A ROADMAP FOR CHANGE:

Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV

By

Catherine Hanssens, Center for HIV Law and Policy
Aisha C. Moodie-Mills, Center for American Progress
Andrea J. Ritchie, Streetwise and Safe (SAS)
Dean Spade, Center for Gender and Sexuality Law, Columbia Law School
Urvashi Vaid, Center for Gender and Sexuality Law, Columbia Law School

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Cover images:

Community United Against Violence (CUAV) member at a march demanding trans justice, San Francisco. *Courtesy of CUAV*

LGBTQ youth leaders from Streetwise and Safe (SAS) advocate for an enforceable ban on police profiling in New York City, July 2013. *Courtesy of A. Ritchie*

CeCe McDonald while incarcerated. *Courtesy of Leslie Feinberg*

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012. *Courtesy of S. Narasimhan*

Silent March to End Stop and Frisk, New York City, June 2012. *Courtesy of S. Narasimhan*

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PREFACE

BENJAMIN TODD JEALOUS

Former President, NAACP

I was born in the one-square-mile hamlet of Carmel, where there was one other black boy I knew who was my age. He lived across the street.

From the age of six months on, he has been my best friend. He truly is my brother in every way except by birth. Part of being brothers has always been our willingness to adopt each other's fight as our own.

At first, our fight was clearly about our skin color. The clerk at the five and dime would chaperone us through every aisle of the store as white friends ran in and out at will. We knew it was because we were black and therefore different, and targets for discrimination.

A few years later, my brother's preference for wigs, dresses, and make-up became an even bigger issue with our peers.

We had confronted racial bullying together. Sometimes our white friends would even come to our defense. But this time, some of my white friends suggested that I let my brother defend himself. At that moment, on that playground, I made a choice: if you pick a fight with my brother, you pick a fight with me.

This is the conviction that led me to devote my life to civil rights and social justice. And this is the conviction we must hold as progressive activists of all backgrounds as we face the criminalization of LGBTQ people and people living with HIV (PLWH).

The principles that define our nation's character do not tolerate racial bias, nor do they tolerate bias against members of any community. Existing research indicates that LGBTQ people and PLWH are overrepresented in all aspects of the penal system. The pages that follow contain recommendations for federal policy change that would represent important steps toward preventing and addressing the impacts of the crisis of mass incarceration on LGBTQ people—a crisis that is too often ignored, even by people of good conscience.

The genesis of this roadmap for policy change was a workshop convened at Columbia Law School in May 2013 where representatives of fifty grassroots, legal and advocacy organizations met to discuss a national policy agenda on LGBTQ criminal justice issues. But that was not the first time that people joined to tackle problems at the intersection of gender, sexuality and criminal justice.

One year earlier, in June 2012, I stood with a coalition of civil rights leaders, labor and LGBT leaders joined together at New York City's iconic Stonewall Inn for a press conference. We gathered to condemn Mayor Bloomberg's support of unconstitutional racial profiling in the context of the NYPD's "stop and frisk" practices, which exploded since he took office.

Some people were confused. Why were advocates for LGBT rights taking the time to speak about a "black issue"?

The answer was simple: stop and frisk was not only a "black issue." New York City police officers were also targeting people because they were LGBT, specifically LGBT youth. Moreover, some people, like my brother, are both black and LGBT, experiencing both similar and specific profiling depending on how they are perceived. For black LGBT people this is not so much an issue of solidarity between communities as it is one of survival at their intersections.

A few days after the Stonewall Inn press conference, an incredibly diverse crowd of 750,000 people marched in silence to Mayor Bloomberg's house to protest stop and frisk policing. Within a year, the City Council passed the Community Safety Act, effectively, a comprehensive ban on police profiling that included race, sexuality and gender identity.

We succeeded because City Council's Black, Latino, LGBTQ and Faith caucuses joined forces as their constituents had during the Silent March. They adopted the same spirit that I adopted on the playground that day with my brother, the spirit of the Three Musketeers—All for One and One for All.

Bayard Rustin, the gay black organizer who planned the March on Washington in 1963 and wrote the textbook on mobilizing the masses for justice, said "If we desire a society in which men are brothers, then we must act towards one another with brotherhood. If we can build such a society, then we would have achieved the ultimate goal of human freedom."

When my brother got older, and he moved to New York City, I never knew if the cops who abused him did so because he was black, or because he was transgender, or because he was gay. I didn't really care why. I just knew that the cops were wrong. We need to end institutionalized homophobia and transphobia, just as we need to end institutionalized racism. We will be more successful in both fights if we continue to see them as part of one united struggle—a struggle to achieve equality in the land of the free and home of the brave.

Let us all have courage. Let us all be free.

FOREWORD

CECE MCDONALD*

As a black transwoman, I am used to facing discrimination based on gender identity and race.

I have been stopped many times by officers who use inaccurate stereotypes to justify harassing me and my peers. The night of June 5th, 2011 was no different. I went out with friends to a grocery store, and on the way we were stopped by officers who had gotten a "noise complaint" in the area. In a neighborhood full of loud bars closing down, my friends and I knew all too well that these officers were racially profiling a group of black youth who were "up to no good."

They eventually stopped harassing us and we continued toward the store until we passed a group of white people outside a bar who began spewing racial epithets at us. I know that exchanges such as these never end well, so my first instinct was to get away.

As I turned, a woman who was yelling at us threw a drink at me. Discombobulated, I turned back as she broke the glass on my face. Blood ran into my eyes and mouth, and she grabbed my hair. I did not fight, thinking I might worsen what had been done to my face. Instead, I yelled for help from my friends who broke us up.

With blood all over me, all I could focus on was getting to the grocery store to call police. I reached the parking lot of the bar and my friends yelled for me to turn around. With my ears still ringing, I finally heard them in time to turn and find a man from the same group chasing me. He threw two bottles at my head and missed. When he wasn't satisfied with that, he continued walking toward me. My first reaction was to scare him away, so I pulled scissors from my purse. Instead, this made him angrier and he tried to grab my hair, so I defended myself.

I was being attacked, and I stood my ground. Every day, I have to live with the fact that I took another person's life. This is hard for me to accept, no matter how evil they were. This does not change the fact that every person should have a right to protect themselves when they are in danger. Unfortunately, the criminal justice system does not take this into account with minority groups.

Police officers use many stereotypes of black trans people to dehumanize me, such as assuming that I am a sex worker. I've been interrogated while standing at a bus stop because I "looked like" another black trans person police were looking for, so this treatment is nothing new to me. When police arrived, they saw a white man on the ground and a black trans person with scissors. They chose to not see the blood from my wounds and kept me from the ambulance nearby. I had complications with my face for weeks after the incident because of the improper treatment.

> ***"I do not want to sensationalize my story as a black transwoman in prison. I was one of millions of people who are wrongfully put in jail; many of whom will never have the opportunity to tell their story."***

Anyone who does not realize that our judicial system affects a hugely disproportionate number of people of color is living under a rock. People of color and trans people are seen as "unfit for society," and are therefore targeted by our justice system. Regardless of how I looked in court, my "peers"—a jury including only two people of color—were going to see me as a black trans person.

Many cases of self-defense in my area have been thrown out by the District Attorney when they involved a white person defending her or his life against a person of color. However, they chose to prosecute me, and brought up my past indiscretions, including a bounced check, to further incriminate me. They even tried me on a second murder charge in case they couldn't find me guilty on the first.

They placed me in holdings according to their definition of my anatomy instead of my gender identity, and would not allow professionals to come and speak about violence against transwomen in prisons. But that is not why I speak out today. I do not want to sensationalize my story as a black transwoman in prison. I was one of millions of people who are wrongfully put in jail, many of whom will never have the opportunity to tell their story. I went through the same struggles of oppression and depression with many others. I was not a transwoman in prison: I was a person in prison.

Many who are seen as "unfit for society" are funneled into jails by our biased system. I speak out for those people whom the justice system has failed, and there are far too many of us. This is why it is important that we reform the criminal justice system, period. To stop the biased policing and unfair sentencing of all minority groups, including LGBT people.

CeCe McDonald while incarcerated
IMAGE: LESLIE FEINBERG

* The foreword was transcribed from a thirty-minute interview Aisha Moodie-Mills conducted with CeCe McDonald on March 13, 2014 exclusively for inclusion in this brief. To listen to the full interview visit americanprogress.org.

1 INTRODUCTION & SUMMARY

Members of FIERCE march in Silent March to End Stop and Frisk, New York City, June 2012
IMAGE: A. RITCHIE

CeCe McDonald's story of victimization and criminalization is unfortunately not unique. Each year in the United States, thousands of lesbian, gay, bisexual, transgender, Two Spirit, queer, questioning and gender non-conforming (LGBT)* people and people living with HIV (PLWH)** come in contact with the criminal justice system and fall victim to similar miscarriages of justice.

According to a recent national study, a startling 73% of all LGBT people and PLWH surveyed have had face-to-face contact with police during the past five years.[1] Five percent of these respondents also report having spent time in jail or prison, a rate that is markedly higher than the nearly 3% of the U.S. adult population who are under some form of correctional supervision (jail, prison, probation, or parole) at any point in time.[2]

In fact, LGBT people and PLWH, especially Native and LGBT people and PLWH of color, are significantly overrepresented in all aspects of the penal system, from policing, to adjudication, to incarceration. Yet their experiences are often overlooked, and little headway has been made in dismantling the cycles of criminalization that perpetuate poor life outcomes and push already vulnerable populations to the margins of society.

The disproportionate rate of LGBT people and PLWH in the criminal system can best be understood in the larger context of widespread and continuing discrimination in employment, education, social services, health care, and responses to violence.

Far too often, families reject LGBT youth at a young age and they are forced to fend for themselves, triggering a lifetime of economic and social instability. In all too many instances, even LGBT youth with supportive families find themselves living outside of a family home due to familial poverty or deportation. Family rejection and homelessness are top predictors that a young person will come in contact with the criminal justice system because of police targeting of homeless and low-income communities and people engaged in survival economies —such as drug sales, sex work, and other criminalized activity—to quite literally survive.[3]

Schools can also play a critical role in pushing youth onto the streets, from hostile school climates that leave LGBT youth feeling unsafe, to harsh discipline policies that have a disparate impact of perpetuating a school-to-prison pipeline.[4]

* In this document, we use the term "LGBT" in a manner that is explicitly inclusive of queer identified, questioning, gender non-conforming and Two Spirit people. Two Spirit is a term that refers to a multiplicity of historic and present-day Indigenous gender identities and expressions and sexualities.

** In this document, we use the term "PLWH" to denote individuals living with HIV and AIDS.

The policing of gender and sexuality pervades law enforcement and the operation of courts and the penal system, often operating within the larger context of racial profiling and targeting of homeless and low-income communities, and disproportionately affecting LGBT people of color.[5]

What's more, LGBT people, specifically transgender women of color and LGBT youth of color, are endemically profiled as being engaged in sex work, public lewdness, or other sexual offenses. Police in many jurisdictions use possession of condoms as evidence supporting arrests for prostitution-related offenses. Surely, no heterosexual white man would be arrested on suspicion of prostitution for carrying condoms in his pocket. Yet policing tactics that hyper-sexualize LGBT people, and presume guilt or dishonesty based on sexual orientation or gender identity, are deployed by law enforcement every day.

