9] After court

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http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf (drawing figures from the 2011 estimate of the National Juvenile Justice and Delinquency Prevention Coalition that 2.1 million youth per year are arrested in the United States).

4. HUNT & MOODIE-MILLS, *supra* note 3, at 1.

5. KATAYOON MAJD, JODY MARKSAMER & CAROLYN REYES, THE EQUITY PROJECT, HIDDEN INJUSTICE: LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN JUVENILE COURTS 1 (2009), http://www.equityproject.org/wp-content/uploads/2014/08/hidden_injustice.pdf (citing Angela Irvine, Ceres Policy Res., *The Inappropriate Use of Secure Detention for Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Youth*, Presentation at the Columbia University Gender on the Frontiers Symposium, [April 10, 2009]).

6. *See generally* AMNESTY INT'L, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 1 (2005) (extensively documenting discriminatory profiling and selective enforcement perpetrated against LGBT people by law enforcement personnel, as well as sexual, physical and verbal abuse; illegal searches to determine genital status of transgender arrestees; and lack of transgender-specific policies, procedures, and training).

7. Brett G. Stoudt, Michelle Fine & Medline Fox, *Growing up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. SCH. L. REV. 1331, 1370 app. IX (2011).

8. Angela Irvine, *We've Had Three of Them: Addressing the Invisibility of Lesbian, Gay, Bisexual, and Gender Non-Conforming Youths in the Juvenile Justice System*, 19 COLUM. J. GENDER & L. 675, 693 (2010).

9. "Institutionalization" is "[t]he practice of placing children or youth in hospitals, residential treatment, institutions, or orphanages. Institutionalization has been associated with developmental delays due to environmental deprivation, poor staff-child ratios, lack of contact with normal societal learning situations, or lack of a consistent caregiver. The term may also be used to describe the damage caused to people so accustomed to life in an institution that they have difficulties assuming or

supervision is lifted, youth face life-limiting collateral consequences; a single criminal conviction can result in restricted access to housing, eviction, denial of public benefits including educational loans, exclusion from professions, and even deportation.[10]

Society's emerging awareness of LGBTQ youth homelessness has caused the proliferation of both congregate and alternative care options such as drop-in centers, transitional housing, and permanent supportive housing. As street-involved young people seek shelter and community indoors, the police have followed suit, increasingly targeting these spaces with warrant enforcement units and unannounced searches with insufficient probable cause, let alone valid warrants, in which officers sometimes threaten staff who object to the legality of the entry or arrest with arrest itself for non-compliance. The threat of conflict with local precincts combines with a scarcity of shelter options to internalize a policing mentality among social service organizations themselves. Efforts to "rightsize" congregate care are incremental at best.[11] These reforms do not carry an equal emphasis on increasing permanent and independent housing options. [12]

This mentality effectively deputizes youth-serving professionals as enforcers of a strict regime of exclusionary and restrictive policies designed to separate the "deserving" or high-functioning youth from those youth who are deemed non-deserving. A culture of rules is built up in these programs which conditions continued receipt of services on perceived good behavior, compliance with time-based bathroom limits, curfews, restrictive guest and visitation policies, and milestones tied to income or employment that are often impossible to reach for youth who face employment discrimination, whether due to their race, gender identity, or record of

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resuming life outside the institution." *Child Welfare Information Gateway—Glossary I*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.childwelfare.gov/glossary/glossarya/ (last visited Dec. 1, 2015) [hereinafter HHS].

10. *See National Inventory of Collateral Consequences of Conviction*, AM. BAR ASS'N CRIM. JUSTICE SECTION, http://www.abacollateralconsequences.org/ (last visited Dec. 1, 2015) [hereinafter ABA–CJS]; *see also* The Collateral Consequences Calculator–New York State, Columbia Law SCH., calculator.law.columbia.edu/about/ (last visited Dec. 1, 2015).

11. *See generally* ANNIE E. CASEY FOUND., RIGHTSIZING CONGREGATE CARE: A POWERFUL FIRST STEP IN TRANSFORMING CHILD WELFARE SYSTEMS (2012), http://www.aecf.org/resources/rightsizing-congregate-care/.

12. LAURA E. DURSO & GARY J. GATES, WILLIAMS INST., SERVING OUR YOUTH: FINDINGS FROM A NATIONAL SURVEY OF SERVICE PROVIDERS WORKING WITH LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH WHO ARE HOMELESS OR AT RISK OF BECOMING HOMELESS 10 (2012).

convictions. A sad irony is that not only does this trend contribute to the push out of young people with the greatest need for support, but it also diminishes the life chances of those young people who manage to remain enrolled. The relative restrictiveness of placement settings has been found to significantly affect educational outcomes in the child welfare context. Roughly two-thirds of youth in foster family-based placements or transitional apartments attend post-secondary education, while only one-third of youth in moderate to highly restrictive settings such as residential treatment facilities and group homes do so.[13]

The disproportionate state-involvement of LGBTQ youth, and in particular LGBTQ youth of color, is therefore well established as a contemporary social problem. But what explains the omission of law enforcement violence from the "safe spaces" reform agenda? In her manuscript *Safe Space: Gay Neighborhood History and the Politics of Violence*, Christina B. Hanhardt offers a convincing social-historical explanation using archival and ethnographic research into the term's deployment by gay and lesbian activists in New York and San Francisco from the 1960s to the early 2000s.[14] While the stated objective of these gay and lesbian activists was to enhance police protection to end street harassment and violence, Harnhardt situates the activists' efforts to achieve "safety" in the context of neoliberalism, gentrification, and the escalating policing and surveillance of LGBTQ low-income people of color.[15]

Harnhardt's analysis tests the limits of "safe space" reform efforts, namely that any space can be truly safe for youth living at the edge of survival whose very existence is criminalized. The irony of a movement for "safe spaces" that does not account for law enforcement violence is readily apparent when considering the riots credited with launching the LGBTQ movement for liberation.[16] The foundational uprisings of the contemporary LGBTQ movement were initiated, organized, and

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13. E.V. Mech & C. Che-man Fung, *Placement Restrictiveness and Educational Achievement Among Emancipated Foster Youth*, 9 RES. SOC. WORK PRAC. 213, 222-23 (1999).

14. *See generally* CHRISTINA B. HANHARDT, SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE (2013).

15. *Id.* at 13-15.

16. *Id.* at 4-7. Note also the earlier small-scale riot in 1959 at Cooper's Donuts in Los Angeles, when street queens and hustlers who hung out at Cooper's Donuts fought back after the L.A.P.D. arrested three people, including John Rechy, the Chicano novelist and author of the hustler memoir *City of Night* (1963). The patrons of Cooper's Donuts pelted police with donuts and coffee cups to free the three arrestees, although the L.A.P.D. would eventually arrest a number of rioters. *See* LILLIAN FADERMAN & STUART TIMMONS, GAY L.A.: A HISTORY OF SEXUAL OUTLAWS, POWER POLITICS, AND LIPSTICK LESBIANS 1-2 (2006).

accomplished by LGBT people of color. The Compton's Cafeteria Riot of August 1966 in San Francisco's Tenderloin neighborhood was started by transgender and gender non-conforming people of color in response to the efforts of Compton's staff to summon the police to disperse and arrest "cross-dressers."[17] When a police officer attempted to restrain one patron, she threw a cup of coffee into the officer's face and other Compton's patrons followed suit with dishes and furniture, breaking a window, lighting a newsstand on fire, and destroying a police car.[18] The following night the militant LGBTQ runaway and homeless youth activists of Vanguard and Street Orphans picketed the cafeteria.[19] Just three years later, the Stonewall Inn riots of June 28, 1969, also erupted in response to police violence, specifically an early morning raid at the Stonewall Inn in which police brutalized and arrested patrons by using anatomical "searches" of transgender, gender non-conforming, and other bar patrons to identify and charge patrons for so-called "cross-dressing."[20] That night, Stonewall Inn patrons, street queens, hustlers, and the homeless youth who resided in Christopher Park responded to the raid by resisting arrest and attempting to free the thirteen arrestees using thrown coins, garbage, glass, fire, bricks, cobblestones, and a battering ram once the police on the scene retreated into the Stonewall Inn.[21] The Stonewall riots set off months of protests in the village to protest discriminatory policing and establish "safe spaces" for LGBTQ people to gather without fear of arrest.[22]

This history has been largely forgotten, or perhaps intentionally erased, in the present-day. On December 10, 2015, United States Senator Kristen Gillibrand, Senator Chuck Schumer, and United States Representative Jerrold Nadler introduced legislation to create the Stonewall National Historic Site as a unit of the National Park System.[23] The stated purpose of the legislation is, in part, to "to enhance understanding of... the discrimination against LGBT individuals that led to the Stonewall uprising;

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17. *See generally Screaming Queens: The Riot at Compton's Cafeteria* (documentary film by Victor Silverman & Susan Stryker, 2005).

18. Joe Dignan, *Recalling a San Francisco Stonewall: Drag Queens Fought Back at a Tenderloin Coffee Shop in 1966*, GAY CITY NEWS, vol. 5, no. 26, June 29-July 5, 2006, gaycitynews.nyc/gcn_526/recallingasanfrancisco.html.

19. *Id.*

20. *See generally* DAVID CARTER, STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION (2010).

21. *Id.* at 160.

22. *Id.* at 182-94.

23. Stonewall National Historic Site Establishment Act of 2015, H.R. 4230 & S.2386, 114th Cong. (2015).

and . . . the ongoing struggle to achieve civil rights."[24] The legislation contains no reference to police violence.

The willful blindness of contemporary "safe spaces" reformists to state violence and racialized poverty may also be due in part to the knowledge gap between high-level policy advocates and staff providing direct services to runaway, homeless, and unstably housed youth. Among youth-serving professionals in New York City, the reality is increasingly harder to ignore. Without reform, this trend threatens to enlist youth-serving professionals in contributing to the ever-increasing number of state-involved LGBTQ youth of color.

This Article provides guidance to youth-serving professionals to assist social service organizations in mitigating the disproportionate policing and criminalization of LGBTQ youth of color. Part I offers background on the disproportionate policing and state-involvement of LGBTQ youth, primarily LGBTQ youth of color. Part II surveys the type and characteristics of social service settings in which youth find themselves, whether voluntarily or as the result of a court mandate. Part III analyzes legal standards applicable to arrest and search warrants, as well as relevant exceptions to the Fourth Amendment warrant requirement in the context of social service settings. This section integrates recommendations for youth-serving professionals seeking to minimize police entry and protect the Fourth Amendment rights of clients, including police incident reporting, staff escort policies and mediation of client grievances. While the guidelines contained in this Article offer better protection for young people, they also present the potential benefit of minimizing liability for professional misconduct by social service personnel and organizational liability. Part IV provides guidance to youth-serving professionals who may face a risk of committing professional malpractice through falsely reporting crimes or breaching confidentiality when involving third parties such as security guards or law enforcement. The Article concludes by urging youth-serving professionals to adopt policies and practices designed to minimize police involvement in their programs, to close off this rapidly emerging pathway into the criminal legal system for LGBTQ youth of color.

