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Ethics in Criminal Advocacy
30 April 2021

THE ROLE OF THE ZEALOUS ADVOCATE: IMPLEMENTING LGBTQIA+-CONSCIOUS ETHICS IN
JUVENILE CRIMINAL DEFENSE TO COMBAT THE SCHOOL-TO-PRISON PIPELINE¹

I. Introduction

The criminal legal system is no stranger to the concept of race-conscious ethics.² However, discussions surrounding other conscious-based ethics in our criminal legal system are scarce. Conscious-based ethics explore the need to understand the hardships a specific group undergoes without blinding oneself to the characteristics of the group. Conscious-based ethics seek out methods that reflect the historical significance and identities of specific groups.

There is a need for LGBTQIA+-conscious practices in the criminal legal system, especially within the juvenile criminal legal system. Youth that identify within the LGBTQIA+ community are more likely to engage with the criminal legal system than heterosexual youth.³ Additionally, LGBTQIA+ youth in the criminal legal system are less likely to receive adequate mental health services.⁴ Implementing LGBTQIA+-conscious ethics within our juvenile criminal legal system may assist in dismantling the school-to-prison pipeline that so many children are forced into. Zealous advocates should be the first line of defense in ensuring that their young

¹ The LGBTQIA+ community encompasses those who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, and ally or asexual with the plus sign to include individuals that do not identify within any of the listed categories. For more information: Michael Gold, *The ABCs of L.G.B.T.Q.I.A. +*, THE NEW YORK TIMES (June 7, 2019), <https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>. See also *LGBTQIA Resource Center*, UNIVERSITY OF CALIFORNIA, DAVIS, <https://lgbtqia.ucdavis.edu/> (last visited Apr. 25, 2021).

² See, e.g., Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 TEX. L. REV. 1585 (1999). That article examines the hardships criminal defense attorneys face regarding the social and racial stereotypes their clients experience in the criminal legal system.

³ *Juvenile Justice: Youth in the Juvenile Justice System*, THE TREVOR PROJECT, <https://www.thetrevorproject.org/get-involved/juvenile-justice/#:~:text=Although%20LGBTQ%20youth%20are%20estimated,sexual%20orientation%20or%20gender%20identity.> (last visited Apr. 15, 2021).

⁴ *Id.*

clients do not fall victim to the criminal legal system.

First, this paper defines race-conscious ethics as an example to better understand how LGBTQIA+-conscious ethics can be beneficial to our criminal legal system.⁵ Next, this paper considers the role of the zealous advocate, what it means to fight for one's client, and other concerns one may have working with an LGBTQIA+ client in connection to Sections 1.2 and 8.4 of the Model Rules of Professional Conduct ("MRPC").⁶ Third, this paper explores the need for LGBTQIA+-conscious ethics in criminal defense by analyzing cases with adult defendants that identify with the LGBTQIA+ community and exploring current LGBTQIA+-focused practices in public defenders' offices and court systems in the United States.⁷ Then, this paper turns its attention to LGBTQIA+ youth in the criminal legal system, looking specifically at how and why it is within the role of the zealous advocate to consider the gender identity and sexual orientation of their younger clients.⁸ Finally, this paper examines the need to implement LGBTQIA+-conscious practices for youth so that the school-to-prison pipeline may be combatted.⁹

II. Understanding Conscious-Based Ethics

a. Race-Conscious Ethics

Conscious-based ethics is the middle ground between either underinclusive or overinclusive methods and practices.¹⁰ To understand the need for LGBTQIA+-conscious ethics in criminal defense, one must first examine the benefits that other conscious-based ethics provide. An easily understandable conscious-based ethics theory is race-conscious ethics. Race-conscious ethics is the middle group between race-based and race-blind policies. Race-based

⁵ See discussion *infra* Section II.a & II.b.

⁶ See discussion *infra* Section III.a, III.b, & III.c.

⁷ See discussion *infra* Section IV.b & IV.c.

⁸ See discussion *infra* Section V.

⁹ See discussion *infra* Section VI.a.

¹⁰ Isabel V. Sawhill & Richard V. Reeves, *The Case for 'Race-Conscious' Policies*, BROOKINGS (Feb. 4, 2016), <https://www.brookings.edu/blog/social-mobility-memos/2016/02/04/the-case-for-race-conscious-policies/>.

policies focus resources and intervention plans towards an explicitly defined racial group.¹¹ The other extreme of race-based ethics would be race-blind ethics, in which programs and other measures disregard race entirely.¹² Race-conscious ethics aims at closing the gaps of inequality while abstaining from targeting specific racial groups.¹³

An example of a race-conscious practice is a baby bond for children born into poverty.¹⁴ Statistically, black households in 2013 have a median net worth of just \$11,000 compared to over \$100,000 for white households.¹⁵ A proposed baby bond would provide funding to all families with a below-average net worth.¹⁶ These bonds would subsidize families of all races, but especially black families who, on average, are more likely to be found within the lower net worth threshold.¹⁷ Conscious-based ethics and practices prevent the “othering” pandemic.¹⁸ While still identifying an issue within a certain racial group, conscious-based methods provide programs that would benefit all affected by the identifying issue.¹⁹

b. LGBTQIA+-Conscious Practices: An Example

In terms of LGBTQIA+-conscious ethics, this paper now turns to disparities that those in the LGBTQIA+ community face in order to understand the need for such kind of conscious-based ethical practices. One majority disparity includes discrimination when using public

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Christa Cassidy et al., *Baby Bonds: A Universal Path to Ensure the Next Generation Has the Capital to Thrive*, THE SAMUEL DUBOIS COOK CENTER ON SOCIAL EQUITY AT DUKE UNIVERSITY (Dec. 2019), https://socialequity.duke.edu/wp-content/uploads/2019/12/ICCED-Duke_BabyBonds_December2019-Linked.pdf.

¹⁵ Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RESEARCH CENTER (Dec. 12, 2014), <https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

¹⁶ Cassidy, *supra* note 14.

¹⁷ *Id.*

¹⁸ ACLUMICH_eadolphus, *How ‘Othering’ Trans People Leads to Discrimination*, ACLU MICHIGAN (Apr. 27, 2016, 3:00 AM), <https://www.aclumich.org/en/news/how-othering-trans-people-leads-discrimination>.