According to a recent national study, a startling 73% of all LGBT people and PLWH surveyed have had face-to-face contact with police during the past five years. Five percent of these respondents also report having spent time in jail or prison, a rate that is markedly higher than the nearly 3% of the U.S. adult population who are under some form of correctional supervision (jail, prison, probation, or parole) at any point in time.

It is important to note that the profiling, arrests, and incarceration of LGBT people and PLWH are not simply a response to greater incidences of illicit behavior within the community. Deep-seated homophobia and transphobia, as well as stereotypes about race and gender, all manifest in biased policing practices that presume LGBT people and PLWH, especially those of color, are inherently guilty or deserving of victimization.

LGBT people and PLWH are often targets rather than perpetrators of violence, enduring significant rates of violence and harassment at the hands of both community members and law enforcement. Transgender people of color in particular are three times more likely to be victims of harassment and assault than non-transgender people. Yet, according to the National Coalition of Anti-Violence Programs, 48% of survivors who reported the violence to the police, reported incidents of police misconduct.[6] Under these conditions, many people are afraid of the police and have nowhere to turn for help when they are victimized.

As outlined in this policy brief, justice continues to be elusive and conditional for LGBT people and PLWH due to a range of unequal laws and policies that dehumanize, victimize, and criminalize these populations, even as attitudes toward and acceptance of LGBT people have reached an all-time high.

In recent years, issues affecting LGBT people and PLWH have garnered new attention and support, and significant changes at the federal level have been achieved. There is now in place the first National HIV/AIDS Strategy designed to reduce HIV-related health disparities, especially among people of color and LGBT people. Regulations implementing the 2003 Prison Rape Elimination Act include protocols written to directly address the need to safeguard this population. The Obama Administration has adopted LGBT-inclusive employment non-discrimination policies (even as the Employment Non-Discrimination Act, which would provide federal protections for all LGBT workers, languishes in Congress), and it has worked to address LGBT issues in numerous realms.

LGBT equality has gained momentum, but it remains unevenly distributed and incomplete. Even where it exists, legal equality has not yet translated into lived equality for LGBT people, especially poor people and people of color. Moreover, there is still little justice for LGBT people like CeCe and countless others who remain significantly vulnerable because of unfair criminal justice policies. Significant policy reforms are needed to ensure that they receive equitable treatment.

Even where it exists, legal equality has not yet translated into lived equality for LGBT people, especially poor people and people of color.

The good news is that the time is ripe, now more than ever, for the federal government to leverage this momentum and intervene to address the criminalization of LGBT people and the harms they face once within the system.

This document outlines a range of policy solutions that would go a long way towards addressing discriminatory and abusive policing practices, improving conditions for LGBT prisoners and immigrants in detention, de-criminalizing HIV, and preventing LGBT youth from coming in contact with the system in the first place. Additionally, we identify many areas of opportunity for the federal government to support improved outcomes for LGBT people and eliminate some of the systemic drivers of incarceration through federal programs relating to housing, employment, health care, education, immigration, out of home youth, violence response and prevention, and social services.

Above all, the goal of this brief is to set forth a roadmap of policy actions that the federal government can take to reduce the criminalization of LGBT people and PLWH, particularly people of color who are LGBT and/or living with HIV, and address significant safety concerns faced by these populations when they come in contact with the criminal justice system.

NATURE OF THE BRIEF

This is one of the first comprehensive publications to offer federal policy recommendations to address the myriad criminal justice issues that impact LGBT people and PLWH.

Each issue certainly warrants additional research to further understand the drivers of contact with law enforcement and incarceration for LGBT people and PLWH, the structural barriers to safety both within and beyond the criminal justice system, and the challenges LGBT people and PLWH face at each point of contact with the system. We encourage advocacy organizations and federal agency staff to adopt and advance the components of this roadmap towards reducing the criminalization of LGBT people and PLWH.

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2013 *IMAGE: S. NARASIMHAN*

Specifically, this publication is intended to: 1) guide federal engagement with federal, state, and local law enforcement agencies, jails, and prisons; 2) inform the implementation of the Prison Rape Elimination Act (PREA); 3) advocate for additional reforms beyond PREA; 4) generate momentum around the LGBT policy priorities that members of this working group have presented to the current Administration over the last four years; 5) highlight and address drivers of criminalization of LGBT people and PLWH; and 6) provide analysis that will serve as a resource for policy makers and advocates alike.

LGBTQ demonstration in support of litigation challenging NYPD stop and frisk practices in New York City, March 2013 *IMAGE: A. RITCHIE*

Six key topic areas organize the discussion:

Policing and Law Enforcement.
In this section, we outline policy reforms that could be implemented by the Department of Justice (DOJ) and other federal government agencies to reduce discriminatory profiling and policing practices, unlawful searches, false arrests and discriminatory targeting of LGBT people and PLWH, and to put an end to the use of condom possession as evidence of intent to engage in prostitution-related offenses or lewd conduct. We also offer recommendations to facilitate the implementation of the new PREA regulations in police lock-ups, and increase safety for LGBT individuals in police custody.

Prisons and Detention Centers.
Here we propose reforms for DOJ and the Federal Bureau of Prisons (BOP) to address issues associated with incarceration, including and beyond the implementation of the PREA regulations, access to LGBT-inclusive sexual health care (including STI/HIV prevention) and sexual health literacy programs for prisoners, and classification and housing policies.

Immigration-related Issues.
Here we provide recommendations for Immigration and Customs Enforcement (ICE) and the Department of Homeland Security (DHS) to reduce exclusion, profiling, detention, and deportation of immigrants who are LGBT and/or living with HIV; address conditions of confinement and access to essential general and sexual health care services in immigrant detention centers; ensure adoption of policies within ICE and DHS on LGBT people and PLWH and other serious, chronic health needs in systems; and address administrative discretion regarding applicability of prior criminal convictions in immigration hearings.

Criminalization of Youth.
A top predictor of adult involvement with the criminal justice system is youth involvement. Here we outline policy solutions that the Department of Education (ED) and DOJ can employ to dismantle the school-to-prison pipeline for LGBT youth, eliminate discrimination in family courts, reduce incarceration of LGBT youth, and ensure that youth have access to LGBT-inclusive sexual health services in juvenile detention facilities.

HIV Criminalization.
There is still a patchwork of state laws across the country that criminalize PLWH for consensual sex and conduct, such as spitting and biting, that pose no measurable risk of HIV transmission and that do not require evidence of intent to harm for convictions. Most of these laws are serious felonies, and ten of them attach sex offender status to those convicted under them. There are parallel policies in the U.S. armed forces that have resulted in the discharge or incarceration of PLWH in the military. Here we outline measures that are needed to modernize current laws, practices, and policies that criminalize HIV exposure, nondisclosure, and transmission.

Drivers of Incarceration.
We know that LGBT people and PLWH experience higher rates of homelessness and poverty, lower levels of education, and high rates of family and community rejection. Here we identify key policy reforms that could be taken up by various federal agencies to address the disparities of LGBT people and PLWH in the criminal justice system, and the consequences of the criminalization these populations currently face.

Our policy analysis and recommendations are given life through essays from academic experts in the field, advocates, and formerly incarcerated LGBT people introducing each chapter, as well as through stories and case studies that demonstrate the need for systemic reforms.

BACKGROUND: CONTRIBUTORS AND COLLABORATORS

This brief is the culmination of an 18-month collaboration with key advocates, activists, and practitioners working with LGBT people and PLWH in the criminal justice system.

In May 2013, a working group made up of the authors of this report convened a group of over 50 activists, policy advocates, lawyers, and grassroots organizations working on LGBT, criminalization, and racial justice issues at the local, state, and federal levels for a two-day meeting at Columbia Law School[7] to discuss and articulate a legislative and policy agenda for action on behalf of the communities we serve—namely LGBT people and PLWH who have come in contact with the criminal justice system.

Participants at convening held at Columbia University School of Law May 2013 *IMAGE: RICKKE MANANZALA*

> ***" I speak out for those people whom the justice system has failed, and there are far too many of us."***
>
> *CeCe McDonald*

Our goals were to gather the collective wisdom and expertise of individuals who have been advocating on various fronts to address the criminalization of LGBT people; foster communication across movements, sectors, and regions; and build a network of advocates that can more effectively and strategically achieve policy change in the administration of criminal justice at the federal, state, and local levels. This brief reflects a crowdsourced aggregate of the ideas, recommendations, and proposed outcomes of that meeting in the federal realm, and aggregates the best thinking and visions of multiple perspectives of the movement, from incarcerated individuals to grassroots organizers, to academics, to litigators, to federal policy advocates. It represents an innovative and unprecedented feat of collaboration around a common purpose and a reminder that while tactics may occasionally differ, our end goal is ultimately the same: ending the criminalization of and miscarriages of justice towards LGBT people and PLWH.

Early drafts of this brief were circulated to the attendees of the meeting, other experts in the field, and incarcerated individuals, for additional feedback to ensure that the issues raised and policies proposed accurately reflected their needs and priorities.[8] The authors would like to thank all of those who collaborated with us and contributed to the process, and honor all of the individuals who, like CeCe McDonald and countless others whose names we will never know, have resisted and survived the criminalization of LGBT people and PLWH across time and space.

Community United Against Violence (CUAV) members, staff and board at May Day march
IMAGE: CUAV

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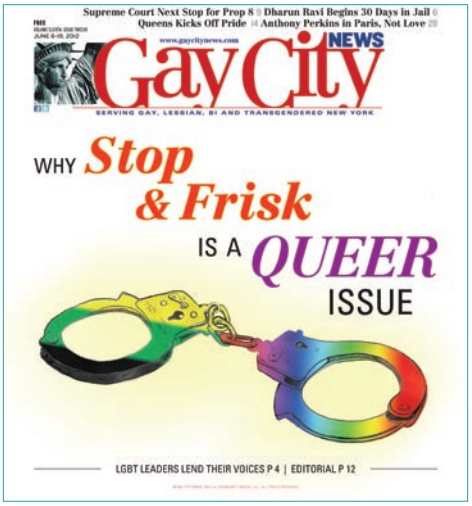
POLICING & LAW ENFORCEMENT



Cover of Gay City News, New York City, June 2012
IMAGE: GAY CITY NEWS

President Obama's 2013 State of the Union address made history by recognizing LGBTQ and Two Spirit communities' resistance to discriminatory policing during the Stonewall Uprising as a critical moment in the march toward equality. Today, the discriminatory policing and abuse of LGBTQ and Two Spirit people which features prominently in the origin story of the modern LGBTQ rights movement is widely perceived to be relegated to the now distant past by more recent legal, legislative, and policy victories.

Yet profiling and discriminatory policing of LGBTQ people persists. Moreover, it often takes place within larger patterns of racial profiling, discriminatory use of stop and frisk, immigration enforcement, and other policing practices contributing to the mass incarceration of people of color in the U.S.