II. VULNERABILITY TO SYSTEMS INVOLVEMENT

The overrepresentation of LGBTQ youth in arrest and court statistics is well established. Drawing from the 2011 estimate of the National Juvenile

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24. *Id.* § 2-b. *See also* Hanna Trudo, *N.Y. Lawmakers Seek to Honor Gay Rights Landmark*, POLITICO, Sept. 20, 2015, www.politico.com/story/2015/09/stoneweall-gay-rights-nadler-gillibrand-213865.

Justice and Delinquency Prevention Coalition in combination with other research, one study estimated that 300,000 LGBTQ youth arrested or detained annually nationwide, 60% of whom are Black and/or Latino/a.[25] While LGBTQ youth represent just 4-8% of the nation's overall youth population, they make up as many as 13% of those currently in detention.[26]

The pipelining of LGBTQ youth into the child welfare and juvenile justice systems is driven by a variety of factors: homelessness, failing social safety nets, biased school discipline policies, and family rejection are each commonly cited as influential. Yet these explanations merely set the stage for youth to be exposed to frequent police contact due to housing instability or street-based homelessness. This Article argues in the alternative that these youths' disproportionate state involvement has a primary cause: racially and sexually discriminatory practices in law enforcement, as well as family, juvenile, and criminal court systems. For each young person subjected to this systemic bias, there follows lifelong consequences, but for many youth, the consequences are far more imminent. LGBTQ youth are at risk of classification as sex offenders upon entry; institutionalization by default where they lack accepting family-based placement options; segregation and isolation of gay and transgender youth in custody; physical, sexual, and emotional abuse by staff and other youth; unsafe "reparative" or conversion therapy; and increasingly restrictive placement settings.[27] There is however an opportunity to interrupt this escalating sequence of consequences, and that is by mitigating or eliminating the triggering event itself. It is decidedly the professional responsibility of youth-serving professionals to stand by the side of the runaway and homeless youth they have sworn to support and protect, the very moment when that same young person is confronted with a situation critical to their lives for decades to come.

A. Law Enforcement Contact

LGBTQ people of all ages face a disturbingly high incidence of police contact, discriminatory profiling, false arrest, police harassment, and other forms of violence. The body of research documenting violence that LGBTQ communities experience in the legal system—whether through the prism of victim, suspect, arrestee, defendant, or convicted person—has been cited in support of advocates' claims that law enforcement officers, court personnel, and corrections officers view non-normative sexual orientation or gender identity as inherently criminal, and that the policing

25. *See* HUNT & MOODIE-MILLS, *supra* note 3, at 1.

26. *See* MAJD, MARKSAMER & REYES, *supra* note 5, at 44.

27. *See generally* HUNT & MOODIE-MILLS, *supra* note 3.

of sex and gender reinforces racial and gender inequalities.[28]

In a national survey of 2,300 LGBTQ people and people living with HIV, 25% of respondents with any recent police contact reported at least one type of misconduct or harassment, such as: being accused of an offense they did not commit, verbal assault, being arrested for an offense they did not commit, sexual harassment, physical assault, or sexual assault.[29] Respondents who were of color, low-income, and/or transgender were much more likely to report an experience of at least one type of misconduct or harassment.[30] Another survey of LGBT people and people living with HIV who had encounters with police, courts, prison, and security found that 25% of respondents with any recent police contact reported at least one type of misconduct or harassment, such as: being accused of an offense they did not commit, verbal assault, being arrested for an offense they did not commit, sexual harassment, physical assault, and sexual assault.[31] Transgender and gender non-conforming people are particularly vulnerable to police harassment and abuse. The National Transgender Discrimination Survey found that 22% of transgender people who interacted with police report harassment, 6% report physical assault, and 2% report sexual assault by police officers.[32]

The situation facing LGBTQ youth is especially fraught, as adolescents and young adults have long faced disproportionate policing and criminalization. Criminologists have long noted that "[t]he relationship between offending and age is bell-shaped, and the prevalence of offending tends to increase from late childhood, peaks in the teenage years (around ages fifteen to nineteen), and then declines in the early twenties."[33] While many putative explanations based on developmental psychology, brain science, and the like have been introduced, the age-crime curve is more meaningfully explained as a reflection of patterns of age-stratified

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28. *See generally* JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 1 (2011).

29. LAMBDA LEGAL, PROTECTED AND SERVED? SURVEY OF LGBT/HIV CONTACT WITH POLICE, COURTS, PRISONS, AND SECURITY 8-13 (2014), http://www.lambdalegal.org/sites/default/files/ps_executive-summary.pdf.

30. *Id.*

31. *Id.*

32. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 6 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

33. ROLF LOEBER & DAVID P. FARRINGTON, FROM JUVENILE DELINQUENCY TO YOUNG ADULT OFFENDING 1, 3 (2013), http://www.ncjrs.gov/pdffiles1/nij/grants/242931.pdf.

inequality, particularly as mediated by race or ethnicity.[34] The United States Census Bureau found that in 2013, 19.9% of persons ages seventeen years-old and under (14.7 million) lived in poverty, compared to 13.6% of people eighteen to sixty-four (26.4 million), and 9.5% of people sixty-five and older (4.2 million).[35] It also found that in 2013, 27.2% of Black people live in poverty compared to 23.5% of people described as Hispanic whites, 10.5% of people of Asian descent, and merely 9.6% of non-Hispanic whites in 2013.[36]

LGBTQ youth face compound criminalization, involving their age, sexual orientation, gender identity, and race or ethnicity.[37] This proposition is borne out by the wealth of social science research on the subject. Drawing from a national, population-based sample, one study found that LGBTQ youth are more likely to be stopped by the police and have a 1.25 to 3 times greater probability of experiencing sanctions than their heterosexual counterparts, even when controlling for engagement in transgressive behavior.[38] Similarly, a study on the effect of stop-and-frisk policies in New York City found that LGB youth are more likely to experience negative verbal, physical, and legal contact with the police, over twice as likely to experience sexual misconduct in the previous six months, and tend to not feel as comfortable seeking out a police officer for help.[39] Transgender youth report that police frequently profile them as being engaged in prostitution, mock them, sexually harass and assault them, and conduct unlawful strip "searches" to assign them a gender based on anatomical features.[40]

These figures are especially troubling in the context of New York State's policy that youth ages sixteen and seventeen years old are prosecuted in adult criminal court, regardless of the offense.[41] For those young people

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34. Jeffrey T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY: ON THE ORIGINS OF CRIMINAL BEHAVIOR AND CRIMINALITY 377, 394 (Kevin M. Beaver, J.C. Barnes, & Brian B. Boutwell eds., 2014).

35. U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013 table 3, 13 (2014), www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf.

36. *Id.*

37. *See generally* AMNESTY INT'L *supra* note 6.

38. Kathryn E. W. Himmelstein & Hannah Brückner, *Criminal Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 49-57 (2011).

39. *See* Stoudt et al., *supra* note 7, at 1370 app. IX; *see also* HUNT & MOODIE-MILLS, *supra* note 3, at 1.

40. MAJD, MARKSAMER & REYES, *supra* note 5, at 162-63.

41. CITIZENS CRIME COMM'N OF N.Y.C., GUIDE TO JUVENILE JUSTICE IN NEW

who are ages nineteen or above, or who are sixteen to eighteen years old, but disqualified from Youthful Offender status as a result of a prior felony offense, once court supervision is lifted, youth face life-limiting collateral consequences; a criminal conviction can result in restriction of access to housing, eviction, denial of public benefits including educational loans, exclusion from professions, and even deportation.[42]

B. Juvenile Justice System Involvement

Given the particularly high incidence of police encounters, profiling, false arrest, police harassment, and violence experienced by LGBTQ youth, it is not surprising that these young people also make up a disproportionate share of the juvenile justice system. Recent estimates of the percentage of LGBTQ youth in detention range from 12-15%.[43] Gay and transgender youth are particularly at risk of being labeled sex offenders for consensual sexual activity with other youth and of being treated as sex offenders despite entering the justice system on unrelated charges.[44]

LGB and gender non-conforming youth are twice as likely to be held in pre-trial detention—which is the temporary custody of a juvenile before trial in a secure confinement facility[45]—for truancy, warrants, probation violations, running away and prostitution; they are also more likely than heterosexual youth to face pre-trial detention for non-violent offenses.[46] In one study, justice system personnel reported that LGBTQ youth often experience pretrial detention on the biased assumption that they are predatory or cannot be kept safe in the community; detention was also relied on in cases where parents refused to assume custody of youth.[47] These system-based observations are supported by data specific to youth reached outside the justice system, such as through programs for runaway and homeless youth. LGB homeless youth are significantly more likely than non-LGB homeless youth to have been in jail or detention (33%-24%), and transgender homeless youth are significantly more likely to have been in jail or detention (32%-25%).[48]

Whether placed in secure confinement as a result of a pre-trial detention

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YORK CITY 4 (2010).

42. *See generally* ABA–CJS, *supra* note 10.

43. *See generally* Irvine, *supra* note 8.

44. HUNT & MOODIE-MILLS, *supra* note 3, at 1-2.

45. *Glossary*, JUVENILE LAW CTR., www.jlc.org/news-room/media-resources/glossary (last visited Dec. 1, 2015).

46. Irvine, *supra* note 8, at 693.

47. MAJD, MARKSAMER & REYES *supra* note 5, at 104-105.

48. LANCE FREEMAN & DARRICK HAMILTON, EMPIRE STATE COAL. OF YOUTH AND FAMILY SERVS, A COUNT OF HOMELESS YOUTH IN NEW YORK CITY: 2007 22 (2008).

or final disposition, placing LGBTQ youth in a locked facility[49] carries its own risks. Once in detention, LGBTQ youth report higher rates of sexual victimization by other youth.[50] They also report incidents where correctional personnel try to change their sexual orientation.[51] Lack of appropriate medical care for transgender youth in secure confinement has been well documented.[52] In secure confinement, LGBTQ youth are at risk of inappropriate classification and housing. For example, transgender youth can be housed based on their birth sex, which can be psychologically traumatic.[53] Facilities will sometimes segregate LGBTQ youth "for their protection," placing them in isolated areas or even in solitary confinement, which can create distress and deprive youth of educational and recreational opportunities.[54]

Even for cases that do not result in secure confinement, court dispositions can include harmful outcomes for LGBTQ youth. Those young people who avoid secure confinement may still face multiple court appearances, fines and surcharges, and a high likelihood of a negative disposition, leading to secure confinement or intensive probationary supervision, often in institutional placements. Court supervision may include mandates to undertake "therapy" or counseling to attempt to change their sexual orientation or gender identity.[55] Trauma and Post-Traumatic Stress Disorder (PTSD) are prevalent among juvenile detainees, and justice system involvement has been shown to be associated with "lower high school graduation rates, a higher risk of unemployment, and

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49. JUVENILE LAW CTR., *supra* note 45. Note that despite their potentially restrictive conditions other out-of-home placements such as shelters, halfway houses, or residential facilities are generally not considered secure confinement facilities. *Id.*

50. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH 2012 20 (2013), http://www.bjs.gov/content/pub/pdf/svjfry12.pdf.

51. MAJD, MARKSAMER & REYES, *supra* note 5, at 65.

52. *Id.* at 111-12.