¹⁹ See Tiffani Burgess, *Race-Conscious Policies – Including Affirmative Action – Are Necessary For Addressing Racial Inequity*, ACLU (Dec. 1, 2020), <https://www.aclu.org/news/racial-justice/race-conscious-policies-including-affirmative-action-are-necessary-for-addressing-racial-inequity/>.

restrooms.²⁰ A way to implement LGBTQIA+-conscious policies that would combat this specific kind of discrimination plaguing the LGBTQIA+ community would be to provide gender-neutral restrooms in public areas.²¹ This application does not “other” or call out people in the LGBTQIA+ community like a transgender bathroom would, rather this application applies to all people since anyone is allowed access to the restroom if he or she wishes.²² The implementation of gender-neutral bathrooms is not an LGBTQIA+-based practice since bathrooms do not focus explicitly on people within the LGBTQIA+ community, and moreover, people from outside that community are also allowed access to these facilities. This implementation is also not LGBTQIA+-blind because the installation of these restrooms focuses on plights faced by those within the LGBTQIA+ community. Much like how race-blind approaches cannot destroy the deeply rooted systemic racism legacy of this country, LGBTQIA+-blind approaches to current issues cannot end discrimination towards this community in this country.²³ More action, especially within our criminal legal system, is needed.

Conscious-based practices are not a new concept. In the early nineties, two philosophers coined the term “color conscious.”²⁴ This theory explores the historical influence on the creation of race. The theory looks to the history of the American political system to conclude that it is not sustainable to push for race-blind practices because American society is not race-blind.²⁵

American society, rather, is rooted in discrimination.²⁶ To combat racial disparities without

²⁰ Sharita Gruberg *et al.*, *The State of the LGBTQ Community in 2020*, CENTER FOR AMERICAN PROGRESS (Oct. 6, 2020, 9:00 AM), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020/>.

²¹ See generally *id.*

²² *Id.*

²³ ACLU, *supra* note 19.

²⁴ KWAME ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* (1996). Noting that race has no biological basis, but instead was implemented as a social category that can easily show differences among people. *Id.*

²⁵ *Id.*

²⁶ See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (3rd ed. 2014).

entirely dismantling the American political system, a push for diminishing racial inequality must come from a race-conscious practice, not a race-blind one.²⁷ Therefore, if this theory reigns true, to combat the discrimination within our criminal legal system towards LGBTQIA+ individuals, we must implement LGBTQIA+-conscious practices.²⁸ To begin implementing these practices towards our clients, attorneys first must consider their role as advocates in the criminal legal system.

III. The Role of the Zealous Advocate

attorneys are held to a high standard – some are entrusted with supporting people during some of the lowest points of their lives.²⁹ As part of that high standard, attorneys are expected to conduct work with dignity, or at least appreciate that this profession has ethical measures in place that must be comprehended.³⁰ Conducting work with dignity includes understanding the legal ethics rules established by the American Bar Association (“ABA”) in the MRPC.³¹ Although this set of rules is not binding *per se* on attorneys, every state has adopted legal ethics that, in most cases, closely resemble the MRPC.³²

Even if a state has not adopted a certain provision of the MRPC, almost every jurisdiction of the United States requires lawyers to pass the Multistate Professional Responsibility Exam to

²⁷ *Id.*

²⁸ It is worth noting that the theory of race-based ethics is entirely different from the idea of separate but equal seen in Supreme Court cases like *Plessy v. Ferguson*. Race-conscious does not call out races as separate, but rather includes the thought of race when implementing practices. A common and well-known race-conscious practice involves affirmative action. *See generally* Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265 (1978).

²⁹ Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (June 2012), <https://www.nacdl.org/Article/June2012-TheRoleofDefenseCounselinEnsur>. *See also* Defense Function in Criminal Justice Standards – Table of Contents, AM. BAR ASS’N, https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ (last visited Apr. 15, 2021).

³⁰ *Jurisdictions Requiring the MPRE*, NATIONAL CONFERENCE OF BAR EXAMINERS, <https://www.ncbex.org/exams/mpre/> (last visited Feb. 24, 2021).

³¹ *Id.*

³² *Rules of Professional Conduct Cross-Reference Chart*, CAL BAR, <http://www.calbar.ca.gov/Portals/0/documents/rules/Cross-Reference-Chart-Rules-of-Professional-Conduct.pdf> (last visited Feb 24, 2021).

be admitted to the bar.³³ There are many rules, split into eight distinct categories.³⁴ For the sake of this paper, however, three rules pertain closely to the role of the zealous advocate in light of LGBTQIA+-conscious practices in the criminal legal system: MRPC §§ 1.2, 1.3, and 8.4.

a. Model Rules of Professional Conduct Section 1.2

Section 1.2 of the ABA's MPRC pertains to the scope of representing a client and addressing the power struggle between that relationship.³⁵ According to these rules, the lawyer controls the means, and the client controls the ends.³⁶ This means that decisions regarding settlements, plea deals, jury trial waivers, or decisions to take the witness stand in criminal cases are decisions of the client to which the lawyer must abide.³⁷ Clients, however, are allowed to provide authorization for the lawyer to take action without consultation.³⁸ Additionally, a lawyer cannot counsel the client to commit any criminal or fraudulent acts, and a lawyer may, but is not under a mandatory obligation, to discuss the legal consequences of a proposed course of action.³⁹

i. A Zealous Advocate's Moral Plights in Representing a Client

Rule 1.2(b) closely relates to the issue of advocating in an LGBTQIA+-conscious criminal legal structure: “[a] lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.”⁴⁰ This standard is important regarding the possible religious or social beliefs of an attorney representing a member of the LGBTQIA+ community. Being a member of

³³ NATIONAL CONFERENCE OF BAR EXAMINERS, *supra* note 30.

³⁴ *Model Rules of Professional Conduct – Table of Contents*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (last visited Feb, 24, 2021).

³⁵ MODEL RULES OF PRO'L CONDUCT R. 1.2 (AM. BAR ASS'N 2020).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ MODEL RULES OF PRO'L CONDUCT R. 1.2(b) (AM. BAR ASS'N 2020).

the LGBTQIA+ community can be seen as a social or moral view or activity.⁴¹ Although Rule 1.2(b) does not state that an attorney must privately support the social, spiritual, or moral beliefs of his client, it also does not state that an attorney can fail to educate himself on the plights of his client's social, spiritual, or moral beliefs.⁴²

You may have heard of the new debate within Hollywood: should gay characters only be played by gay actors?⁴³ The same debate has plagued our legal system as well.⁴⁴ This question begs to answer whether non-LGBTQIA+ attorneys should even be representing LGBTQIA+ clients.⁴⁵ However, Dr. Johnson, writing on behalf of the American Bar Association, claims that the sexual orientation or sexual preference of the attorney should not matter when representing clients.⁴⁶ The simplest rule is that there is not enough LGBTQIA+ representation among the legal community to limit only LGBTQIA+ attorneys to representing LGBTQIA+ clients. However, that is not an excuse to fail at cultural competence.