LGBTQ people of color, youth, homeless people, and immigrants experience both similar and different forms of profiling and discriminatory policing as other members of our communities. Even as discriminatory policing of LGBTQ people often takes unique forms rooted in policing of gender and sexuality, it remains a central feature of race and poverty-based policing.

As Mitchyll Mora, research and campaign staff at Streetwise and Safe (SAS), a New York City-based organization focused on profiling and policing of LGBTQ youth of color, testified during recent debates around the NYPD's discriminatory use of 'stop and frisk' practices:

"Most of the time, my experiences of 'stop and frisk' look like those of countless other Latin@ youth in this city, especially when I am dressed in a way perceived to be 'hood' by the police. We know from the statistics that discriminatory policing practices target Brown and Black bodies, and disproportionately affect young people aged 14-21.

But other times, when I am dressed in a different way, when an officer perceives me to be gay or gender nonconforming, my experiences look different. The policing of Brown and Black people begins with the color of our skin, our race, our ethnicity, and our youth, but it does not end there.

These experiences look like a friend of mine, a trans-identified woman, being told to unzip her pants to reveal her genitals to satisfy the curiosity of a police officer. They look like a young queer person being profiled and arrested for a prostitution-related offense based on condoms found on them when they are ordered by an officer to empty their pockets or open up their purse. They look like young lesbian women being sexually harassed and assaulted by police during stops, or being told by officers that they wouldn't get stopped if they didn't dress "like a boy." They look like my

experience earlier this year, when, during the fourth of five baseless stops in a two-year period, a police officer frisking me called me a "faggot" and grabbed my ass.

My body, my life, my very being as a young Brown gay person is policed by the NYPD. Our bodies, our lives, our very beings as LGBTQ youth of color are policed by the NYPD."

In the decade since Amnesty International conducted the first national study of LGBTQ experiences of policing in the U.S., the patterns of discriminatory policing we identified have continued unabated. LGBTQ people—and particularly LGBTQ youth, people of color, Native and homeless LGBTQ people—experience frequent profiling, sexual, homophobic and transphobic harassment, stops and searches, and often face profiling and targeting for "lewd conduct" and prostitution-related offenses. Demands for identification and "consent" searches during street and car stops take on a different character once identification that does not comport with expected or expressed gender is produced, when an officer decides they need to satisfy doubts or curiosity about a gender non-conforming person's anatomy, or when a search produces condoms. Even police responses to violence feature profiling and discrimination against LGBTQ people, producing dual or discriminatory arrests of LGBTQ survivors of homophobic, transphobic, sexual, or domestic violence. Once in police custody, LGBTQ people face further danger and harassment through verbal abuse, searches, placement and assaults in sex-segregated police lockups.

No matter what form discriminatory policing of LGBTQ people takes, there can be no question that it contributes to the criminalization and mass incarceration of communities of color and low-income communities in the U.S. Police officers represent the first point of contact with the criminal legal system. Their day-to-day decisions regarding who to stop, question, search, arrest, charge, or protect are deeply informed by enforcement of racialized gender and sexual norms, and play a significant role in driving LGBTQ people into the criminal legal system.

There is a wealth of expertise among small grassroots organizations who have challenged discriminatory policing of LGBTQ people—and particularly LGBTQ youth, people of color and trans and gender non-conforming people—before, during, and since Stonewall. In recent years, these voices have informed groundbreaking Department of Justice consent decrees with police departments in New Orleans and Puerto Rico, the adoption of police department policies and practices governing interactions with transgender and gender non-conforming people, and the passage of historic legislation in New York City which created the first enforceable ban on profiling based on sexual orientation and gender identity alongside race, religion, gender, age, disability, housing, immigration, and HIV status. These grassroots organizations working at the front lines of LGBTQ criminal justice issues must continue to be the ones driving and informing local, state, and national level policymaking around criminal justice issues.

There is still much more to be done at the federal level to address harmful and discriminatory policing practices across the country, and to interrupt ongoing yet often invisible pathways to criminalization and violation of the rights of LGBTQ people. By tackling these persistent policing patterns and practices, we will further honor the legacy of Stonewall.

ANDREA J. RITCHIE
Coordinator, Streetwise and Safe (SAS), co-author, *Queer (In)Justice: The Criminalization of LGBT People in the United States*

In addition to experiencing many of the same profiling and discriminatory policing practices as other members of communities of color, American Indian and Alaska Native peoples,[9] homeless and low-income communities and immigrants, LGBT youth and adults often experience gender and sexuality-specific forms of racial profiling and poverty-based policing which require specific policy reforms.[10]

In a recent national survey of LGBT people, a quarter of respondents who had recently had in-person contact with police reported at least one type of misconduct or harassment, including profiling, false arrests, verbal or physical assault, or sexual harassment or assault. LGBT respondents of color and low-income respondents and transgender respondents were much more likely to report an experience of at least one type of misconduct or harassment.[11] Between 20-40% of respondents reported verbal harassment or hostile attitudes, with higher percentages of reports among LGBT people of color, transgender and gender non-conforming people, low-income people and LGBT people under 30 years old.[12] LGBT people of color were five times more likely to be asked about their immigration status by law enforcement than white survey respondents.[13]

Across the country, non-heterosexual youth are more likely to be stopped by the police and to experience greater criminal justice sanctions not explained by greater involvement in violating the law or engaging in transgressive behavior.[14] In New York City, LGB youth are more likely to experience negative verbal, physical, and legal contact with the police, and more than twice as likely to experience negative sexual contact in the preceding six months.[15]

Another national survey found that 22% of transgender people who interacted with police reported harassment, 6% reported physical assault, and 2% were sexually assaulted by officers.[16] In light of these statistics, it is not surprising that almost half of survey respondents were uncomfortable seeking police assistance.[17]

Indeed, experiences of police harassment and abuse often extend to circumstances under which LGBT youth and adults are seeking protection from violence. Nearly half of LGBT survivors of violence who sought help from police report misconduct.[18] Over the past decade, law enforcement agents have consistently been among the top three categories of perpetrators of homophobic or transphobic violence against LGBT people reported to anti-violence organizations.[19]

> In 2012 at around 9pm, I left a BreakOUT! meeting. I was walking toward my friend's house. I stopped at a convenience store where I encountered an NOPD officer who was in the process of stopping another transgender girl. I kept walking because it didn't have anything to do with me. At first, they looked at me and didn't say anything. I made it half a block when another unit swarmed in front of me. They stopped me and asked me for my identification. They asked me for my name and my social security number. They asked if I'd been arrested ever and what I had been arrested for. They asked if I'd ever been arrested for prostitution—I told them I had never been arrested for prostitution. I was terrified and nervous. I was detained and in handcuffs but I was never told what I was being arrested for. At processing they told me I was being charged for Crimes Against Nature—charges that were subsequently dropped. When I went to court... the Judge called me a punk and a faggot under his breath...A lot of NOPD officers are abusing their authority by targeting young Black transgirls as they walk down the street. They are targeted simply by how they are dressed. But what is more disturbing is that they are targeted because walking down the street while being young, Black and transgender is considered a crime.
>
> *Member, BreakOUT!*

While law enforcement is generally conceived as a state or local issue, the federal government has considerable influence over the operation of state and local law enforcement agencies through federal funding, Title VI of the Civil Rights Act of 1964, and the pattern and practice enforcement authority created through the Violent Crime Control and Law Enforcement Act (VCCLEA),[20] as well as through the Federal Law Enforcement Training Center and Department of Justice programs aimed at promoting best practices such as the Community Oriented Policing Services (COPS). Additionally, the federal government exercises complete control over the actions of federal law enforcement agencies, and can issue specific regulations and guidance to federal officers such as the guidance on racial profiling issued by DOJ in 2003.[21]

Approximately a half to two thirds of homeless LGBT New Yorkers surveyed in one study reported that they had been stopped, searched, questioned, threatened with arrest or falsely arrested by police, compared to a quarter of LGBT New Yorkers who lived in their own apartments.

Conversely, to address discriminatory policing and law enforcement in Indian country, the Indian Law and Order Commission recommends that the President and Congress act immediately to undo the prescriptive commands of federal criminal law and procedure in Indian country and, with the assurance that the federal civil rights of all U.S. citizens will be protected, recognize Tribal governments' inherent authority to provide justice in Indian country.[22]

LGBT community organizations join launch of Communities United for Police Reform, New York City, February 2012
IMAGE: COMMUNITIES UNITED FOR POLICE REFORM

PROFILING

LGBTQ youth leaders from Streetwise and Safe (SAS) advocate for an enforceable ban on police profiling in New York City, July 2013
IMAGE: A. RITCHIE

As documented across the country by academic researchers,[23] international human rights organizations,[24] and by local groups in many urban areas,[25] LGBT youth and adults, and particularly LGBT youth and people of color, experience pervasive profiling and discriminatory treatment by local, state, and federal law enforcement agents based on actual or perceived sexual orientation, gender, gender identity or expression, or HIV status. Such gender and sexuality-based profiling often takes place in conjunction with and compounds profiling and discriminatory treatment based on race, color, ethnicity, national origin, tribal affiliation, religion, age, immigration status, and housing status, among other determinants.

RECOMMENDATIONS:

- The Department of Justice (DOJ) should immediately adopt and enforce an updated directive on profiling by federal law enforcement agents prohibiting profiling based on actual or perceived sexual orientation, gender, gender identity and expression, disability, immigration, housing, marital and HIV status, and promptly issue and enforce an updated directive to federal law enforcement agents to that effect.

- All federal law enforcement agencies, including Immigration and Customs Enforcement (ICE), should adopt anti-discrimination and anti-profiling provisions of recent consent decrees entered into by DOJ with the New Orleans Police Department (NOPD) and the Commonwealth of Puerto Rico (PRPD) prohibiting the use of race, color, ethnicity, national origin, immigration status, religion, gender, disability, sexual orientation, or gender identity as a factor, to any extent or degree, in establishing reasonable suspicion or probable cause, exercising discretion to conduct a warrantless search or seek a search warrant, or effecting arrest, except as part of an actual and apparently credible description of specific suspect or suspects in a criminal investigation.[26]

- DOJ should make promulgation and compliance with policies consistent with the above referenced anti-discrimination and anti-profiling provisions of recent consent decrees entered into by DOJ with NOPD and PRPD a condition of federal funding to local law enforcement agencies.[27]

- DOJ should make collection of data concerning stops, frisks, and searches of pedestrians and motorists a condition of federal funding to local law enforcement agencies, promulgate guidelines for data collection, and collect and publish this data on an annual basis.

- The Administration should support and promote passage of the End Racial Profiling Act, with provisions inclusive of prohibitions on profiling based on gender, gender identity and expression, and sexual orientation.