53. *See generally* HUNT & MOODIE-MILLS, *supra* note 3.

54. *Id.*

55. MAJD, MARKSAMER & REYES, *supra* note 5, at 64. A "disposition" is a "[d]efinite action taken or treatment plan decided on or initiated regarding a particular case after the judicial decision is made. In the juvenile delinquency context, a disposition may include: transfer to criminal court, placement in a residential facility for delinquents or otherwise placed in out-of-home care, probation or supervision, or dismissal, including cases dismissed with no further action anticipated. A disposition may also include a variety of other actions, such as fines, restitution and community services, or referrals outside the court for services . . ." *Statistical Briefing Book, Glossary*, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION [OJJDP], http://www.ojjdp.gov/ojstatbb/glossary.html (last visited Dec. 1, 2015).

increased future delinquency."[56]

C. Child Welfare System Involvement

There is increasing evidence that LGBTQ youth are also over-represented in the child welfare system. The Los Angeles Foster Youth Survey found that 19.1% of the Los Angeles foster care youth population ages twelve to twenty-one years are LGBTQ.[57] The Midwest Evaluation of the Adult Functioning of Former Foster Youth found 11% of foster care youth were lesbian, gay, or bisexual.[58] This observation tracks with research showing that the proportion of runaway and homeless youth with experience in foster care ranges between 21% to 53%.[59] In one New York City study, LGB homeless youth were found to be significantly more likely to have been in foster care than non-LGB homeless youth (33%-27%).[60] Once in the child welfare system, youth are at great risk of being brought into the juvenile justice system. Among youth in secure confinement, LGBTQ youth are almost twice as likely as heterosexual youth to have lived in a foster or group home.[61]

It is also apparent that LGBTQ youth are more likely to be subject to an institutional placement in a group home or residential treatment facility in the child welfare system rather than a family-based placement. This is particularly true for youth arrested on prostitution-related offenses. One New York City study found that among a subgroup of youth aged fifteen and under brought before Family Court for prostitution-related offenses from 2004 to 2006, 90% of cases resulted in an admission or finding that the acts were committed, while 10% were dismissed or withdrawn, and only one case resulted in an adjournment in contemplation of dismissal.[62]

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56. MEREDITH DANK ET AL., URBAN INST., LOCKED IN: INTERACTIONS BETWEEN LGBTQ YOUTH, YMSM, YWSW WHO ENGAGE IN SURVIVAL SEX AND THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS 10 (2015).

57. BIANCA D. M. WILSON ET AL., WILLIAMS INST., SEXUAL AND GENDER MINORITY YOUTH IN L. A. COUNTY FOSTER CARE: ASSESSING DISPROPORTIONALITY AND DISPARITIES 26 (2014).

58. AMY DWORSKY, MATHEMATICA POLICY RES., THE ECONOMIC WELL-BEING OF LESBIAN, GAY, AND BISEXUAL YOUTH TRANSITIONING OUT OF FOSTER CARE 2 (2013), http://www.acf.hhs.gov/sites/default/files/opre/opre_lgbt_brief_01_04_2013.pdf.

59. M.G. Haber & P. A. Toro, *Homelessness Among Families, Children, and Adolescents: An Ecological-Developmental Perspective*, 7 CLINICAL CHILD & FAMILY PSYCH. REV. 123, 130 (2004).

60. FREEMAN & HAMILTON, *supra* note 48, at 22.

61. Irvine, *supra* note 8, at 691.

62. AMY MUSLIM ET AL., THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN NEW YORK CITY, VOL. 2: FORMATIVE EVALUATION: THE NEW YORK CITY DEMONSTRATION 17 (2008).

Among those cases reaching a final disposition, 62% resulted in institutional placement.[63] In contrast, among PINS cases generally, one study found that only 12% resulted in a final disposition of foster care placement, likely in foster homes.[64]

The disproportionalities evident in both the initiation of child welfare involvement and the likelihood of institutional placement are especially disturbing in light of findings as to the conditions of placement that LGBTQ youth face. Researchers have found that LGBTQ youth in residential treatment facilities, group homes, and shelters experience harassment, discomfort, insensitivity, rejection, and feelings of isolation.[65] In fact, some homeless LGBTQ youth report engaging in survival sex to avoid the experience of violence and abuse in child welfare placements.[66] These youth also suffer the burden of more restrictive placement settings, which have been found to significantly affect educational outcomes; roughly two-thirds of youth in foster family-based placements or transitional apartments attend post-secondary education while only one-third of youth in moderate to highly restrictive settings such as residential treatment facilities and group homes do so.[67] The restrictive conditions imposed by a given facility include a variety of limitations imposed on freedom of movement, the extent to which rules and regulations are used as a mechanism of controlling behavior, and limits established regarding contact with normalizing community based environments outside the placement setting, such as recreation and social relationships.[68]

In New York City, the Administration for Children's Services is responsible for the child welfare and juvenile justice systems in the city. The agency has indicated that improving services for LGBTQ children, youth, and families is a priority, according to its 2006 strategic plan.[69] Recently, the agency issued an official guide of policies and best practices

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63. *Id.*

64. WEINGARTNER ET AL., VERA INST. OF JUSTICE, A STUDY OF THE PINS SYSTEM IN NEW YORK CITY: RESULTS AND IMPLICATIONS 25 (2002).

65. NICHOLAS RAY, NAT'L GAY AND LESBIAN TASK FORCE POLICY INST. & NAT'L COALITION FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 83-89 (2006).

66. DANK, *supra* note 56, at 85-92.

67. *See* Mech & Fung, *supra* note 13, at 222-23.

68. *See generally* Mary E. Rauktis et al., *Measuring the Restrictiveness of Living Environments for Children and Youth: Reconceptualizing Restriction,* 17 J. EMOTIONAL & BEHAVIORAL DISORDERS 147 (2009).

69. *See generally* N.Y.C. ADMIN. FOR CHILDREN'S SERVS., PROPOSED STRATEGIC PLAN TO IMPROVE SERVICES TO LGBTQ YOUTH AT THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES (2006).

for serving transgender and gender-nonconforming children and youth in the child welfare, detention, and juvenile justice systems and has multiple official policies in place to address the needs of this population.[70] However, service providers have criticized the slow pace and failure to appropriately implement these policies with regard to staff discipline, placement options, and agency priorities.[71]

III. SOCIAL SERVICE SETTINGS AVAILABLE TO LGBTQ YOUTH

Through heightened policing and involvement in juvenile justice and child welfare systems, LGBTQ youth face institutional placement in group homes and residential treatment facilities that carry their own risk of law enforcement presence in these spaces. But there are also an increasing number of congregate and alternative care options such as drop-in centers, emergency shelter, transitional housing, and permanent supportive housing that operate outside of the justice system. In both cases, as street-involved young people seek shelter and community indoors or are placed into institutions, the police have followed suit, increasingly targeting these spaces with warrant enforcement units and unannounced, warrantless searches often threatening staff with arrest for non-compliance.

This section describes the different care settings to inform Part III's discussion of the relevant Fourth Amendment standards that govern law enforcement entry for the purposes of arrests and searches: covering relevant circumstances such as accessibility by the public, entry requirements for participants versus non-participants, security measures, and the existence or non-existence of a lease.[72] While this analysis focuses on New York State, definitions are also sourced from the United States Family and Youth Services Bureau, which administers Basic Center Program and Transitional Living Program grants in many other states. In this context it is important to note that some care settings are more common—and serve far more youth—than others, making them particularly vulnerable to policing targeting. Still other programs specifically tailored to LGBTQ youth are limited at best and rarely involve independent living or supportive housing in an apartment. In a national

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70. N.Y.C. ADMIN. FOR CHILDREN'S SERVS., PROMOTING A SAFE AND RESPECTFUL ENVIRONMENT FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUESTIONING (LGBTQ) YOUTH AND THEIR FAMILIES INVOLVED IN THE CHILD WELFARE, DETENTION AND JUVENILE JUSTICE SYSTEM, ACS POLICY NO. 2012/01, http://www.nyc.gov/html/acs/downloads/pdf/lgbtq/LGBTQ_Policy.pdf.

71. DANK, *supra* note 56, at 82-4.

72. *See generally* Douglas H. Lasdon, *Beyond the Quagmire: The Fourth Amendment Rights of Residents of Private Shelters for the Homeless*, 3 N.Y.L. SCH. J. HUM. RTS. 389 (1985-86).

survey of service providers working with LGBTQ homeless youth, 50% of respondents reported that their agencies offered transitional living services and street outreach services, as well as having a drop-in-center, but far fewer offered independent living (19%), permanent housing (10%), and host home services (8%).[73]

A. Voluntary Social Service Settings

1. Youth Drop-In Centers

A youth drop-in center is a physical building where homeless youth can rest and receive food, clothing, and have other basic needs met, as well as access to counseling and referrals to relevant services. The Basic Center Program administered by the United States Family & Youth Services Bureau provides limited grants for drop-in centers to provide youth up to age eighteen with food, clothing, counseling and referrals for health care—as well as connection to emergency or crisis shelter as defined below. Among all social service settings, a drop-in center is typically the least restrictive, but still maintains procedures such as screening at intake to determine client eligibility and front-door staff who monitor and restrict entry by the general public.

In New York City, drop-in centers are open six days a week, open from 12 p.m. to 9 p.m., and are located in each of the five boroughs of New York City—one per borough with the exception of Manhattan, which hosts three.[74] Starting in FY 2010, New York City contracts required that drop-in centers provide transportation services, such as MetroCards.[75]

2. Crisis or Emergency Shelters

A crisis shelter offers emergency shelter for runaway and homeless youth. The Basic Center Program administered by the United States Family & Youth Services Bureau provides grants for emergency shelter for youth who are eighteen years-old and younger.[76] By contrast, New York State law provides funds for sheltering youth twenty-one years-old or younger. This means that if a crisis or emergency shelter facility has a bed available that is funded with federal money, that bed cannot be used to

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73. DURSO & GARY J. GATES, *supra* note 12, at 10.

74. *Borough-Based Drop-In Centers*, N.Y.C. DEP'T OF YOUTH AND COMMUNITY DEV., http://www.nyc.gov/html/dycd/html/runaway/drop_in.shtml (last visited Dec. 1, 2015).

75. N.Y.C. INDEP. BUDGET OFF., CITY SPENDING FOR RUNAWAY AND HOMELESS YOUTH GROWS STEADILY 3, Aug. 2010, www.ibo.nyc.ny.us/iboreports/rhyaugust122010.pdf.

76. *See* 42 U.S.C.A. § 5732a(3)(a)(1) (Westlaw 2015).

serve a youth who is nineteen years-old or older,[77] as is the case for youth twenty-one years-old or older with regard to state funded facilities.

Basic Center Program crisis shelters are federally subsidized up to a maximum of a twenty-one day stay per young person.[78] On January 27, 2015, the Runaway and Homeless Youth and Trafficking Prevention Act was referred to Committee.[79] This critical legislation would also expand the maximum stay in Basic Center Program shelters from twenty-one to thirty days and fund street-based services for runaway and homeless youth.[80] The Committee has yet to take a vote, due to the opposition by some Republican Senators to a non-discrimination clause that would prohibit grant recipients from discriminating against youth on the basis of gender identity or sexual orientation.