To support the rise of conscious-based ethics, attorneys must understand the cultural factors that influence their clients' relations with the rest of the world.⁴⁷ Attorneys that want to push for justice according to conscious-based measures, must always learn.⁴⁸ They must learn the social, legal, and political intricacies of their clients.⁴⁹ They must be willing to learn about the strife of being an individual within the LGBTQIA+ community. Cultural competency is a

⁴¹ Stephanie L. Brooke, *The Morality of Homosexuality*, 4 J. OF HOMOSEXUALITY 77 (2008).

⁴² MODEL RULES OF PRO'L CONDUCT R. 1.2(b) (AM. BAR ASS'N 2020).

⁴³ Charles Kaiser, *Should Straight Actors Play Gay Roles? A Star TV Writer Says No*, THE NEW YORK TIMES (Feb. 24, 2021 5:23 PM), <https://www.nytimes.com/2021/02/24/arts/television/russell-t-davies-gay-characters.html>.

⁴⁴ Takeia R. Johnson, *Cultural Competence to Represent LGBTQ Clients Post-Obergefell*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/january-february/cultural-competence-represent-lgbtq-clients-post-obergefell/ (last visited Feb. 24, 2021).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See Id.*

⁴⁸ Deanell Reece Tacha, *Training the Whole Lawyer*, 96 IOWA L. REV. 1699, 1701 (2011).

⁴⁹ Patrick J. Schilz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Foundation of the Novice Attorney*, 82 MINN. L. REV. 708, 729 (1997).

brick in the foundation of supporting LGBTQIA+-conscious ethics in the criminal legal system.⁵⁰

b. Model Rules of Professional Conduct Section 1.3

The comment in Rule 1.3 echoes the importance and goal of an attorney. The comment reads:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.⁵¹

This comment emphasizes the importance of acting diligently and promptly on behalf of an attorney's client.⁵² It is argued that this Rule was put in place to prove that the legal profession does care about people.⁵³ However, this comment regarding zealous advocacy has come to mean that attorneys have a duty to use the legal process to the fullest potential to benefit the clients while not exploiting the legal process.⁵⁴ An example that illustrates this role in relation to helping LGBTQIA+ clients can be found in *United States v. Westmoreland*.⁵⁵

The Defendant in *Westmoreland* was charged under 18 U.S.C. § 2422 for knowingly enticing a child under the age of 18 into prostitution or some other kind of sexual activity.⁵⁶ The Defendant believed that, as a bisexual man, the fact-finder needed to hear a discussion regarding

⁵⁰ *Cultural Competence in Lesbian, Gay, Bisexual, Transgender, Questioning, (LGBTQ) and Two-Spirit Health*, INDIAN HEALTH SERVICE, <https://www.ihs.gov/lgbt/culturalcompetence/#:~:text=According%20to%20SAMHSA%2C%20cultural%20competence,is%20essential%20in%20providing%20the> (last visited Apr. 28, 2021).

⁵¹ MODEL RULES OF PRO'L CONDUCT R. 1.3 cmt. (AM. BAR ASS'N 2020).

⁵² MODEL RULES OF PRO'L CONDUCT R. 1.3 (AM. BAR ASS'N 2020).

⁵³ See Elizabeth Mary Kameen, *Rethinking Zeal: Is It Zealous Representation or Zealotry?*, 44 MD. B. J. 4, 6 (2011) (arguing that our profession has turned from zealous advocacy of our clients to zealotry of our clients by pursuing our clients' interests to our detriment).

⁵⁴ *Id.* at 9.

⁵⁵ *United States v. Westmoreland*, 419 F. Supp. 3d 1277 (D. Utah 2019).

⁵⁶ *Id.*

“the homosocial male lifestyle, particularly ‘the hookup culture,’ which is distinctively non-traditional.”⁵⁷ To illuminate such, the Defendant and his attorney planned to call a gay man as a witness who could testify about converting from a traditionally viewed heterosexual marriage, to “being an out, homosexual man.”⁵⁸

This case concerns a motion to recuse the judge who was currently sitting on the bench.⁵⁹ The Defendant presented two arguments before the judge: (i) the personal view of the judge mimics the views of his former clients, and (ii) the positions the judge took while he was a privately practicing attorney have determined or improperly influenced his conduct as a judge.⁶⁰ Both of which the judge believed to be unjustified.⁶¹ The judge reasoned that while he was a private attorney, he was simply required to “act with commitment and dedication to the interests of the client with zeal in advocacy upon the client’s behalf.”⁶² The judge argued that under this duty, he can hold whatever view he wishes while still pursuing justice on behalf of his client zealously and diligently.

The judge continued by echoing a statement made at the confirmation hearing for Chief Justice Roberts.⁶³ There, Chief Justice Roberts stated that “you don’t identify the lawyer with the particular views of the client, or the views that the lawyer advances on behalf of a client, is critical to the fair administration of justice.”⁶⁴ That comment edifies the true role of the advocate regarding zealous advocacy. It helps to distinguish the difference between zealous advocacy and advocating because it reflects a moral belief. Attorneys, criminal defense attorneys especially,

⁵⁷ *Id.* at 1278.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1279.

⁶¹ Westmoreland, 419 F. Supp. 3d at 1279.

⁶² MODEL RULES OF PRO’L CONDUCT R. 1.3 cmt. (AM. BAR ASS’N 2020).

⁶³ Westmoreland, 419 F. Supp. 3d at 1279.

⁶⁴ *Id.*

are working on behalf of their client's wishes.⁶⁵ For example, a black attorney may represent a client indicted for a hate crime against the black community, but he is still able to represent his client zealously, not because he believes in the cause, but because his profession calls him to act on behalf of his client. Likewise, in light of this paper, a heterosexual attorney may still zealously represent an LGBTQIA+ defendant, even if the attorney does not support the community as long as he can put his prejudices aside and provide the same level of care that a heterosexual defendant in the same situation would receive.⁶⁶

c. Model Rules of Professional Conduct Section 8.4

MRPC 8.4 considers attorney misconduct, not as a duty to the client, but as a duty to the profession.⁶⁷ Under MRPC 8.4, it is misconduct for a lawyer to knowingly engage in or help someone else engage in, *inter alia*, prejudicial conduct that is discriminating based on “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”⁶⁸ The supposed goal of this Rule is to remove the bias that is so deeply rooted within the legal system.⁶⁹ MRPC 8.4 is fairly new, and gained adoption in 1998.⁷⁰ This Rule has received countless criticism regarding its vagueness and possible infringement on an attorney's right to choose whom to represent.⁷¹ However, this Rule has since been altered and included the right for attorneys to withdraw if granted under another Rule in the MRPC.⁷²

⁶⁵ See, e.g., Charlie Gerstein, *Dependent Counsel*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 147, 165 (2020).