POLICING HOMELESSNESS

LGBT youth are estimated to make up 40% of the homeless youth population in the United States.[28] LGBT adults and PLWH similarly experience high rates of housing instability and homelessness.[29] As a result, LGBT people are disproportionately impacted by targeted policing, harassment, and abuse of homeless people by law enforcement, as well as by discriminatory enforcement of laws that criminalize everyday activities in public spaces and public housing projects. Approximately a half to two thirds of homeless LGBT New Yorkers surveyed in one study reported that they had been stopped, searched, threatened with arrest, or falsely arrested by police, compared to a quarter of LGBT New Yorkers who lived in their own apartments.[30]

> Gay men of color, along with women and transgender people of color, are among the Black and Latina/os disproportionately subjected to more than 685,000 stops and frisks by the NYPD last year. I know, because I am one of them.
>
> Sometimes our experiences are no different than the rest of our communities. For instance, I was first stopped and frisked just months after I moved to New York as I was riding my bicycle in Fort Greene, as part of the NYPD's "quality of life" policing. The second time I was stopped, police rummaged through my bags of recently washed clothes as I was on my way home from a laundromat in Bed-Stuy. This time, presumably the goal was finding weapons or drugs. But, as in 99.9% of stops conducted by the NYPD [in 2011], no gun or contraband was found among my clean boxer briefs.
>
> At other times, our experiences are marked by homophobia and transphobia in addition to racism and policing of poverty. This past December, my friends and I were stopped, questioned, and searched in Marcus Garvey Park in Harlem—not on the pretense that we had weapons or contraband—but because we were three Black gay men in a park. The fact that we were dancing to Beyoncé was presumably enough to give rise to reasonable suspicion that we were engaged in unlawful sexual activity.
>
> *Chris Bilal, Camaign Staff, Streetwise and Safe (SAS)*

RECOMMENDATIONS:

- DOJ should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances, intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.[31]

- DOJ should promote and support enactment of federal, state, and local legislation prohibiting profiling discrimination by law enforcement based on housing status.[32]

- Federal agencies should leverage federal funding to discourage criminalization of homelessness and poverty through enforcement of anti-panhandling laws, laws prohibiting sitting or lying on sidewalks, loitering and vagrancy laws.[33] This could include providing bonus points in applications for funding for communities that do not engage criminalization of homelessness and pursue alternate solutions to housing instability along the lines of Utah's Housing First Program.[34]

POLICE DETENTION

As highlighted by many testimonies and submissions to the National Prison Rape Elimination Commission (PREC),[35] as well as reports by international human rights organizations,[36] women and LGBT people in the custody of local law enforcement, including in police lock-ups, all too often experience unlawful searches and sexual assaults by law enforcement officers and fellow detainees.

Additionally, sexual harassment, sexual assault, and rape take place in police squad cars and vans, often driven to isolated locations but still within the control of a government agent.[37] Such locations meet the PREA's definition of a "lock-up" in that they are "secure enclosures that are: (1) [u]nder the control of a law enforcement, court, or custodial officer; and (2) [p]rimarily used for the temporary confinement of individuals who have recently been arrested, detained, or are being transferred to or from a court, jail, prison, or other agency."

Finally, searches conducted by police officers on the street or in police detention facilities for the purposes of assigning a gender to detainees based on anatomical features—or simply to ogle or humiliate transgender and gender non-conforming arrestees—are both constitutionally prohibited and widespread.[38] LGBT youth and adults often experience such unlawful and invasive searches as state-sanctioned sexual assaults.

> Stop and frisk affects women of color such as myself. It affects LGBT youth of color such as myself. I have been stopped numerous times by police in the West Village and Chelsea neighborhoods. For instance, I was stopped and frisked three years ago when I was leaving Chi Chiz, a primarily African American LGBT club in the West Village at around 2 AM with a group of four friends who were transgender women and gay men. As we left the club, we were immediately stopped by police who told us to put our hands on the wall. They told us it was a "routine search." There was no reason to believe we were committing any crime. We did what they told us to. I was facing the wall, they pat my arms down, ran their hands between my chest, patted my pockets and then went inside my pockets and pulled my wallet out, checked my ID, made sure none of us had any warrants, and then told us we were free to go, but we better not be around when they came around again. After they walked away, I felt violated. I felt like they took something from me. I felt demoralized. I felt like I wasn't safe, I was afraid that they would lock me up just for being outside.
>
> *Don Thomas, Youth Leader, Streetwise and Safe (SAS)*

RECOMMENDATIONS:

- DOJ should aggressively pursue enforcement of existing PREA standards for police lock-ups.
- DOJ should issue a clarification that the definition of "lock-ups" contained in the PREA regulations includes police cars and other temporary locations of police detention.
- DOJ should initiate new rulemaking pursuant to PREA that would more closely harmonize the PREA provisions pertaining to police lock-ups with those pertaining to adult jails and prisons, including augmenting provisions related to access to victim advocates, response planning, training and education, and screening for risk of sexual victimization and abusiveness, to police lock-ups.
- DOJ should amend PREA regulations to include an explicit prohibition on search for the sole purpose of determining genital characteristics in police lock-ups, regardless

of whether conducted as part of a broader medical examination, and regardless of whether genital characteristics are known.[39]

- DOJ should provide necessary guidance regarding searches and placement of transgender and gender non-conforming individuals in police custody, and issue a clarification through the Frequently Asked Questions section on the PREA Resource Center's website[40] indicating that that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.[41]

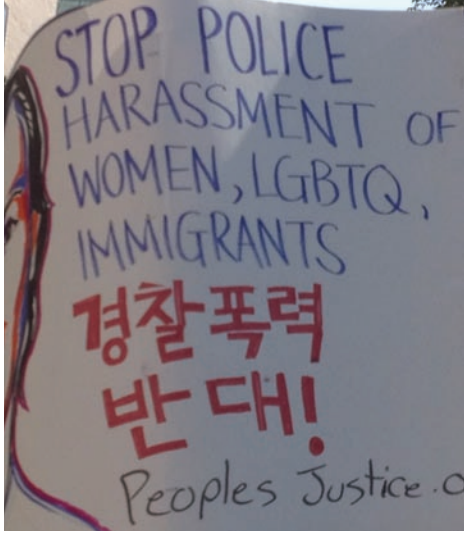
- The Bureau of Justice Statistics (BJS) should develop a survey analogous to the National Inmate Survey (NIS) that would enable annual data collection concerning reports of sexual harassment and assault in police custody by mandating that selected agencies participate in the survey as a condition of receipt of federal funding.

- Federal law enforcement agencies should adopt policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the recommendations of the International Association of Chiefs of Police (IACP).[42]

- DOJ should condition federal funding to local law enforcement agencies on adoption of policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the IACP recommendations.[43]

- DOJ should condition federal funding to local law enforcement agencies on adoption of provisions of NOPD and PRPD consent decrees with respect to regulation of consent searches.[44]

- In consultation with groups who have successfully advocated for local policies, DOJ should promulgate guidance for local law enforcement agencies relating to placement, searches, and interactions with transgender and gender non-conforming individuals consistent with those contained in NOPD and PRPD consent decrees,[45] and make adoption of policies consistent with the guidance a condition of receipt of federal funding.



Sign by People's Justice at Silent March to End Stop and Frisk, New York City, June 2012
IMAGE: YUL-SAN LIEM

> In October 2014, I was accompanying a transgender woman to a court date for a default warrant in New Bedford, Massachusetts. When her name was called and she was brought before the judge they placed her in cuffs and sent her into the holding area before they could go forward with the probation violation hearing. When the court officer brought her into the holding area he asked her, "are you a man or a woman?" When she responded that she was a woman he grabbed her genitals and said, "women don't have dicks." While she was crying he called her names and continued to make comments about her breasts and genitals. All of this was reported to me after the incident as she was allowed to return home because she was already on a GPS unit. There was no one else around watching the court officer. The individual who was assaulted did not want any reports filed or comments made to the court because she was fearful that it would result in her getting in more trouble, possibly getting locked up in jail again, or having another incident of being alone with another court officer.
>
> *Rev. Jason Lydon, Black and Pink*

USE OF POSSESSION OF CONDOMS AS EVIDENCE TO ENGAGE IN PROSTITUTION-RELATED OFFENSES

As documented by Human Rights Watch in four major cities across the United States and reported in many other jurisdictions,[46] local law enforcement agencies and prosecutors routinely use possession or presence of condoms as evidence of intent to engage in prostitution-related offenses. This harmful practice has a significant deterrent effect on individuals' willingness to carry condoms or make them available to others for fear of police harassment and criminal prosecution, particularly among populations routinely profiled and targeted in enforcement efforts, including LGBT youth and adults.

> ***"When the police take our condoms or lock us up for carrying condoms, they are putting our lives at risk. How am I supposed to protect myself from HIV and STIs when I am scared to leave my house with condoms in my purse?"***
>
> *Trina, Youth Leader, Streetwise and Safe (SAS)*

RECOMMENDATIONS:

- The Centers for Disease Control and Prevention (CDC) and DOJ should issue and publicize guidance condemning reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity, and encouraging local law enforcement agencies to adopt policies prohibiting this practice.

- Consistent with the resolution of the Presidential Advisory Council on HIV/AIDS, DOJ and CDC should develop, disseminate, publicize, and promote guidance to state lawmakers and prosecutors to adopt legislation and policies that would eliminate the practice of using possession or presence of condoms as the basis of criminal prosecutions or sentence enhancements.

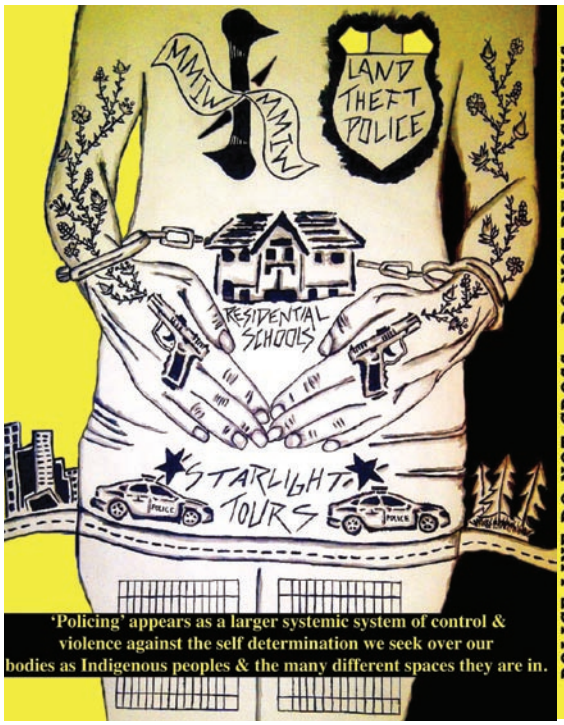
"Know Your Rights" buttons created by LGBT youth leaders at Streetwise and Safe (SAS), *IMAGE: K. LUNDIE*