In New York City, crisis shelters are the entry-point for the DYCD's Runaway and Homeless Youth system. These voluntary, short-term residential programs provide emergency shelter and crisis intervention services aimed at reuniting youth with their families or, if family reunification is not possible, arranging appropriate transitional and long-term placements.[81] The maximum stay for emergency shelters varies by program. For instance, Covenant House usually refers youth to an independent living program if they have found employment, and if not, then to the New York City adult shelter system after thirty days. In contrast, depending on which of its four emergency housing sites are used, the Ali Forney Center offers between one to six months. However, the program reports an average waiting list of 200 young people, with youth ages sixteen to twenty experiencing an average wait time of two weeks, and youth ages twenty-one through twenty-four years-old experiencing a wait as long as six months.[82]

A youth crisis or emergency shelter is more difficult to gain access to than a drop-in center, in that its residents typically are routed through drop-in center staff. These shelter beds are rarely sited in the same building as a drop-in center, but in any case a crisis or emergency shelter maintains procedures such as screening at intake to determine client eligibility and

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77. N.Y.C. INDEP. BUDGET OFF., *supra* note 75, at 5.

78. *Id.*

79. GOVTRACK.US, S. 262: RUNAWAY AND HOMELESS YOUTH AND TRAFFICKING PREVENTION ACT (2015).

80. The Runaway and Homeless Youth and Trafficking Prevention Act, S. 262, 114th Cong. § 4(a)(2)(B)(i) (2015-2017).

81. *Crisis Shelters*, N.Y.C. DEP'T OF YOUTH AND COMMUNITY DEV., www.nyc.gov/html/dycd/html/runaway/crisis.shtml (last visited Dec. 1, 2015).

82. *Emergency Housing Program*, ALI FORNEY CTR., http://www.aliforneycenter.org/programs/emergency/ (last visited Dec. 1, 2015).

front-door staff who monitor and restrict entry by the general public, regardless of whether they are sited in drop-in centers or other buildings.

3. Transitional Independent Living ("TIL") Facilities

The federal government operates two state-federal cooperative grant schemes to support transitional independent living. The Juvenile Justice and Delinquency Prevention Act of 1974 established Title III-B, also known as the Runaway and Homeless Youth Act, to provide funds for transitional living youth projects serving runaway and homeless youth. For purposes of Part B funding, a qualifying homeless youth must be between sixteen and twenty-two years-old, but provided the young person commences a stay in the program before twenty-two years-old, they can retain shelter up to the maximum stay provided by law.[83] Specifically, the law caps continuous shelter and services to individual youth at 540 days (or, roughly 1.5 years), and in exceptional circumstances 635 days (or, roughly 1.7 years).[84] The law defines a transitional living youth project to mean a project that "provides shelter and services designed to promote a transition to self-sufficient living and to prevent long-term dependency on social services."[85] The "shelter" provided under this program includes facilities such as group homes and supervised apartments, with a maximum of twenty residents, excluding staff.[86]

Separately, the Independent Living Program specific to foster care-involved youth was written into Title IV-E as section 477 of the Social Security Act in 1986, and substituted with the John H. Chafee Foster Care Independence Program by the Foster Care Independence Act of 1999.[87] Section 477 is intended to serve youth who are likely to remain in foster care until age eighteen, youth who, after attaining sixteen years of age, have left foster care for kinship guardianship or adoption, and young adults ages eighteen to twenty-one who have "aged out" of the foster care system. Section 477, in its current form, provides that participating states and tribes can expend up to 30% of funds to provide room and board for youth who leave foster care at eighteen up to the age of twenty-one years-old, as well as the option to extend Medicaid services to these youth.[88]

Transitional independent living programs may be accessed on an "outpatient" basis by youth in family-based foster care, but the focus of this

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83. 42 U.S.C.A. § 5732a(3)(A)(ii) (Westlaw 2015).

84. *Id.* § 5714-2(a)(2).

85. *Id.* § 5732a(7).

86. *Id.* § 5714-2(a)(1)–(4).

87. Pub. L. 106–169, 113 Stat. 1882 (1999).

88. 42 U.S.C.A. § 477 (Westlaw 2015).

Article is on social service settings where youth reside. In this context, Transitional Independent Living ("TIL") facilities provide these supportive services in tandem with room and board in a physical building for homeless youth between the ages of sixteen and twenty-one with long-term residential services and wraparound supports.[89] In New York City, all TIL Programs are open 24 hours a day, 365 days a year. A young person in need of longer-term residential services must first visit a Crisis Shelter and obtain a referral to TIL facilities. Youth may stay in the TIL facilities for up to eighteen months, although some programs extend the stay up to two years.[90] Services offered at transitional living facilities include: educational programs, vocational training, job placement assistance, counseling, and basic life skills training.[91]

4. Supportive Housing

A supportive housing program is a service that integrates community programs to provide shelter along with other critical resources, including mental health and substance abuse programs for persons who lack adequate housing and may be experiencing other safety needs. Supportive housing tenants have leases or lease-like agreements with a landlord, pay rent, and abide by the terms of their lease.[92] Tenants typically pay 30% of their income toward rent.[93] Tenants also enter into an agreement with the designated service provider for their unit, which might include mental health counseling, help with life skills, relapse support, help with getting an education, help getting and keeping a job, help with parenting, linkage to medical care, crisis management, and help reunifying with family.[94]

B. Institutional or Court-Mandated Social Service Settings

In addition to the voluntary social services described in Part II.A, certain institutional placements are particularly vulnerable to law enforcement

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89. *Transitional Independent Living*, N.Y.C. DEP'T OF YOUTH AND COMMUNITY DEV., www.nyc.gov/html/dycd/html/runaway/independent.shtml (last visited Dec. 1, 2015).

90. *See, e.g.*, *Transitional Housing Program*, ALI FORNEY CTR., http://www.aliforneycenter.org/programs/transitional-living/ (last visited Dec. 1, 2015).

91. *See generally* CHILD WELFARE LEAGUE OF AM. [CWLA], CWLA STANDARDS OF EXCELLENCE FOR TRANSITION, INDEPENDENT LIVING, AND SELF-SUFFICIENCY SERVICES (2005).

92. *Elements of Supportive Housing*, SUPPORTIVE HOUSING NET. OF N.Y., shnny.org/learn-more/what-is-supportive-housing/elements-of-supportive-housing/ (last visited Dec. 1, 2015).

93. *Id.*

94. *Id.*

entry for purposes of search, seizure, or arrest. These settings include residential treatment facilities, group homes, and Supervised Independent Living programs in which young people adjudicated in family court proceedings are placed. The fact that youth are placed in these institutional settings as wards of the state suggests that they have even less of a reasonable expectation of privacy when it comes to their person, room, and belongings.

While secure facilities are indeed a category of institutional placement, this section does not include a discussion of these facilities as they are restricted by construction fixtures designed to physically restrict the movements and activities of juveniles held in the facility.[95] To be sure, law enforcement may enter such facilities, but generally secure facilities are self-regulating and include correctional personnel and internal methods to adjust dispositions in family court proceedings based on delinquent conduct that is alleged to have been committed on facility grounds.

Instead, this section focuses on youth placed in so-called limited-secure, non-secure, and staff secure facilities, which are more likely to involve law enforcement encounters on-premises. The Department of Justice has created wide latitude for supposedly non-secure facilities to avoid application of the federal ban on institutionalization of status offenders. Namely, federal regulations specify that secure detention "does not include facilities where physical restriction of movement or activity is provided solely through facility staff."[96]

Indeed, the Department of Justice has sanctioned this form of institutionalization by staff secure facilities from the definition of "secure" detention, such that a staff secure facility is deemed:

> [A] residential facility (1) which does not include construction features designed to physically restrict the movements and activities of juveniles who are in custody therein, but any such physical restriction of movement or activity is provided solely through staff; (2) which may establish reasonable rules restricting entrance to and egress from the facility; and (3) in which the movements and activities of individual juvenile residents may, for treatment purposes, be restricted or subject to control through the use of intensive staff supervision.[97]

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95. 42 U.S.C.A. § 5603(12)-(13) (Westlaw 2015).

96. 28 C.F.R. § 31.304(b) (Westlaw 2015).

97. U.S. DEP'T OF JUSTICE, OJJDP, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JJDPA OF 2002 52-53 (2010). The term "residential facility pertains to "facilities with the structural and operational capacity to securely detain individuals overnight, and may include sleeping, shower and toilet, and day room areas." Final Revision of the Existing Formula Grants Regulation, 61 Fed. Reg. 65,132 (Dec. 10, 1996).

This functionalist exception to the deinstitutionalization requirement for status offenders also applies to a juvenile placed in a runaway shelter but prevented from leaving due to staff restricting access to exits.[98]

On March 30, 2012, New York passed Close to Home legislation as part of the 2012-2013 New York State Budget designed to provide young people who are adjudicated as juvenile delinquents in New York City Family Court with a continuum of community-based supervision and program options. Close to Home authorizes the City of New York to provide a broad range of services to young people who, for public safety reasons, must be confined in non-secure residential placements located close to their communities.[99] Each non-secure facility has been designed to ensure the safety and security of its residents, staff, and members of the surrounding community.[100] Programs maintain low staff-to-resident ratios at all times, and facilities are equipped with security cameras, delayed doors, and alarms on all windows and doors.[101]

1. Residential Treatment Facilities

A residential treatment facility is a structured 24-hour facility that provides a range of therapeutic, educational, recreational and support services for youth by a professional, interdisciplinary team.[102] In contrast to group homes, the primary emphasis of residential treatment facilities is to provide residents with treatment for mental health problems, in addition to also providing for their basic needs.[103] For purposes of federal law, these facilities are classified as psychiatric facilities, but generally residential treatment facilities are less restrictive and less intensively staffed than psychiatric centers and are operated by non-profit agencies.[104]

In New York State, as in many other states, where a young person has been adjudicated as a juvenile delinquent and is in the custody of a local social service agency such as the Administration for Children's Services,

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98. U.S. DEP'T OF JUSTICE, OJJDP, *supra* note 103, at 52.

99. N.Y.C. ADMIN. FOR CHILDREN'S SERVS., CLOSE TO HOME: AN OVERVIEW OF NON-SECURE PLACEMENT 1 (2012), www.nyc.gov/html/acs/downloads/pdf/Close_to_Home_12.pdf.

100. *Id.* at 88.

101. *Id.* at 79.

102. HHS, *supra* note 9.

103. *See generally* Brady C. Bates, Diana J. English & Sophia Kouidou-Giles, *Residential Treatment and Its Alternatives: A Review of the Literature*, 26 CHILD & YOUTH CARE FORUM 7 (1997).