⁶⁶ It is also worth mentioning that pursuant to Rule 1.16, a lawyer may withdraw from representation if there is no material adverse effect to the client's interest. This provides some means of allowing an attorney to withdraw from a case. MODEL RULES OF PRO'L CONDUCT R. 1.16 (AM. BAR ASS'N 2020). Also, an attorney who is vehemently against representing certain kinds of clients could attempt to pursue removal from the case pursuant to Rule 1.2, but this does not guarantee the attorney's withdrawal from a case. MODEL RULES OF PRO'L CONDUCT R. 1.2 (AM. BAR ASS'N 2020).

⁶⁷ MODEL RULES OF PRO'L CONDUCT R. 8.4(g) (AM. BAR ASS'N 2020).

⁶⁸ *Id.*

⁶⁹ Ann Ching & Lisa M. Panahi, *Rooting out Bias in the Legal Profession*, 53 ARIZ. ATT'Y 34 (2017).

⁷⁰ *Id.* at 35.

⁷¹ *Id.*

⁷² *Id.*

Although most states have adopted their own ethical rules that closely resemble the MRPC, only one state, Vermont, has fully adopted Section 8.4 of the MRPC, and only 25 others have some kind of variation of this Rule.⁷³ This Rule closely relates to the need to incorporate LGBTQIA+-conscious ethics in the criminal legal system since that group is routinely discriminated against.⁷⁴ Law is a service job.⁷⁵ Being a defense attorney is a service job.⁷⁶ Allowing discrimination goes against the fundamentals of serving the community.⁷⁷ As defense attorneys, we must take our clients as they come to us, regardless of our own beliefs.⁷⁸

IV. Adult Defendants in the Criminal Legal System

As of 2018, almost 2.2 million adults were incarcerated in the United States.⁷⁹ There is an epidemic of individuals being incarcerated.⁸⁰ Most inmates are held in state prisons and local jails, not federal prisons.⁸¹ The Bureau of Justice Statistics releases statistics every year regarding the demographics of the prison populations.⁸² Some of these demographics include age, race, and sex.⁸³ While this is a beneficial step that advocates can use in determining the kind of conscious-based support needed, this methodology falls short. These statistics fail in providing an accurate and true account of those living in prisons. For example, these statistics fail to

⁷³ Dennis Rendleman, *The Crusade against Model Rule 8.4(g)*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/> (last visited Feb. 28, 2020).

⁷⁴ MODEL RULES OF PRO'L CONDUCT R. 8.4(g) (AM. BAR ASS'N 2020).

⁷⁵ Alison Doyle, *Types of Careers Listed by Industry, Job, and Salary*, THE BALANCE CAREERS (May 21, 2020), <https://www.thebalancecareers.com/different-types-of-jobs-a-z-list-2059643>.

⁷⁶ *Id.*

⁷⁷ Ching, *supra* note 69, at 35.

⁷⁸ *Id.*

⁷⁹ Bureau of Justice Statistics, U.S. Dep't of Justice, *NCJ 255111, Federal Prisoner Statistics Collected under the First Step Act, 2020* (2021). This is jarring; this means if the incarcerated population were to be a city, it would be the fifth largest city in the country. Drew Kahn, *5 Facts behind America's High Incarceration Rate*, CNN (Apr. 21, 2019 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html>.

⁸⁰ Calum McCrae, *The Mass Incarceration Epidemic*, CALIFORNIA INNOCENCE PROJECT (June 15, 2018), <https://californiainnocenceproject.org/2018/06/the-mass-incarceration-epidemic/>.

⁸¹ *Id.*

⁸² Bureau of Justice Statistics, *supra* note 79.

⁸³ *Id.*

recognize any other type of gender identity apart from male or female.⁸⁴

a. The Intersection of LGBTQIA+ Defendants and the Criminal Legal System

There is no secret that our judicial system has deeply rooted, implicit (and explicit) homophobic tendencies.⁸⁵ Although some may argue that our justice system is veering away from homophobic propensities, especially with recent Supreme Court decisions favoring those within the LGBTQIA+ community, LGBTQIA+ discrimination within our criminal legal system extends further than these symbolic decisions by the Supreme Court.⁸⁶ LGBTQIA+ defendants differ from their heterosexual defendant counterparts in that they have different hardships they encounter daily. A heterosexual defendant, for example, may not need to assess the dangers of exposing his or her sexual orientation to a judge.⁸⁷

b. The Advocate's Role

Zealous advocates ought to consider these incredible disparities that their LGBTQIA+ defendants face daily during our representation. To do so, advocates and legislators alike must ensure that sexual orientation and gender identity will not hinder an individual's rights within the criminal legal system. First, advocates must understand that the legal system, including but not dispositive of incarceration facilities, is a dangerous world for LGBTQIA+ individuals.⁸⁸ For example, LGBTQIA+ defendants face more instances of mass incarceration and sexual and

⁸⁴ *Id.*

⁸⁵ Michael B. Shortnacy, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AMULR 309, 316 (2001). See also Matt Kellner, *Queer and Unusual: Capital Punishment, LGBTQ+ Identity, and the Constitutional Path Forward*, 29 TUL. J. L. & SEXUALITY 1 (2020).

⁸⁶ Kellner, *supra* note 85, at 1. Some southern states have laws that are at an increased disparity against those within the LGBTQIA+ community. For example, it is a felony and forces convicted defendants to register as a sex offender in Arkansas to knowingly expose someone to HIV, a crime that is disproportionately rampant in the LGBTQIA+ community.

⁸⁷ Shortnacy, *supra* note 85, at 316. This article considers the likelihood of a gay defendant being sentenced to death after a judge discovered the defendant's sexual orientation. *Id.* at 317.