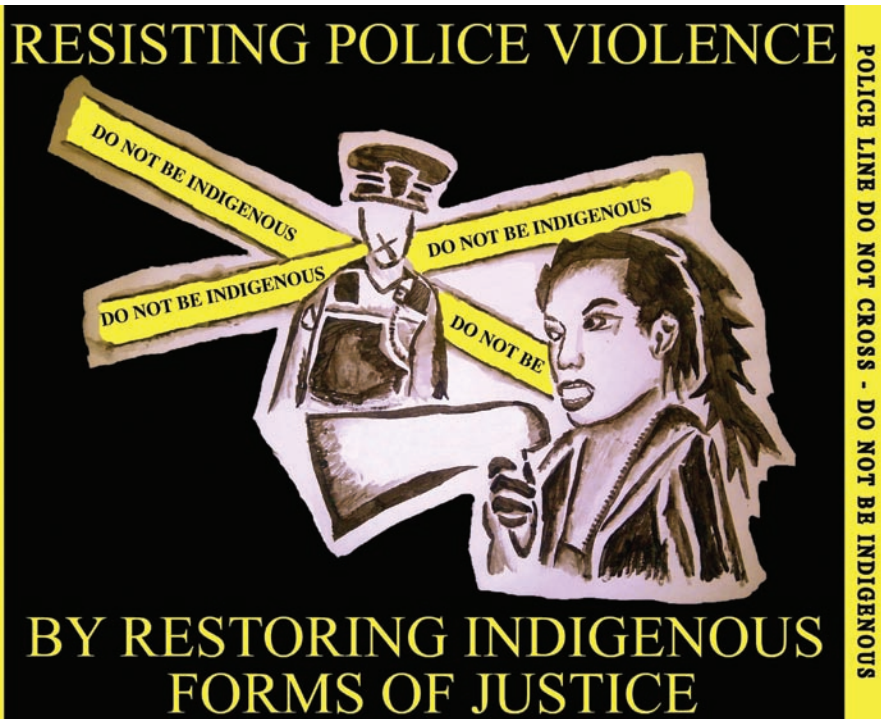
The practice of using condoms in prostitution related offenses affects my community, LGBT young people, because we are often profiled as being engaged in the sex trades. One time, I was going to a kiki ball on a Saturday night in the West Village. I was standing on the street talking with some friends and an officer approached me. She asked me for my ID. I gave it to her. At that time I didn't have my name legally changed. She not only would not call me by my real name, but she kept calling me a man and a faggot. She took a picture of my ID and sent it to the 6th precinct. The dispatcher told her that my record was clear but instead of letting me go, she said she wanted to see in my purse. I didn't know my rights then or I would have not consented to the search. I thought I had to show her the contents of my purse.

When she looked inside, she saw two condoms. She called the precinct back and asked for a police car to come. I asked her, "Why are you locking me up? I can't carry condoms?" She replied, "You are getting locked up for prostitution." I was taken to the precinct and put in with the men. I was 17 years old. This is my story but this is also the story of many of my friends who are Lesbian, Gay, Bisexual and Transgender, young, and of color.

When the police take our condoms or lock us up for carrying condoms, they are putting our lives at risk. How am I supposed to protect myself from HIV and STIs when I am scared to leave my house with condoms in my purse? For my community, it is not only being put at risk for HIV, STIs, and unwanted pregnancies, but having to be harassed and assaulted by police officers for being transgender or queer.

Trina, Youth Leader,
Streetwise and Safe (SAS)





IMAGES: NATIVE YOUTH SEXUAL HEALTH NETWORK

3
PRISONS

Artwork by Yeniel Hernandez, FL, incarcerated Black and Pink member

Every day, the lives and the physical integrity of lesbian, gay, bisexual, and transgender people are at stake within our prison systems."[47] These are words from the report of the National Prison Rape Elimination Commission (NPREC), a group of experts convened by Congress to study the epidemic of sexual violence in prison. The NPREC made critical findings that led to the Department of Justice's inclusion of important protections for LGBT people in the final regulations of the Prison Rape Elimination Act (PREA). The regulations limit the use of protective custody, which is routinely used to place LGBT people in solitary confinement for their "protection," and mandate the end to harassing and abusive searches to determine genital characteristics, which transgender and gender non-conforming people have often been subjected to in custody.[48]

> ***" Prisons aren't safe for anyone, and that's the key issue."***
>
> *CeCe McDonald*

Yet, there are many serious problems with the implementation of PREA, and LGBT people face ongoing violence in custody. In my work as an attorney serving imprisoned LGBT people, it is clear that "sexual violence is central to the operation of the prison regime...[where i]ncarceration is itself an act of racialized sexual violence."[49] As black trans activist and prison survivor, CeCe McDonald, said when she was released from prison this year, "Prisons aren't safe for anyone, and that's the key issue."[50] For LGBT people, some particularly widespread and harmful sites of violence include the systemic denial of healthcare and the regular use of isolation.

Federal courts have repeatedly ruled that transition-related health care is medically necessary and officials are liable for their deliberate indifference to this need, but the reality for many transgender people in custody is that this care is routinely withheld.[51] Despite case law establishing that trans people should be able to get the health care they need,[52] one transgender woman we have worked with in North Carolina has been denied an evaluation for Gender Dysphoria (GD) for the past eight years.[53] The majority of transgender people in custody across the country are facing the same problem. Every day I hear from people who are denied care they need to survive. Corrections agencies continue to claim that transition-related health care is not "real" health care. Even where policies have been implemented to provide hormones and surgery for transgender prisoners, like in Massachusetts or New York, people are often evaluated by providers who either don't believe in providing the care or are not qualified to make a diagnosis. In one evaluation I read recently, the clinician determined that because the individual,

who identified as a transwoman, had an interest in cars and was attracted to other women, that she could not have GD. Whereas in the past, people were never sent for evaluations at all, in the systems that have been sued and are forced to evaluate people for GD, clinicians simply routinely deny that the patient has GD. This makes access to care even more difficult because once a medical determination has been made that the care is unnecessary, regardless of how biased the evaluation, it becomes almost impossible to override. The result is that thousands of transgender people are being denied critical medical care in our nation's prisons, jails, and immigration detention facilities.

For many LGBT and gender non-conforming people, protective custody remains the default placement for periods of days, months, years, and in some cases, decades. In addition to the conditions themselves amounting to torture, solitary confinement usually restricts a person's access to education, work, and program opportunities. These opportunities are not only essential for maintaining a person's mental health, but are usually necessary for achieving good time credit and being paroled. This means that LGBT people, who are likely to serve much of their sentence in isolation, are also more likely to serve the maximum time (or longer) of non-life sentences.[54]

Rather than fulfill their constitutional obligation to keep people safe from violence, corrections agencies continue to use solitary confinement to warehouse vulnerable people. I am working with one transgender girl without any criminal convictions who is now being held in isolation in a boy's facility. The agency that is housing her agrees that solitary confinement is not sustainable, but rather than move her into the general population of a girls' facility where she would feel safer, officials are utilizing an exceptional and rarely used procedure to move her out of the juvenile system into the adult men's prison system. She now may spend the next five years in isolation in an adult men's facility.

LGBT people, who are likely to serve much of their sentence in isolation, are also more likely to serve the maximum time (or longer) of non-life sentences.

Though PREA has offered some protections for LGBT people in custody, we have also seen widespread misuse of PREA's mandate by corrections officials. In Idaho, for example, PREA has been used to restrict the gender expression of people in custody under the guise of ending sexual assault: "To foster an environment safe from sexual misconduct, offenders are prohibited from dressing or displaying the appearance of the opposite gender."[55] A few years ago, I represented a transgender woman in a New York men's prison who was disciplined after reporting a sexual assault perpetrated against her. The officials argued that her gender non-conformity was evidence that she had consented to the rape. Meanwhile, all corrections agencies continue to prohibit consensual sexual contact or touching of any kind. Consensual contact is often punished as harshly as rape. As I was writing this, the West Virginia Supreme Court upheld a disciplinary infraction against a prisoner for kissing another prisoner on the cheek. He served 60 days in solitary. Unfortunately, PREA is becoming another mechanism of punishment used by corrections officials, often especially targeting LGBT prisoners.

For all the people that advocates hear from, there are countless others who are unable to access outside support and still others who have died without ever telling their stories. While there continue to be important victories for LGBT people in prison, and the resilience and resistance of those behind bars transcends even the most egregious injustices, much work remains.

CHASE STRANGIO
Staff Attorney, American Civil Liberties Union

Community Members gather at the Sylvia Rivera Law Project to write postcards to prisoners. *IMAGE: SYLVIA RIVERA LAW PROJECT*

LGBT people and PLWH are overrepresented in U.S. prisons and jails, and face widespread and pervasive violence, inadequate health care, nutritional deprivation, and exclusion from much-needed services and programs.[56] LGBT prisoners and prisoners with HIV are more likely to be placed in administrative segregation or solitary confinement, to face harassment and sexual assault, and to be denied access to mail, jobs, and programs while in custody.[57] LGBT prisoners have also experienced unanticipated negative impacts from the Prison Rape Elimination Act (PREA), including being punished through new policies purportedly created to comply with PREA that forbid gender non-conforming behavior and punish consensual physical contact.[58] Transgender women are routinely placed in men's prisons and jails in virtually every jurisdiction, where they face harassment and violence, often for extended periods in isolation ostensibly for their own protection. A 2009 survey found that transgender prisoners experience sexual victimization at a rate 13 times higher than non-transgender prisoners.[59] These conditions not only cause LGBT prisoners and prisoners with HIV harm while incarcerated, but also make them more vulnerable upon release since they are more likely to suffer unmet medical needs, mental health consequences from discrimination and violence, and fewer benefits of educational and other programming inside prisons.

DISCRIMINATION AND VIOLENCE INSIDE PRISONS AND RELATED FACILITIES

RECOMMENDATIONS:

- The Federal Bureau of Prisons (BOP) should provide guidance clarifying that federal regulations that prohibit discrimination based on "sex" include gender identity and expression-based discrimination.[60] This guidance should explicitly discuss examples of discrimination experienced by transgender and gender non-conforming prisoners and describe how it is to be avoided. This guidance should also recognize the right to identify in culturally specific ways, such as Two Spirit and tribal specific forms of gender identity and expression, and the forms of discrimination targeting individuals who express these identities.

- The Department of Justice (DOJ) and BOP should amend their regulations to explicitly add sexual orientation, gender identity, marital status, and HIV status to the forms of discrimination that federal law prohibits.[61]

- DOJ should amend the PREA regulations to require prisons to eliminate bans on consensual sex among incarcerated people. Current BOP policy authorizes prison administrators to ban consensual sex among people in custody, which undermines PREA's goals by discouraging prisoners from reporting sexual violence. In some cases, people who have claimed that they were raped have been punished for purportedly engaging in consensual sex after staff determined that their claim was unsubstantiated.[62] DOJ should convene a working group of relevant agency personnel and outside experts, including people who have been incarcerated and survivors of sexual assault, to recommend modifications to BOP's existing policy with the purpose of creating a policy that allows for appropriate, consensual sexual contact among prisoners but does not undermine the purposes of PREA or authorize relationships between a prisoner and a prison staff

Black and Pink has received numerous letters from prisoners detailing ways PREA has been used to harm them as LGBT prisoners. We have seen particularly harmful patterns in Texas, Florida, and Pennsylvania. Jim, a prisoner in Texas reported that prison guards would write up disciplinary tickets against him for holding hands with his lover in the mess hall. Jim reported that the disciplinary hearing was filled with homophobic jokes and threats of being placed in solitary confinement if the prisoners were found touching again. Hope, a transgender woman prisoner in a men's prison in Massachusetts reported receiving a disciplinary ticket for a PREA violation after she was attacked by another prisoner. The attacker lied and told the guards that Hope had offered him oral sex. As a result, she was punished even though she was the person attacked, and she is now facing being moved to a maximum security prison because of the violation. We have heard numerous stories from prisoners that guards will yell out "PREA" when they see prisoners gathered together closely, creating a culture of fear around the rules created by PREA. We have received many letters about the harm PREA is causing and not a single example of PREA being used to help someone feel safer after an assault.