104. N.Y. STATE OFFICE OF MENTAL HEALTH, RESIDENTIAL TREATMENT FACILITIES – WESTERN REGION 1 (2011).

they may be placed in a residential treatment facility. Nationwide, the Office of Juvenile Justice and Delinquency Prevention of the United States Department of Justice founds in its biennial Juvenile Residential Facility Census that residential treatment centers made up 39% of all facilities surveyed and held 42% of the nation's juvenile offenders.[105]

2. Group Homes

A group home is a residence intended to meet the needs of children who are unable to live in a family setting and do not need a more intensive residential service, and normally house between 4 and 12 youth.[106] A group home placement is commonly referred to as a non-secure or staff secure placement, because they generally do not include construction fixtures designed to physically restrict the movements and activities of juveniles held in the home.

3. Supervised Independent Living Programs

A Supervised Independent Living ("SIL") program is a placement in which a youth sixteen or older who is still in the care of a county child welfare agency lives in settings where they are allowed age-appropriate freedom and responsibility while also receiving the supervision and guidance of the child welfare agency or a service provider.[107] SIL settings may include: scattered-site or semi-supervised apartments, clustered or supervised apartments, shared homes, adult roommate apartments, specialized foster homes, host homes, boarding homes, or subsidized housing.[108] A SIL placement may have varying levels of supervision: ranging from minimal, such as off-site case management, to more restrictive, such as live-in or overnight staff supervision in an agency-owned building.[109]

IV. LEGAL STANDARDS REGULATING LAW ENFORCEMENT ENTRY

The Fourth Amendment to the United States Constitution guarantees the right to be free from unreasonable search, seizure, and arrest.[110] This

105. SARAH HOCKENBERRY ET AL., JUVENILE RESIDENTIAL FACILITY CENSUS (2012), www.ncjj.org/pdf/247207.pdf.

106. HHS, *supra* note 9.

107. JUVENILE LAW CTR., *supra* note 45.

108. *Id.*

109. *Id.*

110. U.S. CONST. amend. IV (establishing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the

Article focuses on nationally applicable standards regulating law enforcement entry in social service settings for purposes of responding to an emergency, executing a search, or conducting an arrest. Where New York State and local law require additional protections, they are mentioned briefly to supply additional context.

The various social service settings where young people encounter law enforcement provide a range of competing standards governing law enforcement entry. While a tenant in a supportive housing apartment has the same rights as any tenant, for instance, a drop-in center, emergency or crisis shelter, or transitional living program present more complicated circumstances. For this among other reasons, it is critical that youth-serving professionals in all social service settings adhere to the strict warrant-checking, entry protocol, and meticulous documentation practices described *infra* Part IV to preserve their client's ability to challenge deficiencies in a warrant in order to suppress evidence in a criminal trial, bring an individual or organizational civil suit for police misconduct, or file a complaint with a local law enforcement oversight entity.

A. Validity of a Warrant

A warrant in the Fourth Amendment context is an order signed by a magistrate or judge that permits a law enforcement officer to perform a search, seizure, or arrest.[111] The proper evaluation of a warrant for its validity is perhaps the most important role for a youth-serving professional confronted with law enforcement efforts to enter a social service setting. It is a critical tool of any criminal legal defense to suppress evidence, particularly those offenses brought against LGBTQ youth, such as drug or weapons possession, petit larceny, or the possession of condoms as evidence of a prostitution related offense.

To obtain a warrant, a law enforcement officer must convince a neutral magistrate that he has probable cause that contraband—evidence of a crime or a person to be arrested—will be found in the area searched. The Fourth Amendment requires that a search warrant specify with "particularity" the place to be searched and the items or persons to be seized,[112] but in certain cases a misdescription of a person or the premises may not render the warrant invalid.[113] For instance, law enforcement may obtain and enforce a valid arrest warrant using an incorrect name, if supplemented by a

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persons or things to be seized.").

111. BLACK'S LAW DICTIONARY (10th ed. 2014).

112. U.S. CONST. amend. IV.

113. Jay M. Zitter, Annotation, *Error, in Either Search Warrant or Application for Warrant, As To Address of Place To Be Searched as Rendering Warrant Invalid*, 103 A.L.R. 5th 463 (2002).

photograph or adequate description, including characteristics such as height, weight, and age[114] or even where an error in an arrestee's surname exists, but the warrant correctly designated the defendant's address.[115] A youth-serving professional should therefore examine and record the terms of the proffered warrant to verify that the warrant specifies the address where the person is located, including the floor or suite number, and the exact spelling of the person named for arrest.

In executing the warrant, law enforcement must comply with the terms and limitations contained in the warrant, such that officers "search" only the areas and items authorized by its language—but note the discussion *infra* Part III.B for variations on this rule, particularly the plain view exception, which permits police who are lawfully on the premises or in a position to observe items that are discovered in plain view to seize items that may be evidence of a crime or contraband. Law enforcement may also comply with the terms of the warrant by including the hours during which the warrant may be executed. In New York State, a search warrant may be executed any day of the week, but only between the hours of 6:00 a.m. and 9:00 p.m.,[116] unless a "nighttime" or "anytime" search is authorized by a judge based on the warrant's allegations supporting a departure from the general rule.[117] Similarly, law enforcement officers executing a warrant must generally "knock and announce" their presence and purpose before forcibly entering the place to be searched, although where an officer reasonably believes doing so would be futile, dangerous, or would inhibit the investigation they may do so.[118] In New York State, among others, an officer may apply for a "no-knock" warrant in special circumstances. A youth-serving professional should therefore closely monitor and record the officers' compliance with a warrant's terms, including any departure from the areas or items specified in the warrant (e.g., opening a locker when the warrant specifies a common room where the locker is located), as well as any violation of the approved time for the warrant's execution or the manner of its service.

Each jurisdiction may have categorical time limitations adopted by statute or rule that may be written into a warrant. For instance, the Federal Rules of Criminal Procedure require that in all cases except for a tracking-device warrant, a federal warrant to search for and seize a person or property must command the officer to "execute the warrant within a

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114. People v. Rawluck, 198 N.E.2d 266, 266 (N.Y. 1964).

115. People v. Brooks, 388 N.Y.S.2d 450, 452 (App. Div. 1976).

116. N.Y. CRIM. PROC. LAW § 690.30(2) (LexisNexis 2015).

117. *Id.* § 690.45[6]; § 690.35[4][a]; § 690.40[2].

118. Wilson v. Arkansas, 514 U.S. 927, 933 (1995).

specified time no longer than 14 days,"[119] and New York State provides that a search warrant must be executed within ten days of issuance.[120] A youth-serving professional should therefore clearly refuse—but not obstruct or resist—entry by an officer without a timely warrant.

For reasons discussed in more detail *infra* Part III.C, specifically the consent search and plain view exceptions to the warrant requirement, it is vitally important that youth-serving professionals not permit entry to law enforcement without first asking the officer to produce a warrant and checking its validity, or obtaining the officer's explicit affirmation that a valid warrant exists. Even then, it is important that the youth-serving professional nonetheless state "You cannot enter. You do not have consent to enter" when stepping aside because a judge might later determine that the warrant was invalid for whatever reason, but without stating non-consent, a person may be interpreted to have consented to the police entering the space.

With that said, it is unlikely that any amount of training can prepare a youth-serving professional to best evaluate the validity of law enforcement entry *without* a warrant in hand. While evaluating a warrant can be as simple as checking for things such as timeliness, the correct spelling or description of the person to be arrested, the floor and unit number of the space to be searched, and whether a judge or magistrate signed the warrant, there are a number of well-established exceptions that may categorize the law enforcement action in question to be a non-search within the meaning of the Fourth Amendment or that the action itself was reasonable as discussed *infra* Part III.B-C, which renders entry lawful, certain evidence admissible in a criminal or other proceeding, and potentially bars a civil suit for police misconduct. By following the best practices described in more detail *infra* Part IV, however, youth-serving professionals can still comply with an ostensibly valid warrant without putting clients or staff at further risk, while still preserving this crucial suppression argument that may at the very least offer room for a defense attorney to negotiate down the severity of the charge.

B. Warrantless On-Premises Arrests

Before detailing the requirements for a warrantless search in a social service setting, it is important to note the slightly different standard applicable to a warrantless *arrest*. In a public place a law enforcement officer does not need a warrant to arrest a person who commits a misdemeanor in their presence or where the officer has probable cause to

119. FED. R. CRIM. P. 41(e)(2)(A)(i).

120. N.Y. CRIM. PROC. LAW § 690.30(1).

believe the person committed a felony, whether or not the felony occurred in their presence, if there are reasonable grounds for making the arrest.[121] A "public place" can be a sidewalk, street, or even the vestibule of an apartment building.[122]

However, law enforcement is required to have a warrant to execute any arrest in a person's home or dwelling absent one or more of the exceptions to the warrant requirement described *infra* Part III.C. Where the suspect to be arrested is sought out in the residence of a third party, such as a friend, relative, or social service setting, law enforcement must obtain *both* an arrest and search warrant.

C. Warrantless On-Premises Searches and Seizures of a Person or Property

While it is not unheard of that law enforcement secures a search and arrest warrant for social service settings, it is far more common that police will rely on psychological tactics to gain entry. The Supreme Court has held that warrantless searches are presumptively unreasonable and any evidence seized without a warrant will be suppressed.[123] The Court in *Katz v. United States* famously stated that the warrant requirement is subject "only to a few specifically established and well-delineated exceptions," but subsequent case law has drastically expanded the number and breadth of these exceptions.[124] This Article reviews only those exceptions to the warrant requirement most applicable to social service settings, and therefore does not discuss important exceptions and variations applicable to: *Terry* stop-and-frisks; protective sweeps; administrative or civil warrants; automobile searches; plain feel, smell, and hearing; border searches; and foreign intelligence surveillance. The Article similarly does not discuss the exclusionary rule justifying suppression of evidence in detail, or related exceptions to exclusion of evidence such as independent source or officer "good faith."

The Fourth Amendment protects only a person's *reasonable* expectation of privacy in a protected area or item or a physical intrusion of property.[125] Where the item or area searched does not readily conform to a traditionally protected category—such as one's person (e.g., body, clothing worn at time of search), residence (e.g., apartment, hotel room), papers (e.g., letters,

121. United States v. Watson, 423 U.S. 411, 423-24 (1976).

122. United States v. Santana, 427 U.S. 38, 44 (1976).

123. Kyllo v. United States, 533 U.S. 27, 32 (2001).

124. Katz v. United States, 389 U.S. 347, 357 (1967).

125. United States v. Jones, 132 S. Ct. 945, 947 (2012). *See also* Erica Goldberg, *How United States v. Jones Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 62 (2012).

personal correspondence), or personal belongings (e.g., purse, backpack, locker)—a court may weigh the evidence and determine that the governmental intrusion was not a "search" within the meaning of the Fourth Amendment. The class differential in the Fourth Amendment's conception of "privacy" is readily apparent.[126] For example, courts have removed from Fourth Amendment protection homeless encampments and cardboard shelters on both private and public land.[127]

Even if a court determines there is a "search" within the meaning of the Fourth Amendment, they may still decide based on the context within which a search takes place that it is not "unreasonable," after balancing a subject's privacy interests against legitimate interests of law enforcement.[128] A classic example of an exception to the warrant requirement based on reasonableness is an inventory search. This warrant exception, commonly applied to booking an arrestee or conducting a search of an impounded or seized car, allows police to perform a search of a person or items lawfully in police control, where the search is conducted according to a routine administrative policy and not done solely to look for evidence of criminal conduct.[129] Similarly, DNA identification, fingerprinting, and photographing of a lawfully arrested person have been found reasonable searches, because that information can be considered part of a routine booking procedure and an arrestee in law enforcement custody has a diminished expectation of privacy.[130]

1. The Consent Search Exception

The Fourth Amendment provides protection only to a person whose privacy interest is affected by the search or seizure. This means that where a youth-serving professional gives consent to law enforcement to enter, youth themselves may have more limited grounds to challenge their arrest or suppress the evidence seized. Consent searches are perhaps the most common tactics relied upon by police, with one study finding that over 90% of warrantless police searches are accomplished using the consent exception to the Fourth Amendment's warrant requirement.[131]

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126. *See generally* Michele E. Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389 (2012).