⁸⁸ JODY MASKSAMER & HARPER JEAN TOBIN, *STANDING WITH LGBT PRISONERS: AN ADVOCATE'S GUIDE TO ENDING ABUSE AND COMBATING IMPRISONMENT* (2014).

physical abuse than their white, heterosexual counterparts.⁸⁹ Those who identify within the LGBTQIA+ community are often placed in high-risk, solitary confinement for their protection from the general incarcerated population once their sexual orientation or gender identity has been revealed to the public.⁹⁰

Next, advocates must understand the lack of social, familial, and financial support their clients may experience due to their sexual orientation or gender identity.⁹¹ LGBTQIA+ defendants who are faced with the criminal legal system must weigh the dangers of exposing their sexual orientation or gender identity to those enforcing the system.⁹² For example, in *Molina Mendoza v. Sessions*, the petitioner, a gay man from Mexico, was told by police to refrain from “acting gay” in public when seeking help following a homophobically targeted assault.⁹³ He lacked the security and familial support to obtain help.⁹⁴ In that case, after the lower court found that Molina Mendoza failed to show a reasonably objective fear, the appellate court reversed, finding that the lower court failed to adequately explain why they held that the petitioner lacked a reasonable fear of future persecution.⁹⁵ Perhaps, the zealous advocate, who assisted in finding proof that over 250 individuals in the LGBTQIA+ community were murdered in that area of Mexico in a span of a few years, is the reason why Molina Mendoza’s case was reversed for further review.⁹⁶

Advocates play a large role within their clients’ lives. The advocate, especially a criminal

⁸⁹ *Id.* It is worth noting that members of the LGBTQIA+ community are also disproportionately people from minority backgrounds, so this representational statistic may be slightly skewed. *Id.*

⁹⁰ *Id.*

⁹¹ Matthew Lee Dominguez, *LGBTQIA people of color: Utilizing the Cultural Psychology Model as a Guide for the Mental Health Assessment and Treatment of Patients with Diverse Identities*, 21 J. OF GAY & LESBIAN MENTAL HEALTH 203, 217 (2017).

⁹² *Id.*

⁹³ *Molina Mendoza v. Sessions*, 712 F. App'x 240, 241 (4th Cir. 2018).

⁹⁴ *Id.* at 244.

⁹⁵ *Id.* at 246.

⁹⁶ *Id.* at 245.

defense attorney, can become enveloped in the life of the client.⁹⁷ The attorney, as an advocate for his client, must understand the intricacies that are specific to the client in order to be a zealous advocate.⁹⁸ To be a zealous advocate, an attorney must act with commitment and dedication to his client's interests.⁹⁹ An advocate cannot perform on his client's behalf with zeal if he does not understand the plights of the client.¹⁰⁰ More education about the LGBTQIA+ community for advocates is needed to ensure advocates can adequately support their clients.¹⁰¹

c. Current LGBTQIA+-Conscious Implementations in Our Legal Systems

Various entities across the United States have made it their purpose to provide awareness and resources for LGBTQIA+ youth and their families.¹⁰² Additionally, some local legal entities have implemented LGBTQIA+-conscious initiatives. For example, the Bronx Defenders have issued the LGBTQ Defense Project.¹⁰³ This program provides training to a specialized team of advocates to assist those who identify with the LGBTQIA+ community. This initiative was born out of the need to assist low-income members of the LGBTQIA+ community since those within that community are at a high risk of being wrongfully profiled as sex workers and thus being wrongfully charged with prostitution related offenses.¹⁰⁴ LGBTQIA+ individuals that are incarcerated are at a higher risk of sexual assault and harassment, and more likely to be denied

⁹⁷ See generally Judith A. McMorrow, *The Advocate As Witness: Understanding Context, Culture and Client*, 70 FORDHAM L. REV. 945 (2001).

⁹⁸ *Id.*

⁹⁹ Judge J. Thomas Green, Address at the 1998 Annual Luncheon of the Utah Bar Foundation: Humor and Zealous Advocacy in Our Adversary, 184 F.R.D. 433, 438 (1998).

¹⁰⁰ *Id.* See also McMorrow, *supra* note 97, at 945.

¹⁰¹ McMorrow, *supra* note 97, at 945.

¹⁰² See, e.g., Center for American Progress et al., *Unjust: LGBTQ Youth Incarcerated in the Juvenile Justice System*, LGBTQ MOVEMENT ADVANCEMENT PROJECT, <https://www.lgbtmap.org/file/lgbtq-incarcerated-youth.pdf> (last visited Mar. 3, 2021). Various agencies include Center for American Progress, Movement Advancement Project, Youth First, U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention, The Trevor Project, National Juvenile Defender Center, and the Equal Justice Initiative. *Id.*

¹⁰³ *LGBTQ Defense Project*, BRONX DEFENDERS, <https://www.bronxdefenders.org/programs/LGBTQ-defense-project/> (last visited Mar. 3, 2021).

¹⁰⁴ *Id.*

access to gender-appropriate housing, clothing, hygiene products, and healthcare.¹⁰⁵ The Bronx Defenders noted this issue, and provided training to their attorneys in order to “creatively, zealously, and compassionately...ensure meaningful access to justice and secure better outcomes for our clients.”¹⁰⁶ To be a zealous advocate, aforementioned in the earlier sections of this paper, more training must be provided to understand the complexity of being an LGBTQIA+ defendant in our current criminal legal system.¹⁰⁷

In addition to these subjects within public defenders’ offices within New York, LGBTQIA+ defendants can outsource aid for their cases through programs like GLBTQ Legal Advocates & Defenders (GLAD).¹⁰⁸ GLAD is a legal advocacy and public defender program that specializes in cases in which one party is a member of the LGBTQIA+ community.¹⁰⁹ Each GLAD defender focuses on demolishing stereotypes imposed upon the LGBTQIA+ community and seen within our legal system.¹¹⁰ This program is more LGBTQIA+-based, but if GLAD were to essentially create sects within our offices of public defenders, those LGBTQIA+ clients would receive the utmost advocacy.¹¹¹ This would allow local attorneys, who arguably understand the law and decorum of the local courts better than an outside source, to team up with a GLAD defender, who arguably understands the plights of an LGBTQIA+ defendant better than an untrained public defender. Together, they could provide a more holistic performance when advocating on a client’s behalf that is not entirely LGBTQIA+-blind or LGBTQIA+-based.

¹⁰⁵ *LGBTQ People Behind Bar: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf> (last visited Apr. 28, 2021).

¹⁰⁶ *Id.*

¹⁰⁷ See discussion *supra* Section V.b.