" Black and Pink has received numerous letters from prisoners detailing ways PREA has been used to harm them as LGBT prisoners."

Rev. Jason Lydon, Black and Pink

member. The group should also investigate and address instances of prison staff using PREA as a pretext for punishing non-sexual displays of affection, which tend to be based on homophobia and transphobia.[63]

- DOJ and BOP should ensure that prison visitation policies, including conjugal visitation policies, do not permit discrimination or harassment on the basis of sexual orientation, gender identity, or marital status.

- PREA regulations extend important new protections to transgender people, including limitations on bodily searches and segregated housing.[64] However, the current PREA regulations provide no clarity regarding what constitutes a cross-gender search for transgender prisoners and detainees. DOJ should issue a clarification through the Frequently Asked Questions section on the PREA Resource Center's website[65] indicating that that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.[66]

- DOJ should amend PREA regulations to include an explicit prohibition on search for the sole purpose of determining genital characteristics, regardless of whether genital characteristics are known or whether as part of a broader medical examination.[67]

- The Administration should initiate, support and promote legislation that would create a private right of action to enforce the PREA regulations.

- The Administration should work with Congress to reform the Prison Litigation Reform Act (PLRA). PLRA creates significant obstacles for prisoners seeking redress for harm and violence, including sexual violence. Reforms should include repeal of the physical injury requirement, repeal or amendment of the exhaustion requirement, and repeal of the provisions extending the law to children.[68]

HEALTH AND NUTRITION

- BOP should ensure that LGBT-inclusive sexual health care is available as part of essential medical care in its facilities, and make condoms and other barriers freely available to federal prisoners as part of basic sexual health care and sexual health care literacy programs. BOP should also provide guidance[69] to states and local recipients of federal law enforcement funding on the elements of basic sexual health care and literacy programming, including condom availability in all facilities of confinement.[70]

- Ensure all prisoners and detainees receive access to quality necessary medical care, including continuity of care during transfers between facilities and after release, access to treatment based on contemporary medical standards, and full informed consent for all treatment.[71] This should include screening, diagnosis, and evidence-based treatment for substance use-related conditions, including access to approved opiate replacement therapies such as methadone and buprenorphine. Prisoners who were previously receiving treatment with methadone or buprenorphine before incarceration should be continuously maintained on it throughout intake to any correctional facilities.[72]

- BOP should complete an assessment of current practices to ensure that all prisoners with HIV receive regular evaluation and therapy consistent with current Department of Health and Human Services (HHS) treatment standards and guidelines and receive prescribed HIV medications immediately upon detention and transfer in a confidential and timely manner consistent with prescribed timing and dosage.

- BOP should ensure regular and comprehensive training of prison officials in the appropriate medical treatment for HIV-positive and LGBT prisoners and detainees.

- BOP should create rules and guidance ensuring that prisoners have access to gender-appropriate clothing and grooming items, which are often particularly denied to transgender prisoners. BOP should use the New York Office of Children and Family Services (OCFS) policy as a model.[73]

- BOP should ensure that all confinement facilities follow standards set by the Department of Agriculture (USDA) and the CDC on nutritional adequacy for all people in custody, with an emphasis on creating menus that reflect the needs of people living with long-term illness, pregnant people, people with HIV, young people, and people over the age of 50.[74] Specific attention should be paid to resolving current problems of inadequate nutrition and lack of physical activity for prisoners in solitary confinement.[75]

ACCESS TO PROGRAMMING

- BOP should ensure meaningful access to libraries and educational programs for prisoners in federal prisons, and provide guidance for such access in state and local facilities, including youth facilities. Access to the internet, LGBT educational materials and publications, materials relevant to a racially and religiously diverse set of populations, cultural supports and Native-specific programming, mental health resources, and programs designed to prepare prisoners for release should be provided.[76] People in solitary confinement, protective custody, or other types of segregation should also have access to such materials and programs.

PLACEMENT WITHIN PRISON FACILITIES

- PREA regulations extend important new protections to transgender people, including limitations on segregated housing.[77] Consistent with these regulations, BOP should eliminate involuntary placement in protective custody in federal prisons and DOJ should provide guidance to state and local jurisdictions to do the same. Such placement is regularly used to effectively place LGBT prisoners in solitary confinement.[78]

- BOP should eliminate all forms of solitary confinement in federal prisons and DOJ should provide guidance to state and local facilities to eliminate such placements, sometimes called "Intensive Management Units," "Communication Management Units," "Special Housing Units," or "Security Housing Units." LGBT prisoners, including youth, and prisoners with HIV and/or other serious health conditions are regularly placed in such units at the discretion of prison staff for long periods without justification, due process or outside oversight. Such placement causes significant psychological harm and adverse health outcomes, including suicidality.[79]

- BOP should make transparent determinations of whether to place transgender prisoners in women's or men's facilities[80], and enable engagement of transgender advocates in those determinations. PREA regulations require officials to make case-by-case decisions that are not solely based on anatomy, and give serious consideration to the individual's own views as to his or her safety.[81] However, significant challenges remain regarding the pace of implementation of these requirements as well as the process for making the determination. BOP should ensure that this process is meaningful by making it transparent, disclosing statistics on the assignment of transgender people and the preferences that they expressed, and inviting advocates from the transgender community to play a role in the review process.

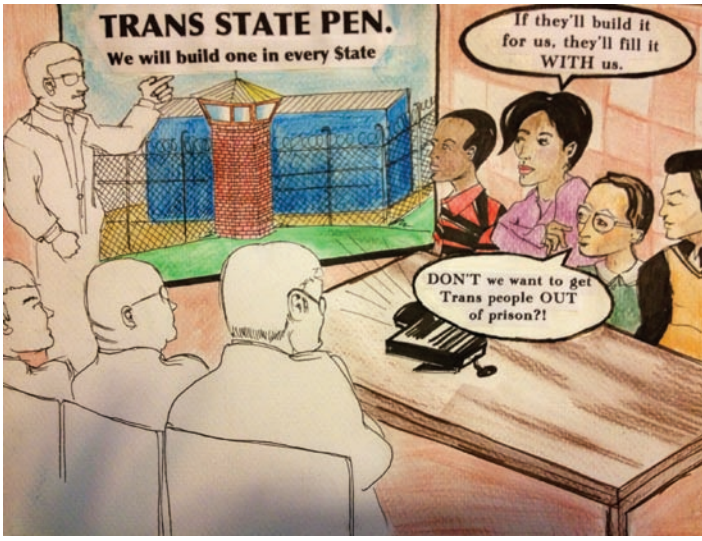


IMAGE: TALCOTT BROADHEAD

I spent three and a half years in federal prison on a drug charge. As a black trans woman, I experienced sexual violence while in prison. I was put in blatantly dangerous housing situations where officials knew I would be taken advantage of. When I went to tell the prison staff that the guy that I was in the cell with had several times fondled my breast when I tried to sleep, I was told that if I reported the assault the only place he could house me was in the SHU, which is isolation. I knew that being housed in the SHU would prevent me from participating in the drug program that was allowing me to qualify for early release and I would not be able to attend school programs that I was involved in. I chose to keep quiet about what was happening to me so that I could be part of the program and be released from prison 18 months early. No one should have to make the choice between enduring a longer prison sentence or being sexually assaulted. It was one of those things that I felt caused me so much pain and helplessness—a hard decision to make but I learned to shut my mouth and do the best I could just to stay strong. I was even afraid to talk about it via mail or phone where I was housed because they listened to your phone calls closely.

Janetta Johnson, Program Coordinator, Transgender, Gender Variant, and Intersex Justice Project

4
IMMIGRATION

Community United Against Violence (CUAV) member at a march against S-Comm deportation policy, San Francisco, 2013. *IMAGE: CUAV*

My client, Julio, came to the U.S. from Mexico under stressful and difficult circumstances when he was 21. He was marginally housed when he arrived and had homophobic experiences at shelters that made it harder for him to access social services. His life was chaotic, between trying to find both housing and a job in a new country. He missed the one-year deadline for applying for asylum because he was unaware of it. Three years after arriving in the U.S., he found himself in an immigration detention center following a fight with his boyfriend. The fight resulted in a malicious mischief charge and an arrest by local police. The criminal charges didn't stick so he should have been released, except that, because of the Secure Communities (S-Comm) program, he was turned over to Immigration and Customs Enforcement (ICE). I met him when he was in detention, awaiting deportation. He was very ill, and was not getting the medical care he needed. When he learned that he might be detained for months and even years while his case was pending, he lost hope and signed off on his own deportation. I lost touch with him after his deportation. I worry about whether he is still alive.

Immigration laws and policies in the U.S. present a difficult and sometimes impossible maze for most immigrants. For LGBTQ people and people living with HIV, this maze can prove deadly. The past seven years have seen an unprecedented build-up in immigration enforcement efforts, justified as a pre-requisite to comprehensive immigration reform. The results have been disastrous for immigrant communities, including LGBTQ immigrants and immigrants living with HIV.

The enforcement build-up includes increased partnerships between ICE and local law enforcement, best exemplified by the S-Comm program. S-Comm has been forcibly implemented across the country despite state and local efforts to opt out of the program. Under S-Comm, fingerprints of individuals booked into jails are automatically checked against Department of Homeland Security (DHS) immigration databases. If there is a "hit" in an immigration database, ICE is automatically notified, even if the person has not been convicted of any criminal act. ICE then places an "immigration hold" on the person, and they are transferred from local custody into ICE custody, where they face detention and deportation.

S-Comm and the 12 other "ICE ACCESS" programs transform any contact with local law enforcement into a direct conduit to immigration detention. LGBTQ people are especially likely to be swept up into the criminal legal system because they are targets of police profiling and because they are disproportionately economically marginalized due to discrimination in employment and social services. LGBTQ immigrants face heightened levels of police and other violence in the U.S., all the while fearing deportation to countries they may have fled due to the same types of harm.

Once in immigration detention, LGBTQ and HIV-positive immigrants face denial of basic health care, solitary confinement, and sexual and physical violence. Immigrants can spend months and even years in detention fighting their deportation. With no right to appointed counsel in immigration proceedings, LGBTQ and HIV-positive immigrants often must engage in one of the most important fights of their lives alone, in an adversarial court setting against trained ICE prosecutors.

LGBTQ immigrants seeking lawful status in the U.S., whether detained or not, face an uphill struggle. Those seeking asylum, a common form of relief sought by LGBTQ immigrants, can be thwarted by the requirement that asylum be sought within a year of arriving in the U.S. For LGBTQ immigrants first arriving in the U.S., one year can prove to be insufficient time to gain even basic stability—; shelter, food, and employment can remain out of reach.