127. *See id.* at 1393 n.34 (collecting cases). *But see* Lavan v. City of Los Angeles, 797 F. Supp. 2d 1005, 1009 (C.D. Cal. 2011), *aff'd*, 693 F.3d 1022 (9th Cir. 2012) (holding that the Fourth Amendment protects a homeless person's unattended personal belongings from unreasonable seizures).

128. Maryland v. King, 133 S. Ct. 1958, 1978 (2013).

129. *See* Illinois v. Lafayette, 462 U.S. 640, 643-44 (1983).

130. *King*, 133 S. Ct. at 1980.

131. Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for*

For a consent search to be valid, consent must be voluntary and intelligent, but a police officer does not need to instruct the subject that she has the right to refuse.[132] Whether a court will find that consent is voluntary or intelligent is influenced by the presence of duress or coercion, either express or implied, as well as the age of the subject and the level of education or intelligence.[133] The Supreme Court has found that certain police tactics are coercive such that they prevent voluntary consent, specifically that "when a law enforcement officer claims authority to search a home under a warrant, he announces, in effect, that the occupant has no right to resist the search. . . . Where there is coercion, there cannot be consent."[134]

The special circumstance of social service settings—where third party staff or co-occupant clients or residents may be asked by police to permit police entry—raises especially important questions for youth-serving professionals. If a police officer obtains consent to search the premises from someone who lacks the actual authority to grant it, the consent is still valid if the officer reasonably believed the consenting party had actual authority.[135] This exception, known as the apparent authority rule, is further complicated where premises are shared, as in many social service settings. When a residence is shared, *any* occupant can consent to search of common area on the premises, but if co-occupants who are also present disagree regarding consent to search, the objecting party prevails as to the area over which the parties share control.[136]

A youth-serving professional should never consent to law enforcement entry, but instead should request the production of a warrant and evaluate its validity as discussed *supra* Part III.A. In the event that law enforcement threatens to or does use force to obtain entry anyway, it is important that staff repeat "You do not have permission to enter." If law enforcement seeks to rely on a client's invitation to enter, youth-serving staff should still not consent to entry where other clients' Fourth Amendment rights would be at risk. Staff may also seek to negotiate a compromise with law enforcement, such that they inform a young named in a warrant of its contents and offer to help plan for his or her safety, escort him or her when taken into custody, and appear at arraignment and subsequent court dates to advocate on his or her behalf. In the congregate-care supportive housing

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Understanding the Consent Searches Doctrine, 80 IND. L.J. 773, 773 (2005).

132. Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

133. *Id.* at 225-26.

134. Bumper v. North Carolina, 391 U.S. 543, 550 (1968).

135. Illinois v. Rodriguez, 497 U.S. 177, 183 (1990).

136. Georgia v. Randolph, 547 U.S. 103, 120 (2006).

context, consent is complicated by the fact that tenants are leaseholders who can permit entry to the police if they so choose. It is advisable that staff confirm a tenant's permission for the police to enter in writing at the time consent is given, and include applicable disclaimers to limit the scope of consent so that the search can only extend to areas such as the youth's own apartment and those common spaces necessary for police to traverse in order to enter the apartment.

2. Exigent Circumstances: The "Hot Pursuit," Emergency Aid, and Evanescent Evidence Exceptions

One broad category of exceptions to the warrant requirement is commonly referred to as exigent circumstances—meaning circumstances that exist in emergency situations where there is a serious risk to other people or where evidence may be destroyed or disappear in the time it takes to obtain a warrant.[137] The exigent circumstances exceptions to the warrant requirement include "hot pursuit," emergency aid, and evanescent evidence.

Under the first such exception, law enforcement may enter the home of a suspect or third party when in "hot pursuit" of a fleeing felon, and any evidence of criminal activity discovered in plain view while searching for the suspect on-premises is admissible. However, there should be an immediate or continuous pursuit of the arrestee from the scene of the crime, and the gravity of the crime committed is a significant factor in deciding whether the search was justified.[138] For example, the Supreme Court upheld a warrantless home search where the police were reliably informed that an armed robbery suspect entered a specific house five minutes earlier,[139] but in another case ruled that a driving under the influence charge punishable by fine but not imprisonment was not sufficiently serious to justify warrantless entry into the arrestee's home to conduct an arrest.[140] A youth-serving professional confronted with officers' explanations that they are in "hot pursuit" should therefore inquire and record specifics of the alleged criminal activity and any time lapse between the alleged criminal activity and the officers' arrival at the social service setting.

Another commonly cited exception is the "emergency aid" rule, by which police may enter a home or dwelling without a warrant when there is an objectively reasonable basis for believing a person inside is in need of

137. *Warrant*, *supra* note 117.

138. Welsh v. Wisconsin, 466 U.S. 740, 754 (1984).

139. Warden v. Hayden, 387 U.S. 294, 298-99 (1967).

140. *Welsh*, 466 U.S. at 754.

emergency aid to address or prevent imminent injury.[141] Clear cases of circumstances justifying warrantless entry for emergency aid include the sound of a gunshot coming from a home or smoke pouring out of a building. The Supreme Court, in one example, upheld the emergency aid exception where police responded to a complaint of a "loud party" and observed through a window upon arrival an ongoing physical altercation between an adult and a juvenile in which the adult was punched in the face, drawing blood.[142]

A third exception is the "evanescent evidence" exception, where law enforcement may perform a minimally intrusive search where the evidence would dissipate or disappear in the time it would take to obtain a warrant. This exception is commonly invoked to justify "searches" of persons involving fingernail and DNA evidence, as well as drug and alcohol testing in certain circumstances, on the theory that the evidence may be destroyed or disappear by the time police obtain a warrant.[143] Similar to the "hot pursuit" exception, a court may consider the severity of the crime contemplated in deciding whether warrantless entry is justified to prevent destruction of evidence.[144] A youth-serving professional confronted with officers' explanation that they are attempting to prevent the destruction of evidence should therefore inquire and record specifics of the alleged criminal activity.

3. The Plain View Exception

The plain view exception to the Fourth Amendment warrant requirement is particularly relevant to social service settings. It may allow police to seize incriminating evidence in plain view after entering to execute an arrest—but not search—warrant, provide "emergency aid," or upon the consent of an occupant. For the plain view exception to apply, however, the police must lawfully be on the premises or in a position to observe items that are discovered in plain view, and it must be immediately apparent to the police that the items in plain view properly can be seized as they may be evidence of a crime, contraband, or otherwise subject to seizure.[145]

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141. Brigham City v. Stuart, 547 U.S. 398, 406-07 (2006).

142. *Id.* at 406.

143. Cupp v. Murphy, 412 U.S. 291, 296 (1973) (upholding warrantless search of evidence found underneath a murder suspect's fingernails).

144. *Welsh*, 466 U.S. at 754.

145. Coolidge v. New Hampshire, 403 U.S. 443, 464-73 (1971).

4. Special Needs Exception

As stated previously, whether a search or seizure is "reasonable" within the meaning of the Fourth Amendment depends on the context within which a search takes place. Courts have articulated a "special needs" exception to the warrant requirement where an investigation's primary programmatic purpose is civil or administrative in nature, such that the need to search against outweighs the constitutional intrusiveness of the search.[146]

A subcategory of these cases turn on the diminished expectation of privacy attributable to a person who bears some relationship to the state. This trend is particularly relevant to those young people in institutional placements such as residential treatment centers, group homes, or supervised independent living pursuant to a court order. For instance, courts have permitted suspicionless home visits as a condition of receiving public benefits,[147] routine searches of inmate cells,[148] random drug testing of students in athletic and extracurricular programs,[149] and warrantless police entry where a person obtains a "keep the peace" order for a police escort to remove his or her personal belongings from her former home with the assistance of a law enforcement officer.[150]

5. The Search Incident to a Lawful Arrest Exception

Yet another exception to the Fourth Amendment warrant requirement is triggered where a police officer performs a lawful, custodial arrest, and conducts a search to protect his own safety and preserve evidence.[151] The search must be contemporaneous in time and place with the arrest, and the scope of the search is limited to an arrestee's body, clothing, and any bags, containers, or other personal belongings within the suspect's immediate control.[152] The Supreme Court, for instance, permitted introduction of evidence seized in a search incident to a lawful arrest, where an officer removed a cigarette box from a suspect's pocket and discovered heroin contained within it upon opening it.[153]

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146. Henderson v. City of Semi Valley, 305 F.3d 1052, 1059 (9th Cir. 2002) (internal citation omitted).

147. Sanchez v. City of San Diego, 464 F.3d 916, 928 (9th Cir. 2006).

148. Hudson v. Palmer, 468 U.S. 517, 530 (1984).

149. Bd. of Educ. v. Earls, 536 U.S. 822, 838 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995).

150. *Henderson*, 305 F.3d at 1059.

151. United States v. Robinson, 414 U.S. 218, 224 (1973).

152. *Id.*

153. *Id.* at 223-24.

In contrast, states may adopt more restrictive procedures by state constitution or statute. For instance, the New York Court of Appeals held in *People v. Gokey* that under Article 1, section 12 of the New York State Constitution, police may only search a closed container incident to a lawful arrest when they have a reasonable belief that the container search is necessary to protect themselves or to prevent the destruction of evidence.[154]

D. Criminal Liability for Refusal to Admit Law Enforcement

It is not uncommon that police with or without a valid reason to enter a social service setting may threaten staff with arrest for obstruction for refusing to admit them onto the premises. In New York, the offense of Obstruction of Governmental Administration in the Second Degree, a Class A misdemeanor, occurs when a person "intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act. . . ."[155] It is also important to note the offense of Resisting Arrest, also a Class A misdemeanor, which occurs when a person "intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person."[156]

In New York these charges require that police have lawful authority to conduct an arrest or demand entry in the first place.[157] In other words if police attempt to gain entry without a valid warrant or exigent circumstances as described *supra* Parts III.B-C, a refusal to permit entry, without more, does not constitute obstruction or resisting arrest. Where a law enforcement officer is however enforcing a valid arrest warrant, the refusal of a staff member to allow police entry may be grounds for obstruction if police reasonably believe that the subject of the warrant is present in the residence.[158] In the context of exigent circumstances, there are a variety of qualifying exceptions to the warrant requirement discussed *supra* Parts III.B-C that would apply to this scenario. A typical justification, for instance, for police officers who have not secured warrants before attempting entry in social service settings is the "emergency aid." Yet in one recent case, an obstruction charge was dismissed as facially insufficient to trigger the "emergency aid" exception, where the

154. 457 N.E.2d 723, 724 (N.Y. 1983).