¹⁰⁸ See GLAD LEGAL ADVOCATES & DEFENDERS, <https://www.glad.org/> (last visited Mar. 3, 2021).

¹⁰⁹ *Mission and Values*, GLAD, <https://www.glad.org/about/> (last visited Mar. 3, 2021). Additionally, GLAD will also provide legal advocacy and public defense to HIV-positive individuals. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Public defenders' offices are not the only legal entities taking notice of the growing need to provide LGBTQIA+ services to criminal defendants. Earlier in 2020, Los Angeles County established a new section of its Collaborative Court that directly benefits LGBTQIA+ people ordered into substance abuse recovery programs.¹¹² The discussion surrounding this new court program stems from the specialized needs of people who are marginalized due to their sexual orientation or gender identity.¹¹³ People who identify within the LGBTQIA+ community, according to Deputy Public Defender Chand, often experience different traumas than their cis and heterosexual counterparts that can lead to illnesses such as substance abuse.¹¹⁴ Most of these traumas, as Deputy Public Defender Chand explained, happen during childhood for those identifying with the LGBTQIA+ community.¹¹⁵ These LGBTQIA+ programs within the legal system are a step forward to becoming more inclusive, but they still fall short. Programs developed for LGBTQIA+ youth may limit the need for retroactive programs in our criminal legal system for LGBTQIA+ adult offenders.

V. Youth in the Criminal Legal System

Historically, children did not have a specialized criminal system; instead, they were treated as adults.¹¹⁶ In the early 1800s, New York formed the first juvenile reform house; this was the first time the public considered the distinction between juvenile defendants and their adult counterparts.¹¹⁷ The number of children subjected to the criminal legal system has been

¹¹² *LGBTQ-Plus Court Launched*, LAW OFFICERS OF LOS ANGELES COUNTY PUBLIC DEFENDER, <https://pubdef.lacounty.gov/lgbtq-plus-court-launched/> (last visited Mar. 13, 2021).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Gabrielle M. Thomas, *The Fate of Black Youth in the Criminal Justice System: The Racially Discriminatory Implications of Prosecutorial Discretion and Juvenile Waiver*, 17 RUTGERS RACE & L. REV. 267, 270 (2016).

¹¹⁷ *Id.*

declining since 1995; however, there are still nearly a million youth arrests per year.¹¹⁸ The three most common crimes committed by juveniles that result in arrests are simple assaults, some kind of property crime, and “all other offenses (except traffic).”¹¹⁹ According to the Office of Juvenile Justice and Delinquency Prevention, all types of crimes committed by children and young adults have declined in the past year, apart from embezzlement, which has increased by 22% from the prior year.¹²⁰ This governmental entity has provided a statistical briefing on special topics including race, yet fails to consider other factors like sexual orientation and sexual identity of youth in the criminal legal system.¹²¹

Youth in juvenile detention facilities are currently facing issues regarding sexual misconduct not only perpetrated among fellow peers in these facilities, but also by staff in these facilities.¹²² About six percent of males in these facilities report staff sexual misconduct, while nearly five percent of females in these facilities report youth-on-youth sexual misconduct.¹²³ Unlike the Bureau of Justice Statistics’ findings regarding adult prisoners and other correctional facilities, the statistics regarding youth in facilities include sexual orientation and gender identity, which is a step in the right direction.¹²⁴ However, again the reporting statistics fall short. For example, for sexual orientation, the only options include heterosexual, something else, or not sure.¹²⁵ According to these statistics, youth who identify with a group other than heterosexual are

¹¹⁸ *Despite Improvements, an Ineffective and Biased System Remains*, CHILDREN’S DEFENSE FUND, <https://www.childrensdefense.org/policy/resources/soac-2020-youth-justice/> (last visited Apr. 28, 2021).

¹¹⁹ Officer of Juvenile Justice and Delinquency Prevention, *Law Enforcement & Juvenile Crime*, OJJDP.GOV, <https://www.ojjdp.gov/ojstatbb/crime/qa05101.asp?qaDate=2019> (last visited Mar. 3, 2021).

¹²⁰ *Id.*

¹²¹ Officer of Juvenile Justice and Delinquency Prevention, *Special Topics: Hispanic Youth in the Juvenile Justice System*, OJJDP.GOV, https://www.ojjdp.gov/ojstatbb/special_topics/index.html (last visited Mar. 3, 2021).

¹²² Bureau of Justice Statistics, U.S. Dep’t of Justice, *NCJ 255446, Victim, Perpetrator, and Incident Characteristics of Sexual Victimization of Youth in Juvenile Facilities, 2018 – Statistical Tables* (2021).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* A better option for these self-reports would include more identifiable characteristics regarding sexual orientation. This would lead to a decrease in othering people based upon their sexual orientation.

over half as likely to be subjected to some kind of sexual victimization while at these correctional facilities than their heterosexual counterparts.¹²⁶

a. LGBTQIA+ Children

According to the New York Times, one in six people born within the Generation Z (“Gen Z”) age group identify with the LGBTQIA+ community.¹²⁷ This is more than any previous generation.¹²⁸ Children who identify within the LGBTQIA+ community are at a greater risk of negative outcomes such as a life of crime as compared to their heterosexual counterparts.¹²⁹ A large issue that prevails in the LGBTQIA+ community as it relates to children is the societal concept that children cannot discover their sexual orientation or gender identity prior to adulthood.¹³⁰ Although LGBTQIA+ children experience different challenges than their heterosexual counterparts, it is still detrimental to reduce their identity to their sexual preference or gender identity.¹³¹ Although LGBTQIA+ children may have similar gender identities or sexual preferences, they do not necessarily have similar life experiences.¹³² Other factors such as race, ethnicity, class, or religion may also directly interact with the children’s sexual preferences or gender identity.¹³³ Even though more children in Gen Z identify with the LGBTQIA+ community than any generation prior, in 2013, only about 5% of the youth population identified with the LGBTQIA+ community, but about 15% of the juvenile justice

¹²⁶ *Id.*

¹²⁷ Christina Morales, *More Adult Americans Are Identifying as L.G.B.T., Gallup Poll Finds*, THE NEW YORK TIMES (Feb. 24, 2021), <https://www.nytimes.com/2021/02/24/us/lgbt-identification-usa.html>. Gen Z comprises those born between 1997 and 2002. *Id.*

¹²⁸ *Id.*

¹²⁹ Thomas A. Mayes, *Understanding Intersectionality Between the Law, Gender, Sexuality and Children*, 36 CHILD. LEGAL RTS. J. 90 (2016).