LGBTQ people seeking forms of family-based immigration relief can find themselves with few options, since many LGBTQ people face rejection from their birth family and are involved in family formations that do not fit the requirements immigration authorities impose. The recent changes in recognition of same-sex marriage by the federal government provide potential immigration benefits only for the relatively small number of LGBTQ immigrants who are partnered with U.S. citizens.

Employment-based immigration is a virtual impossibility for the vast majority of immigrants, and is especially out of reach for LGBTQ people who face employment discrimination. Even if they are able to the overcome the obstacles to stable employment they face by virtue of their status as LGBTQ, their health status, and their lack of lawful immigration status, LGBTQ and HIV- positive immigrants can use employment as a conduit to lawful immigration status in only the rarest of cases.

“ Once in immigration detention, LGBTQ and HIV-positive immigrants face denial of basic health care, solitary confinement, and sexual and physical violence ... With no right to appointed counsel in immigration proceedings, LGBTQ and HIV-positive immigrants often must engage in one of the most important fights of their lives alone, in an adversarial court setting against trained ICE prosecutors.”

With comprehensive immigration reform efforts stalled, and deportations reaching record numbers, many LGBTQ and HIV- positive immigrants live in a constant state of fear and anxiety. By centering the experiences of LGBTQ and HIV- positive immigrants in crafting and revising current policies, however, some clear avenues for change emerge. For most, lawful status and the protections it provides are not currently an option. Thus, the question that must guide policy changes is how to reduce the harms associated with lack of lawful immigration status for LGBTQ and HIV-positive immigrants.

ANGÉLICA CHÁZARO
Immigration Attorney and Professor, University of Washington School of Law

Immigration, border, and security-related enforcement impact the lives of hundreds of thousands of people living in the U.S., including LGBT and people living with HIV (PLWH). The Williams Institute estimates there are at least 267,000 undocumented LGBT immigrants in the U.S.[82] While few data are collected regarding the number of LGBT immigrants who are currently in detention or facing removal proceedings, advocates serving LGBT communities receive hundreds of requests for help per year from LGBT immigrants, many facing or in detention, and note that "LGBTI people make up a significant percentage of those detained in immigration detention and holding facilities."[83] Because of widespread police profiling, selective and discriminatory law enforcement practices, false or dual arrest when seeking protection from violence, poverty, and a history of discriminatory immigration enforcement against LGBT people and PLWH,[84] LGBT immigrants often come into high rates of contact with law enforcement and immigration authorities.

This structural targeting of LGBT persons and PLWH is exacerbated by policy shifts in the past decade that have authorized a new role for local and state law enforcement agencies in federal immigration enforcement through programs like the S-Comm program and the Criminal Alien Program (CAP).[85] Advocates estimate that almost 70% of the 420,000 persons detained by Immigration and Customs Enforcement (ICE) in 2012 were held in state and local facilities.[86] Overall, the number of persons detained has increased dramatically in recent years as has the cost:[87] the number of detention beds maintained by law has increased to 34,000 a year, with this number being reauthorized annually during the appropriations process.

In March 2014, in response to significant pressure from immigrant rights groups, civil rights and labor advocates, and members of Congress—including the Congressional Hispanic Caucus, among others—President Obama ordered a review of his Administration's deportation policy, which has already led to the deportation of nearly 2 million people since 2008.[88] Such mass deportations of undocumented people have been widely questioned and criticized by members of Congress, advocacy organizations, and immigrant rights and LGBT groups.[89]

People who are LGBT and/or living with HIV in immigration detention report high incidence of sexual abuse, assault, transphobic and homophobic harassment, routine use of solitary confinement and restrictive housing, lack of adequate medical care, neglect, discrimination, and abuse at the hands of staff in immigration detention facilities.[90] Additionally, the one-year deadline for filing claims for asylum puts this particular form of immigration relief out of reach for one in five persons fleeing persecution. For LGBT people, this time limit may prove to be an even greater barrier due to reluctance to come forward based on experiences of discrimination at the hands of government authorities both prior to and after arrival in the U.S.[91]

Boston Community Church comes out against Secure Communities, October 2011. *IMAGE: BLACK AND PINK*

RECOMMENDATIONS:

- The Department of Homeland Security (DHS) should end S-Comm and CAP, along with other ICE ACCESS programs that require information sharing between local law enforcement agencies and federal immigration authorities, and shift immigration enforcement duties to local law enforcement agencies.

LGBTI people make up a significant percentage of those detained in immigration detention and holding facilities.

- The Department of Justice (DOJ) and the Administration should work with Congress to remove the one-year application deadline for asylum application.
- DOJ should ensure that asylum applicants are not detained while their applications are pending.
- The Administration should support and promote the elimination of annual deportation and detention quotas, and should clarify that ICE's 34,000 "bed quota" does not mandate ICE to fill the Congressionally authorized detention beds.
- The Administration should enact a moratorium on deportations.
- DOJ and DHS should prioritize the development and implementation of alternatives to detention, and the release of individuals in removal proceedings on their own recognizance. Release for all LGBT individuals should be prioritized to the maximum extent possible. ICE should specifically provide alternatives where existing community-sponsored alternative-to-detention programs are run by the U.S. Conference of Catholic Bishops (USCCB), and generally seek to include LGBT-friendly agencies so that LGBT immigrants who cannot be housed safely in detention may be released.
- The Administration should support and promote legislative changes that would increase discretion to immigration judges to make individualized custody determinations based on flight and safety risks, to set bonds, or to order a less restrictive form of custody. [92]
- The Administration should develop, support and promote legislation that would eliminate the ban on entry and immigration based on prior involvement in prostitution or drug-related offenses.
- The Administration should seek to amend the Deferred Action for Childhood Arrivals (DACA) program requirements to eliminate the "serious misdemeanor" disqualification ground for youth who would otherwise be eligible.
- The Administration should seek to amend DACA program requirements to eliminate the age requirement for eligibility.
- DHS should require specialized and culturally appropriate training conducted by community-based advocates and experts, of at least eight hours annually, on LGBT and HIV issues arising in detention, for all staff in any facility in which ICE holds LGBT immigrants.

VIOLENCE AND ABUSE AGAINST LGBT AND PLWH IN FEDERALLY FUNDED IMMIGRANT DETENTION FACILITIES

Sexual abuse and violence are a pervasive part of the larger pattern of abuse faced by all detainees in federally controlled immigrant detention facilities, and particularly impact LGBT detainees.[93] The Center for American Progress reports that LGBT people are 15 times more likely to be assaulted in detention than non-LGBT people.[94]

A November 2013 report by the Government Accountability Office (GAO) documented 215 allegations of sexual abuse and assault in ICE facilities between October 2010 and March 2013, and cautioned that "ICE data did not include all reported allegations. For example, the GAO was unable to locate an additional 28 allegations detainees reported to the 10 facilities it visited—or 40% of 70 total allegations at these 10 facilities—because ICE field officials did not report them to ICE headquarters."[95]

The Center for American Progress reports that LGBT people are 15 times more likely to be assaulted in detention than non-LGBT people.

The GAO report identified many deficiencies in the operation of DHS detention systems with respect to handling complaints of sexual abuse and assault.[96] The report also documented the existence of several sets of standards governing the operation of immigration detention facilities, each with slightly different sexual abuse and assault provisions.[97] GAO called on ICE to clarify in contracts with each facility which standards govern. In March 2014, DHS finalized its PREA rule for facilities holding immigration detainees. The rule provides significant tools for combating sexual abuse in detention but falls short in key areas when it comes to protecting transgender and intersex detainees, and does not contain a sufficient means of applying the standards to all facilities that hold immigration detainees in a timely manner.[98]

RECOMMENDATIONS:

- DHS should immediately begin to implement its Final PREA Rule in all facilities that hold immigration detainees, including contract facilities, and should certify full implementation by May 2015.

- DHS should adopt the NPREC recommendation that ICE make case-by-case determinations about whether to release victims and witnesses to sexual assaults in immigration detention by balancing: the danger the detainee may face in custody; the ability of the facility to protect that detainee without transferring or isolating him or her; the potential threat the detainee poses to the community; and the burden of monitoring the individual in the community as an alternative. In many cases, it may be safer for the detainee and less burdensome to the facility to release the detainee who has been a victim of or witnessed sexual abuse in custody. The merits of the detainee's immigration case should not be taken into consideration when making such a determination.[99] Additionally, DOJ should consider adoption of a similar procedure in Federal Bureau of Prisons (BOP) facilities.[100]

- DHS and ICE should implement the recommendations of the GAO Report on Immigration Detention, GAO-14-38.

- DHS should provide comprehensive training for officers and contract facility staff on how to identify and protect vulnerable populations, including LGBT individuals, and ensure that such training is provided by LGBT community-based organizations.

- ICE should ensure that immigration detainees have the ability to report sexual assault easily to staff inside and outside the facility; that they receive immediate medical assistance; and that assault evidence-collection kits are available for medical staff at all facilities.

- DHS should issue guidelines ensuring that all family structures are treated equally and LGBT parents or parents of LGBT children are not discriminated against in terms of access to visits, correspondence, video visiting, and other necessary steps to both ensure the strength of their family and meet the demands placed on them by local Departments of Social Services.

- In consultation with LGBT advocates, ICE should implement its Risk Assessment & Classification Tool (RACT) nationally to improve its ability to determine self-identified LGBT and HIV-positive detainees in the system.

Community United Against Violence (CUAV) organized Women Against S-Comm rally to show that deportation is a women's issue and an LGBTQ issue, San Francisco, 2013. *IMAGE: CUAV*

SEGREGATION AND HOUSING

Transgender detainees are not placed in housing consistent with their gender identity, and like most other LGB detainees, are placed in administrative segregation or protective custody as a routine matter, where they are subject to high rates of isolation, abuse, and discrimination.[101] Several studies have shown that people in immigration detention facilities face extended periods of solitary confinement with little recourse to ending this harsh treatment.[102] This problem is particularly acute for LGBT detainees. who are effectively punished for their sexual and/or gender identity.[103]

In September 2013, ICE issued new guidelines governing oversight and procedures for review of people held in administrative segregation and protective custody in immigrant detention facilities, which stated that solitary confinement should be used as a last resort.[104] ICE's guidelines fall short of placing a limit on the length of solitary confinement, leaving many detainees vulnerable to indefinite isolation.[105]

RECOMMENDATIONS:

- Given the tremendous harms demonstrated by the use of solitary confinement, DHS and ICE should end the use of solitary confinement for all detainees.
- DHS should put an end to routine placement of LGBT-identified people in restrictive segregation and/or solitary confinement. Consistent with the September 2013 ICE Segregation Directive, detention facilities should not use a detainee's sexual orientation or gender identity as the sole basis for a decision to place the detainee in involuntary segregation.
- ICE should release LGBT detainees based on "special vulnerability" status, as contemplated by ICE's Segregation Directive issued on September 4, 2013.
- All ICE detention facilities should comply with reporting and notice requirements as detailed in the September 2013 ICE segregation directive for detainees held in involuntary administrative segregation. For any segregation of more than 48 hours, require that detainee receives notice and opportunity to contest segregation.
- ICE should be required to issue periodic reports about placements in segregation and continued use of segregation.[106]

Silent March to End Stop and Frisk, New York City, June 2012 *IMAGE: S. NARASIMHAN*

MEDICAL CARE

The 2013 GAO report on immigration detention[107] documented that the Performance-Based National Detention Standards (PBNDS) governing the provision of medical care at immigration detention facilities are not uniformly applied to all ICE detention facilities.[108]

Many advocates have documented that LGBT and HIV-positive detainees suffer from poor medical care at immigration detention facilities.[109] A recent lawsuit challenging dangerous medical conditions in a Southern Illinois jail illustrated some of the obstacles that face LGBT people and PLWH in immigration detention facilities. The lawsuit noted that ICE had contracted with a facility that failed to meet its own standards four times, that had live cases of TB and MRSA,[110] and in which "requests for medical treatment were repeatedly ignored, showers and restrooms were crusted with mold, drinking water was brown and putrid, jail pods were poorly ventilated, jail uniforms were tattered and soiled, and immigrants had no outdoor recreation or meaningful access to sunlight." The facility was evacuated and the suit was dismissed.[111]

RECOMMENDATIONS:

- DHS should ensure all detainees receive access to necessary medical care to the same extent that is available to persons outside of immigration detention.