155. N.Y. PENAL LAW § 195.05 (LexisNexis 2015).

156. *Id.* § 205.30.

157. People v. Lupinacci, 595 N.Y.S.2d 76, 77 (App. Div. 1993).

158. People v. Paige, 911 N.Y.S.2d 176, 177 (App. Div. 2010).

information alleged only that the police responded to the apartment due to a radio run and heard crying and shouting inside, but there was no indication that the shouting suggested anyone was in imminent danger, and those present in the apartment refused the police entry.[159]

A youth-serving professional should also be prepared to withstand police agitation up to and including threats to arrest them. It is critical that staff have adequate time to evaluate whether the police have presented a valid warrant. Despite what the officer may say to the contrary, even in situations where staff believe that in this particular case the police have a valid warrant or exigent circumstances exist to justify entry, they may still minimize the scope of the search, accompany the police, warn of police presence to clients or members inside the facility, and take any and all notes or recordings so long as the staff does not interfere using intimidation, physical force or interference, or any independently unlawful act.

If despite the best efforts of the appropriate personnel, police nonetheless forcibly enter the premises, staff should not physically interfere with the police but instead state loudly and clearly "You cannot enter. You do not have consent to enter" and follow the appropriate facility emergency, staff-police escort, and incident reporting protocols. Taking this approach allows staff to protect the Fourth Amendment rights of their clients and members while also minimizing their personal exposure to prosecution and conviction for obstruction or resisting arrest.

V. PROFESSIONAL MALPRACTICE AND CRIMINAL LIABILITY FOR ACTS RESULTING IN FALSE ARREST OR OTHER POLICE MISCONDUCT

It is possible that counselors, social workers, security guards, and other professional staff may themselves initiate calls to police to request their assistance or the arrest of their clients or tenants, as well as the guests of tenants. Despite the clear danger posed to these young people by police, it is often the case that facility personnel themselves independently initiate police contact. This conduct, if not properly supervised and recorded, may risk incurring liability. For instance the unauthorized disclosure of confidential information and the false reporting of a crime may subject an organization and its staff to liability, up to and including revocation of a professional license or certification, criminal prosecution, or both.

In New York State as in other states, counselors, social workers, and security guards are licensed according to state law, and so any unlawful act

159. People v. Holmes, 997 N.Y.S.2d 669, 669 (Crim. Ct. 2014). *See also* People v. Briggs, 890 N.Y.S.2d 370, 371 (Crim. Ct. 2009) (finding defendant's refusal to admit the police without a warrant did not amount to obstruction despite allegations that officers heard "fighting and shouting" within the apartment).

regardless of whether an arrest was made can result in the revocation of a professional license.[160] This is especially true for conduct that bears a relationship to the duties of the professional in question. The regulatory definition for "unprofessional conduct" governing licensed social work in New York State includes "willfully making or filing a false report . . . or willfully impeding or obstructing such filing, or inducing another person to do so."[161] In contrast the law specifically states that the principal duties of a security guard include "deterrence, observation, detection, and/or reporting unlawful or unauthorized activity," meaning that a security guard is in breach of this duty when they falsely report a crime.[162] Separate from concerns of unprofessional conduct, the false reporting of a crime or offense is one punishable by criminal law. In New York even the lowest degree of this offense, the third degree, carries an "A" misdemeanor and is punishable by up to one year in jail.[163]

A. Breach of Confidentiality

There is a serious risk of breach in confidentiality posed by youth-serving professionals, particularly physicians and mental health professionals, when they interface with third parties such as security guards and law enforcement. The violation of the federal privacy and security rules established by the Health Insurance Portability and Accountability Act ("HIPAA") of 1996 may result in an investigation by the Office for Civil Rights of the United States Department of Health and Human Services.[164] The Privacy Rule requirements contained in HIPAA apply to "health care providers" and their "business associates" as defined by regulation. A covered health care provider is one that transmits health information electronically for the purposes of a transaction covered under the HIPAA Transaction Rule, and furnishes, bills, or is paid for health care in the normal course of business.[165] A "business associate" is a person or entity, other than a member of the workforce of a covered entity, who performs functions or activities on behalf of, or provides certain services to, a covered entity that involve access by the business associate to protected health information.[166] A permanent supportive housing provider is a business associate under HIPAA when it provides a service to a covered

160. N.Y. GEN. BUS. LAW § 89-f (6) (LexisNexis 2015).

161. N.Y. EDUC. LAW § 6530 (LexisNexis 2015).

162. N.Y. GEN. BUS. LAW § 89-f.

163. N.Y. PENAL LAW § 240.50 (LexisNexis 2015).

164. Heath Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-91, 110 Stat 1936 (1996).

165. 45 C.F.R. § 160.102.

166. *Id.* § 160.103.

entity and receives, uses, or discloses a client's PHI in the process.[167]

The Privacy Rule requirements provide that without a court order or written authorization from the client, a covered entity and its staff can only disclose protected health information to law enforcement in certain circumstances. Even then, the Privacy Rule requires adherence to the principle of "minimum necessary" use and disclosure, such that a covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.[168] A covered entity may disclose protected health information to law enforcement officials for law enforcement purposes where: (1) required by law (including court orders, court-ordered warrants, subpoenas) and administrative requests; (2) to identify or locate a suspect, fugitive, material witness, or missing person; (3) in response to a law enforcement official's request for information about a victim or suspected victim of a crime; (4) to alert law enforcement of a person's death, if the covered entity suspects that criminal activity caused the death; (5) when a covered entity believes that protected health information is evidence of a crime that occurred on its premises; and (6) by a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime.[169]

A violation of a federal Privacy Rule requirement may result in civil monetary penalties against a covered entity of $100 per failure to comply.[170] A person who knowingly obtains or discloses health information in violation of HIPAA faces a fine of $50,000 and imprisonment up to one year.[171] This penalty increases to a fine up to $100,000 and imprisonment up to five years if the conduct involves "false pretenses," and it increases to a fine of up to $250,000 and up to ten years imprisonment if the conduct involves the intent to sell, transfer or use individually identifiable health information "for commercial advantage,

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167. PUBLIC COUNSEL, ANNOTATED BUSINESS ASSOCIATE AGREEMENT FOR PERMANENT SUPPORTIVE HOUSING DEVELOPERS 1 (2015), http://www.publiccounsel.org/tools/assets/files/0652.pdf.

168. 45 C.F.R. §§ 164.502(b), 164.514 (d).

169. *Id.* § 164.512(f). *See also id.* § 164.512(j) (providing that covered entities may disclose protected health information that they believe is necessary to prevent or lessen a serious and imminent threat to a person or the public, when such disclosure is made to someone they believe can prevent or lessen the threat).

170. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended at 42 U.S.C.A. §1320d-5 [Westlaw 2015]).

171. *Id.*

personal gain, or malicious harm."[172]

While many social service settings are familiar with federal HIPAA, local or state protections may exceed federal law. New York is particularly protective of patient medical information.[173] New York law provides special protection to mental health[174] and HIV-related information.[175] The coverage of the New York scheme is also realtively broad, as for instance New York defines "mental disability" to include alcoholism, substance dependence, and chemical dependence.[176] New York law also carries added protection for patients relative to federal standards in the protection of patient medical information from law enforcement scrutiny. In contrast to the HIPAA exception for disclosures required by law, court order, subpoena, or administrative request, for instance, New York State requires a court order for disclosure of mental health information.[177] New York also limits disclosure to law enforcement for purposes of identifying or locating a suspect, fugitive, material witness, or missing person, or in response to a law enforcement request for information about a victim of a crime, to "identifying data concerning hospitalization."[178] A youth-serving professional in New York is therefore further limited in their ability to involve law enforcement, such that it may only disclose to law enforcement protected health information that is minimally necessary to show evidence of a crime that occurred on its premises or against its staff. The reasons for such a disclosure should be fully documented in clinical and facility records.

B. Involuntary Commitment to a Hospital or Psychiatric Facility

Under New York's Mental Hygiene Law, individuals may, under certain circumstances, be involuntarily admitted to a mental health facility to receive specialized care.[179] There are two categories of procedures most often used by social service settings to attempt involuntary commitment in New York. In each case, a licensed provider or security guard may face license revocation or criminal prosecution for departing from the standard for involuntary commitment.

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172. *Id.*

173. N.Y. PUB. HEALTH LAW § 2803-c(1)(3)(f) (LexisNexis 2015).

174. N.Y. MENTAL HYG. LAW §§ 13.13, 13.16 (LexisNexis 2015).

175. N.Y. PUB. HEALTH LAW § 2782. *See also id.* § 2783(1)-(2) (providing that the unauthorized disclosure of HIV-related information may be punished by a $5,000 fine for each occurrence, and the act is punishable as a misdemeanor).

176. N.Y. MENTAL HYG. LAW § 1.03(3).

177. *Id.* § 33.13.

178. *Id.*

179. *Id.* § 9.27.

The "two physician certificate" procedure provides that a hospital may receive a patient for a psychiatric evaluation upon the certificates of two examining physicians, accompanied by an application for the admission of such person made within ten days prior to such admission.[180] The application itself however may be filed by a variety of actors, including a person who resides with the person alleged to need commitment, a police officer, or an officer of any public or chartable institution or agency in which the person alleged to be in need of commitment resides.[181]

The standard for evaluation of an involuntary admission on medical certification in New York is whether the person has a mental illness for which care and treatment in a mental hospital is essential, the person's judgment is too impaired to understand the need for such care and treatment, and as a result of the mental illness, the person poses a substantial threat of harm to self or others.[182] This may include the person's refusal or inability to meet his or her essential need for food, shelter, clothing or health care, or the person's history of dangerous conduct associated with noncompliance with mental health treatment programs. The examining physician must consider alternative forms of care and treatment that might be adequate to provide for the person's needs without requiring involuntary hospitalization.[183] A patient may be held involuntarily up to sixty days, but within sixty days from the date of commitment a hospital must apply for a court order of retention, which the person held may request a hearing to challenge.[184]

The "emergency" involuntary commitment procedure is more common, as it does not require a formal application. The "emergency" procedure chosen may trigger different time periods of commitment. If the person who is held is brought under the first form of emergency commitment, they are entitled to a psychiatric evaluation within forty-eight hours of hospitalization, and a maximum of fifteen days from the date of commitment.[185] However, if the person subject to an "emergency" commitment is brought to a Comprehensive Psychiatry Emergency Program, they must be evaluated within six hours by a staff physician and within twenty-four hours by a staff psychiatrist, which may result in being held up to seventy-hours hours before discharge. However the patient may be subsequently held if determined to meet the involuntary or emergency

180. *Id.* § 9.27(a)-(b).
181. *Id.* § 9.27.
182. *Id.* § 9.01.
183. *Id.* § 9.27(d).
184. *Id.* § 9.33.
185. *Id.* § 9.39(b).

standards previously mentioned, and admitted to an appropriate facility.[186]

The standard for emergency medical commitment requires reasonable cause to believe that the person has a mental illness for which immediate observation, care, and treatment in a hospital is appropriate and which is likely to result in serious harm to him or herself or others.[187] "Substantial threat of harm" is defined as a substantial risk of physical harm to the person as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that the person is dangerous to himself or herself, or a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm.[188]

Unlike the medical certification procedure, the "emergency" involuntary commitment procedures allow for any person to escort and involuntarily commit a person with mental illness to a hospital. The name of the person who escorted will be logged into the hospital's program records, along with details of the circumstances leading that person to admit someone with alleged mental illness to the program.[189]

In the case of social service settings, it is advisable to adopt the strictest of procedures to minimize staff reliance on involuntary commitment, whatever the procedural route taken to obtain it. To this extent, an organization ought to coordinate evaluations with affiliated, but independent, medical and psychiatric staff, if any, and ensure that any physicians or psychiatrists external to the organization that are nonetheless treating the patient are consulted in the decision whether to initiate a commitment procedure or not.