¹³⁰ *Id.*

¹³¹ *Id.* at 91.

¹³² *Id.*

¹³³ *Id.*

system had individuals that identified with the LGBTQIA+ community.¹³⁴

VI. School-to-Prison Pipeline

The school-to-prison pipeline is a national trend in which children are pushed from public schools into the criminal legal system.¹³⁵ Many of the children subject to this school-to-prison pipeline have challenges that separate them from the rest of the population.¹³⁶ Instead of encouraging initiatives such as education and counseling, these children are isolated from society and punished.¹³⁷

This school-to-prison pipeline trend might stem from the introduction of school resource officers in the late 1990s shortly after the Columbine school shooting.¹³⁸ A school resource officer is a licensed police officer employed by the local police department.¹³⁹ Since Columbine, there has been an increase in zero-tolerance policies within schools that criminalize minor violations of school procedures like disallowing cell phones on school grounds.¹⁴⁰ These zero-tolerance policies have led to students being criminally punished at the hands of a school resource officer when such issues could be processed by the school internally.¹⁴¹ As a result, students are channeled into the criminal system.¹⁴²

¹³⁴ Vickie L. Henry, *Have No LGBTQ Youth Clients? Think Again: What Every Attorney Representing Youth Needs to Know*, 57 B. B. J. 10, 11 (2013).

¹³⁵ *School-to-Prison Pipeline*, ACLU, <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline> (last visited Mar. 2, 2021).

¹³⁶ See generally Areto A. Imoukhuede, *The Right to Public Education and the School to Prison Pipeline*, 12 ALB. GOV'T L. REV. 52, 64 (2019).

¹³⁷ Tara Carone, *The School to Prison Pipeline: Widespread Disparities in School Discipline Based on Race*, 24 PUB. INT. L. REP. 137, 141 (2019).

¹³⁸ Maya Lindberg, *False Sense of Security: Police Make Schools Safer – Right?*, LEARNING FOR JUSTICE, <http://www.learningforjustice.org/sites/default/files/general/False%20Sense%20of%20Security%20-%20TT50.pdf?fbclid=IwAR2eoWYAHKxEVlqhsJ7YuTNJFXTEiKQSAktMuT69e7FPqfoTG4ZFgabVb4> (last visited Mar. 16, 2021).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Carone, *supra* note 137, at 137. In addition to school incidences contributing to the school-to-prison pipeline, students who drop out of school for various reasons also contribute to this epidemic. *Id.*

There is no dispute that the school-to-prison pipeline unfairly discriminates against students based on race.¹⁴³ One out of every six black students in public education has been suspended at least once, as compared to one out of every 20 white students.¹⁴⁴ Students from other backgrounds are also discriminated against as compared to their white, able-bodied, and straight counterparts.¹⁴⁵ LGBTQIA+ youth, like minority students and students with disabilities, also experience more disciplinary action than their heterosexual counterparts.¹⁴⁶ LGBTQIA+ students are “up to 3 times more likely to experience harsh disciplinary treatment than [*sic*] their straight counterparts.”¹⁴⁷ LGBTQIA+ students face higher instances of bullying and harassment from their peers, this leads to school districts taking action against these LGBTQIA+ students if these students retaliate.¹⁴⁸ LGBTQIA+ youth, unlike other discriminated groups, get punished more severely and more frequently at schools for public displays of affection and violating gender norms; these students are also more likely to be victimized and blamed for their punishments.¹⁴⁹ LGBTQIA+ students are more likely to be confined instead of placed into diversion programs once they are held as delinquent.¹⁵⁰ LGBTQIA+ students are disproportionately more punished via school suspension, school expulsion, police stops, arrests, and juvenile convictions; all of which support the school-to-prison pipeline.¹⁵¹

a. The Role of the Advocate in Combating the School-to-Prison Pipeline

¹⁴³ See, e.g., *id.* at 138.

¹⁴⁴ *Id.* at 140.

¹⁴⁵ *Id.*

¹⁴⁶ Joeli Katz, *LGBT Students Face Harsher Punishments, Enter Juvenile Justice System*, GLADD (June 16, 2014), <https://www.glaad.org/blog/lgbt-students-face-harsher-punishments-enter-juvenile-justice-system>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Shannon D. Snapp et al., *Messy, Butch, and Queer: LGBTQ Youth and the School-to-Prison Pipeline*, 30 J. OF ADOLESCENT RSCH. 58, 65 (2014).

¹⁵⁰ Sarah E. Redfield & Jason P. Nance, *The American Bar Association Joint Task Force on Reversing the School-to-Prison Pipeline Preliminary Report*, 47 U. MEM. L. REV. 1, 9 (2016).

¹⁵¹ *Id.* at 73. Some argue that girls who identify within the LGBTQIA+ community experience more discrimination than any other archetype of people that identify with the LGBTQIA+ community. *Id.*

Not all hope is lost for children that identify with the LGBTQIA+ community. Advocates and laymen alike can combat the school-to-prison pipeline. Five ways in which the school-to-prison pipeline can be combated include: (i) initiating more communal and familial support, (ii) restructuring schools to have sexual orientation- and gender identity-based measures that do not isolate or “out” LGBTQIA+ students in schools, (iii) reducing schools’ reliance on police, (iv) providing competency training to school personnel, and (v) promoting community-based alternatives to incarceration for all youth.¹⁵² It is time for advocates to zealously advocate for their LGBTQIA+ youth clients. Advocates must understand the cultural complexities of their young LGBTQIA+ clients. This task is more daunting than understanding the cultural complexities of clients from other demographics because identifying within the LGBTQIA+ community is not physically immutable, like race; rather, identifying within the LGBTQIA+ community is internally immutable.¹⁵³

Attorneys, in order to zealously advocate, must find a balance between investigating the inner issues clients may experience by pushing for answers and having uncomfortable, or even triggering, conversations with their clients while still maintaining a healthy attorney-client relationship.¹⁵⁴ Pressing for answers concerning a youth client’s sexual orientation or gender preference may assist in getting an effective safety plan in place at the youth client’s school.¹⁵⁵ Additionally, a zealous advocate may want to investigate whether the school in question is LGBTQIA+-positive to better understand the type of help your client requires since not all schools have LGBTQIA+-conscious initiatives.¹⁵⁶ Even if the school is not an adverse party, an

¹⁵² *LGBTQ Youth & the School-to-Prison Pipeline*, SCCGOV, <https://www.sccgov.org/sites/bhd/info/Documents/LGBTQ%20Resources/O4MH/o4mh-schooltoprisonpipeline-factsheet-00-00-00.pdf> (last visited Mar. 17, 2021).

¹⁵³ Henry, *supra* note 134, at 12.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

attorney can take additional measures in order to ensure he is representing his client in the best way possible. Some of these additional measures include becoming familiar with common LGBTQIA+ phrases and terms, expressing allyship, using inclusive language, understanding the harm of misgendering clients, and abstaining from the practice of misgendering clients.¹⁵⁷ These are simple measures attorneys can practice in order to ensure they are zealously advocating for their clients. The school-to-prison pipeline cannot be taken down without mass social change. However, that does not mean advocates should ignore their clients while such clients are being discriminated against.

VII. Conclusion

The criminal legal system has already seen a progressive upheaval with the introduction of race-conscious ethics.¹⁵⁸ Race-conscious ethics do not turn a blind eye to America's history regarding racial segregation that ultimately generated large disparities in the American system; some of these disparities include socioeconomic status and educational opportunities among different racial backgrounds.¹⁵⁹ Most race-conscious ethics urges advocates to educate themselves regarding the stereotypes and other discriminatory measures their minority clients face daily.¹⁶⁰ Multitudes of research and academia have been produced regarding race-conscious ethics in the realm of the criminal legal system.¹⁶¹ Race-conscious ethics are a step in the right direction for promoting a more progressive legal system, and thus, can curb initialized issues like incarceration rates.¹⁶² However, more can be done for individuals who not only get persecuted due to their race, but are singled out due to other historically discriminated traits, such as sexual

¹⁵⁷ *Id.*

¹⁵⁸ See discussion *supra* Section II.a.

¹⁵⁹ Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1543 (2012). See discussion *supra* Section II.a.

¹⁶⁰ See discussion *supra* Section II.a.

¹⁶¹ See discussion *supra* Section II.b.

¹⁶² Murray, *supra* note 159, at 1543. See discussion *supra* Section II.b.

orientation or gender identity.¹⁶³

Attorneys are called to follow professional conduct as set forth by their jurisdictions.¹⁶⁴ As a part of that calling, attorneys are called to be zealous advocates for their clients.¹⁶⁵ Being a zealous advocate means that an attorney is responsible, within proper means, in assisting the client with his goals; the goals and ambitions of the client are of utmost importance.¹⁶⁶ However, the power of the zealous advocate is limited.¹⁶⁷ Pursuant to Section 1.2, although an attorney may think one course of action is best for the client and pertinent to achieve the client's paramount goal, it is still left to the client to decide if such course of action is in his best interest. This section of the Model Rules of Professional Conduct can work together with Section 8.4.¹⁶⁸ Section 8.4 considers the duties to the profession. Specifically, it is a violation for a lawyer to knowingly engage in or help someone else engage in, *inter alia*, prejudicial conduct that is discriminating based on "race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."¹⁶⁹ This rule can assist attorneys, not only as a means of reporting others who fail to uphold this standard, but also as a reminder that every client is fighting a different battle, regardless of how similar the cases appear to be.¹⁷⁰

Over 2.2 million adults are currently subject to the criminal legal system in the form of incarceration.¹⁷¹ The Bureau of Justice Statistics releases information regarding the race, age,

¹⁶³ Over 40% of LGBTQIA+ adults identify as people of color, while only about 60% of the American population is white. *People of Color*, FUNDERS FOR LGBTQ ISSUES, <https://lgbtfunders.org/resources/issues/people-of-color/> (last visited Mar. 26, 2021). See discussion *supra* Section IV.b & IV.c.

¹⁶⁴ See discussion *supra* Section III.

¹⁶⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (AM. BAR ASS'N 2020). See discussion *supra* Section III.

¹⁶⁶ See discussion *supra* Section III.

¹⁶⁷ See discussion *supra* Section III.

¹⁶⁸ See discussion *supra* Section III.c.

¹⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 8.4 (AM. BAR ASS'N 2020). See discussion *supra* Section III.c.

¹⁷⁰ See discussion *supra* Section III.c.

¹⁷¹ See discussion *supra* Section IV.

and sex of current inmates, but fails to consider inmates' sexual orientations or gender identities. Failing to consider the sexual orientations or gender identities of inmates leaves out an entire, vulnerable class.¹⁷² LGBTQIA+ inmates differ from their heterosexual defendant counterparts in that they have different hardships they encounter daily.¹⁷³ They must be wary of being “outed” and as a result, being harmed or killed.¹⁷⁴

Zealous advocates must understand that many that identify within the LGBTQIA+ community lack the social, familial, and financial support needed to counter the criminal legal system.¹⁷⁵ In addition to understanding the hardships of the LGBTQIA+ community, action needs to be taken. Some public defenders' offices have enacted specialized LGBTQIA+ divisions.¹⁷⁶ Other methods of action include establishing LGBTQIA+-focused courts in county and district courts.¹⁷⁷

Children are one of the most criminalized groups in the United States.¹⁷⁸ Youth in the criminal legal system are also subject to specialized prejudices. LGBTQIA+ youth are in an even more disadvantaged place.¹⁷⁹ The school-to-prison pipeline directly targets the LGBTQIA+ community. LGBTQIA+ children are often punished by school resource officers even if they were victims in the situation.¹⁸⁰

Advocates must zealously push for alternatives to incarceration for their young clients. By amplifying the sexual identity and sexual orientation of clients, zealous advocates can push

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See* discussion *supra* Section II.a.

¹⁷⁵ *See* discussion *supra* Section IV.c.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Mission*, YOUTH BREAK OUT, <https://www.youthbreakout.org/mission/> (last visited Mar. 2, 2021).

¹⁷⁹ *See* discussion *supra* Section V.a.

¹⁸⁰ *See* discussion *supra* Section VI.

for safer alternatives to incarceration.¹⁸¹ While sexual misconduct happens to youth in correctional facilities regardless of their sexual orientation and sexual identity status, it is happening at a much more alarming rate to youth that identify as something other than heterosexual and youth that identify as something other than their assigned sex at birth.¹⁸² Since attorneys can be powerless to change what happens behind bars, they must instead urge alternatives to incarceration for our clients. There ought to be support for community-based restorative programs and other alternatives to combat the school-to-prison pipeline directly attacking LGBTQIA+ youth.

¹⁸¹ See discussion *supra* Section V.a.

¹⁸² *Id.*