It is also strongly advised that social service settings do not rely on police to involuntarily commit clients or tenants, due to the risk of escalation resulting in injury and the possible addition of criminal charges. When taking a person into custody or transporting them to a hospital pursuant to the New York Mental Hygiene Law, police, ambulance services, and emergency medical technicians are immune from ordinary negligence claims; however, they can be held liable for injuring the arrestee if they are grossly negligent, meaning they cause an injury resulting from a conscious and voluntary disregard of the need to use reasonable care.[190]

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186. *Id.* § 9.40 (e)-(f).

187. *Id.* § 9.39.

188. *Id.* § 9.39.

189. *Id.* § 9.40(a).

190. *Id.* § 9.59. Note, however, that the immunity provision does not apply to the negligent operation of a person to be involuntarily committed in a vehicle resulting in injury.

C. False Reporting of Trespass, Harassment, or Other Criminal Offense

Falsely reporting an incident or crime is punishable by state penal law. In New York, the lowest degree of this offense, the third degree, carries an "A" misdemeanor and is punishable by up to one year in jail.[191] The offense applies where a person "[g]ratuitously reports to a law enforcement officer or agency (a) the alleged occurrence of an offense or incident which did not in fact occur; or (b) an allegedly impending occurrence of an offense or incident which in fact is not about to occur; or (c) false information relating to an actual offense or incident or to the alleged implication of some person therein."[192] In certain circumstances this charge may also be supplemented with others, such as reckless endangerment.[193]

Notwithstanding the offenses of false reporting in the second and first degrees, which deal primarily with false reporting of a fire, explosion, or the release of a hazardous substance, the offense of false reporting in the third degree is not limited in type by the class of incident or crime reported.[194] This Article is therefore somewhat limited in that it is impossible to summarize all potential reportable offenses in the New York Penal Law. It is therefore advisable that social service settings provide advance guidance as well as direct supervision of the reporting of an incident or offense, to be determined on a case-by-case basis.

With that said, there are particular offenses that social service personnel commonly misreport that will be used as models addressed by this Article. While Part IV.B concerned grounds for involuntary commitment in New York, this section provides a brief overview of harassment and trespass law in New York. In pertinent part the New York Penal Law states "a person is guilty of Harassment in the Second Degree when, with intent to harass, annoy, or alarm another person," he or she 1) "strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; 2) follows a person in or about a public place or places; or 3) engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."[195] Harassment in the First Degree occurs when a person "intentionally and repeatedly harasses another person by following

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191. N.Y. PENAL LAW § 240.50 (LexisNexis 2015).

192. *Id.* § 240.50[3].

193. *See, e.g., id.* § 120.20 (providing that "[a] person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.").

194. *See id.* §§ 240.55, 240.60.

195. *Id.* § 240.26.

such person in or about a public place or places or by engaging in a course of conduct or by repeatedly committing acts which place such person in reasonable fear of physical injury."[196] The offenses are admittedly broad, but it is critical that personnel not characterize behavior of their clients as "harassment" that is actually protected behavior, such as freely associating with peers, reporting a wrong committed against them, or appealing an agency decision. In a more specific example of the dangers of youth-serving professionals playing judge and jury, staff may call police claiming a client or member is "harassing" them when the youth records conversations between them. But this is in fact not a criminal offense, as New York adopts a "one party consent" approach to recordings and it is only a crime to record or eavesdrop on an in-person or telephone conversation where no party to the conversation consents.[197]

Another offense that is often misreported by youth-serving professionals, particularly in supportive housing programs, is trespass. Under the New York Penal Law, a person is guilty of trespassing when he or she "knowingly enters or remains unlawfully in or upon premises."[198] The charge may be upgraded to Criminal Trespass in the Third Degree where the alleged trespasser does so in a building or upon real property that is a "public housing project."[199] Finally, the charge may rise to Criminal Trespass in the Second Degree, when a person knowingly enters or remains unlawfully in a "dwelling," meaning "a building which is usually occupied by a person lodging therein at night."[200]

In the case of a supportive housing residence, authority to lawfully remain in common areas is shared by both the landlord and tenant. A guest is only guilty of trespassing when a privilege to remain in the building is revoked by a lawful order to leave that is personally communicated to the trespasser by an authorized person, and the guest then demonstrates no intent to leave.[201]

VI. CONCLUSION

The recommendations advanced by this Article are not intended to be exhaustive, but instead to stimulate the development of comprehensive model standards for youth-serving professionals to preserve the Fourth Amendment and other rights of young people in social service settings.

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196. *Id.* § 240.25.

197. *See id.* §§ 250.00, 250.05.

198. *Id.* § 140.05.

199. *Id.* § 140.10(e).

200. *Id.* §§ 140.00(3), 140.15(1).

201. *See* People v. Wolf, 312 N.Y.S.2d 721, 723 (Dist. Ct. 1970).

This Article is unable to address many policy and practice issues that fall within the ambit of the professional responsibility of LGBTQ youth-serving personnel, such as preventing discrimination in admissions, increasing safety from staff-on-tenant and tenant-on-tenant harassment and abuse, mediating grievances, ensuring due process before program exclusion or restriction determinations, meaningfully involving clients or tenants in service planning and the development of reasonable program rules. These issues—each of which the improper resolution of contributes to the vulnerability of youth to police misconduct—will be addressed in a future writing.

A variety of best practices have been discussed, such as ensuring a staff escort at all times to monitor and record the characteristics and actions of the officers present; informing the officers that the space caters to persons with mental health issues and demanding that they respect their Emotionally Disturbed Persons policy and refer the matter to a properly trained team in lieu of entry; informing the officers in the case of an arrest warrant that staff will announce to youth in the program that there is an outstanding warrant and offer to escort the young person to ensure better treatment, record any violations, and connect clients to arraignment and court support as well as independent legal representation. Service providers should also establish written staff protocol for police encounters including staff escorting, monitoring, and reporting of police encounters on uniform incident reports, as well as automatic preservation of any relevant evidence, including the preservation of CCTV footage and witness statements.

The danger of unfettered access to social service settings by law enforcement is perhaps better illustrated not by law and policy, but by the circumstances surrounding a recent police-involved killing in New York City. On August 24, 2015, Harold Carter and Vicente Matias, two veteran detectives of the 26th Precinct of the New York City Police Department, searched for David Felix on information that he had snatched a former girlfriend's purse.[202] Carter and Matias buzzed the front office of a twenty-bed supportive housing program run by The Bridge on a weekend night in plain clothes, while The Bridge building is staffed by a team of one, and were told that David has been diagnosed with schizophrenia. Despite clear instructions in the NYPD Patrol Guide to officers: "Do not attempt to take

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202. The following three paragraphs were published in an op-ed written by the Author and Marissa Ram for *The Guardian*. *See* Brendan M. Conner & Marissa Ram, *David Felix: Jailed by an Unjust System, Failed by City Services, Killed by Police*, THE GUARDIAN, June 10, 2015, http://www.theguardian.com/commentisfree/2015/jun/10/david-felix-immigration-mental-illness-killed-by-police.

[emotionally disturbed persons] into custody without the specific direction of a supervisor," and to "attempt to isolate and contain [the person] while maintaining a zone of safety until arrival of a patrol supervisor and Emergency Service Unit personnel," the officers attempted to take David into custody without supervision or more skilled assistance.[203] The detectives told the staff member that she could not call a supervisor for approval to let them in, pushed through her protests, and headed up to the sixth floor. It was not reported whether the detectives presented a valid arrest warrant to enter David's building, let alone his apartment, in which he was a legal tenant, or whether the staff was threatened with arrest if they did not comply.

As detectives entered the room, David yelled "I'm not going!" and fled down the fire escape. Again, in violation of the Patrol Guide, the officers failed to simply contain him until help arrived, instead intercepted him as he attempted to reenter the building from the courtyard. Nameless police officials then described the ensuing scuffle like ring announcers in an ill-fated boxing match, emphasizing its "brutality," using words like "ripped" and "bash" and repeatedly describing it as a "melee" and "battle."[204] David, at twenty-four years-old and 5'10" was said to have wielded a .7-pound VX-800 police radio, which a former detective was quoted as stating it was "like getting hit with a brick."[205] The fact that a brick is five times a police radio's weight and made of concrete was never mentioned. Rather than follow the clearly stated NYPD policy that "[d]eadly force will be used ONLY as a last resort" in such circumstances, Carter turned to it as a first resort rather than utilizing a less-than-lethal weapon such as a Taser or pepper spray.[206]

On May 12, 2015, the City Council held an oversight hearing concerning the Mayor's action plan on mental health and the criminal justice system.[207] One of the key components of the Mayor's plan is the dramatic expansion of housing programs for people who experience homelessness and mental health issues, who are "frequent flyers" of encounters with the criminal

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203. *Id.*

204. J. David Goodman, *Suspect Fatally Shot by Detective in East Village Had Mental Illness and a Troubled Past*, N.Y. TIMES, Apr. 26, 2015, http://www.nytimes.com/2015/04/27/nyregion/suspect-fatally-shot-by-detective-in-east-village-had-mental-illness-and-a-troubled-past.html?_r=0.

205. *Id.*

206. N.Y.P.D. PATROL GUIDE § 216-05 (2010).

207. Luca Marzorati, *Council Questions Administration on Mental Health and Criminal Justice*, POLITICO N.Y., May 12, 2015, www.capitalnewyork.com/article/city-hall/2015/05/8567940/council-questions-administration-mental-health-and-criminal-justice.

legal system, precisely the type of program where David met his death.[208] Yet, due to virtually unfettered access, law enforcement agencies create traumatic and violent interactions with residents in shelters and supportive housing programs. This was a daily reality for David. These critical housing programs must be expanded and protected from warrantless searches and threats, including threats to arrest supportive housing staff seeking to protect residents with mental health diagnoses from potentially deadly encounters with the police.

208. N.Y.C. OFFICE OF THE MAYOR, MAYOR'S TASK FORCE ON BEHAVIORAL HEALTH AND THE CRIMINAL JUSTICE SYSTEM—ACTION PLAN: 2014 14 (2015), www1.nyc.gov/assets/criminaljustice/downloads/pdf/annual-report-complete.pdf.