- DHS and ICE should immediately extend the 2011 PBNDS to all facilities which it manages or with which it contracts, and must enforce compliance with these and other applicable medical standards.

- DHS should complete an assessment of medical services available to detainees of all federally operated immigration detention centers to determine whether people detained in these facilities are afforded the same level of care afforded to people in the custody of other BOP facilities, including but not limited to voluntary and confidential screening, evaluation, counseling and treatment for all sexually-transmitted and infectious diseases, and uninterrupted, confidential access to all appropriate medications and therapy, including HIV-related care and hormone therapy, consistent with current federal treatment standards and guidelines. DHS should issue a report for plans to remedy any deficiencies in care by January 2015.

Many advocates have documented that LGBT and HIV-positive detainees suffer from poor medical care at immigration detention facilities.

- DHS must ensure that all HIV-positive detainees receive medication immediately upon detention and transfer in a confidential and timely manner, consistent with prescribed timing and dosage.

- DHS must ensure all detainees receive hormone and gender affirming medical treatment in a confidential and timely manner, in accordance with prescribed timing and dosage, and consistent with, but not contingent on, pre-detention treatment.

- DHS should ensure regular and comprehensive training of ICE detention officials in appropriate medical treatment for HIV-positive and LGBT people in detention.

- DHS should create an independent oversight organization to monitor provision of health care in all facilities that house immigration detainees, including tracking of health care metrics such as morbidity and mortality rates, immunization and preventive health utilization, and other standard measures of quality performance in health care settings.

- DHS should require that health care professionals working in detention facilities report to health organizations, such as the Department of Health and Human Services (HHS), rather than to DHS or for-profit private contractors, so that they may maintain clinical independence.

- DHS should address chronic staffing shortages so that health professionals have adequate time to spend with each patient.

- DHS should ensure that lines of accountability for provision of quality health care to individuals in immigration detention are clear to health professionals, patients, and security personnel.[112]

- Because of the strong evidence that confirms the beneficial impact of drug treatment in detention centers, DHS should ensure that all detainees receive screening, diagnosis, and evidence-based treatment for substance use-related conditions, including access to approved opiate replacement therapies.[113]

"... the question that must guide policy changes is how to reduce the harms associated with lack of lawful immigration status for LGBTQ and HIV-positive immigrants.."

Angélica Cházaro
Immigration Attorney and Professor

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012 *IMAGES: S. NARASIMHAN*

May Day LGBTQ contingent, New York City, May 2012 *IMAGE: S. LONDON*

IMMIGRATION HEARINGS AND ACCESS TO COUNSEL

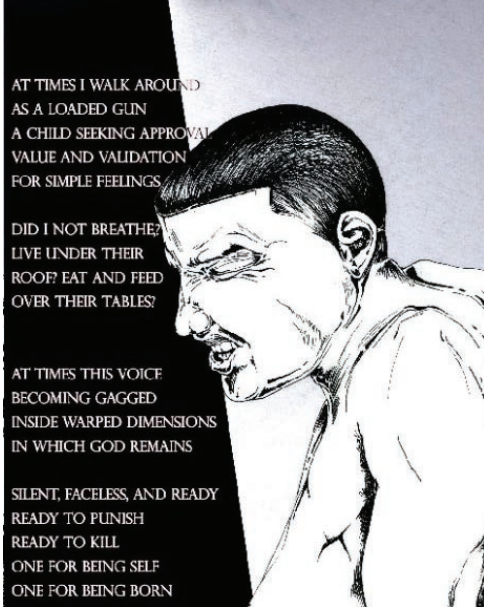
A 2011 study of immigrant legal representation found that between 2000 and 2010, removal proceedings increased by 50% to 300,000 in New York State alone. Two factors had the largest impact on people in removal proceedings: whether they were detained, and whether they had access to counsel.[114] Current law provides for access to counsel in immigration proceedings only at the applicant's expense. Individuals who were not detained were four times more likely to successfully challenge removal, while those who had access to counsel were six times more likely to successfully challenge removal.[115] Funded by Congress, the Legal Orientation Program (LOP) allows legal services groups to educate individuals facing removal proceedings on procedures, options and on *pro se* representation. LOP has proven to improve access to information for immigrant detainees, leading to a more fair and efficient process.[116]

Individuals who were not detained were four times more likely to successfully challenge removal, while those who had access to counsel were six times more likely to successfully challenge removal.

RECOMMENDATIONS:

- The Administration should develop, support and promote statutory change to ensure access to counsel at the government's expense for all indigent immigrants, particularly where facing detention and deportation.[117]
- In the interim, ICE and DHS should partner with state and local government agencies to fund and provide *pro bono* attorneys for indigent, detained immigrants.
- In the absence of broad-based access to counsel, DOJ's Executive Office for Immigration Review (EOIR) should expand LOP to make it nationally available.

5
CRIMINALIZATION OF YOUTH



Artwork by Yeniel Hernandez, FL, incarcerated Black and Pink member

There is an emerging literature on the overrepresentation of lesbian, gay, bisexual (LGB) and gender non-conforming (GNC) youth in the juvenile justice system. The numbers, as reported in this section, have helped establish the urgency of meeting the needs of youth following a pathway from family conflict and rejection to homelessness, arrests for survival crimes, and incarceration. At the same time, the numbers obscure the complexities of young people's full stories.

Over the past two years, my staff and I have conducted interviews with 145 straight, LGB, and GNC youth in San Jose, Oakland, New York, Chicago, and New Orleans. Each story brings its own twist. For example, Mark is now a nineteen-year-old gay, white, homeless youth in Chicago. He is from a rural community and lost his mother when he was six. His aunt adopted him but never treated him the same as her own children, leaving him home during vacations and punishing him more severely because she suspected him of being gay. He accumulated a series of drug possession charges in high school and was on probation for three years. After completing high school, he moved to Chicago. However, he is unable to hold a job because he is bi-polar. He doesn't consistently take his medication because it makes him feel cut-off from his emotions. Instead, he self-medicates with marijuana and is chronically homeless, entering a lottery for shelter beds every night that forces him onto the streets when a bed isn't available. Mark leads a precarious life that leaves him vulnerable to violence and criminal justice involvement.

Other youth that remain at home face challenges that undermine their well-being in more hidden ways. Cazzie is a young black sixteen-year-old living near New Orleans. Like many youth in her area, she is haunted by memories of Hurricane Katrina and losing her grandmother during the months that followed due to health problems that the family attributes to the stress of being displaced. Cazzie has been called a tomboy since she was a little girl and teased by her mother for wearing sweatshirts and playing sports. Conflicts around her gender presentation started escalating when she was in the eighth grade. At that time, Cazzie started a relationship with a boyfriend who was in a gang. She started dealing drugs and driving around town with her new friends. One of the boys was shot and killed on a night when she wasn't out with them. Cazzie was soon after caught on her school campus with pills that she was selling to her friends. She was expelled from school and ultimately transferred to an alternative school that is remedial and fails to challenge her academically. She is currently fighting to get back into her general education high school, but she is vulnerable to the capricious decision making of a principal who is resisting her readmission. Amidst this battle, Cazzie is thankful because her home environment has improved. Cazzie has less conflict with her mother because she has decided to wear more

feminine clothes. But she is clearly stifling her gender expression to maintain peace, a choice that may lead to escalating family tension in the future.

As the federal government pursues policy changes to improve the lives of LGB and GNC youth, remember the large number of youth impacted by families, schools, and the juvenile justice system. But don't forget that these numbers aggregate struggles, both public and private, that real youth live with each day.

ANGELA IRVINE, PH.D.
Director of Research—Oakland, National Council on Crime and Delinquency

" There is an emerging literature on the overrepresentation of lesbian, gay, bisexual (LGB) and gender non-conforming (GNC) youth in the juvenile justice system ... At the same time, the numbers obscure the complexities of young people's full stories."

LGBT youth and youth who are gender non-conforming are significantly overrepresented in the juvenile justice system: approximately 300,000 gay and transgender youth are arrested and/or detained each year, of which more than 60% are Black or Latino/a.[118] Native American youth are even more overrepresented in both federal and state juvenile justice systems and receive harsher sentences.[119] While LGB and gender non-conforming youth comprise just 5 to 7% of the overall youth population, they represent 13 to 15% of youth who come in contact with the system.[120]

A variety of factors including school push out, family rejection, homelessness, and failed safety net programs contribute to the disproportionately high rates of LGBT young people who come into contact with the juvenile justice system. For Indigenous LGBT and Two Spirit youth, these factors are further exacerbated by the continuing impacts of Indigenous communities' historical experiences of mandated attendance at Indian residential schools and of mainstream education, which contribute to school push out and criminalization. For these reasons and others, LGBT youth are often criminalized with harsh school sanctions, labeled as sex offenders, detained for minor offenses, and denied due process and basic civil rights.[121]

Approximately 300,000 gay and transgender youth are arrested and/or detained each year, of which more than 60% are Black or Latino/a. Native American youth are even more overrepresented in both federal and state juvenile justice systems and receive harsher sentences.

Despite the number of LGBT youth entering the system, schools, law enforcement officers, district attorneys, judges, and juvenile defenders are unequipped to respond to the unique experiences and challenges they face. Further, policies that detain youth for status offenses or divert them into alternative schools and day-placement settings unfairly criminalize them, derail their education, and set off what is often a lifetime of economic insecurity.

HOMELESSNESS AND FOSTER CARE

Research shows that LGBT youth entering the juvenile justice system are most likely to have experienced family rejection, abuse, poverty, failed safety net programs, and homelessness. Family rejection and interfamily conflict stemming from parental refusal to accept a child's sexual orientation or gender identity often force LGBT youth onto the streets. One study found that 39% of LGBT youth were forced to leave their homes because of their sexual orientation or gender identity.[122]

Homelessness is the greatest predictor of involvement with the juvenile justice system. In order to take care of themselves, homeless youth are more likely to engage in criminalized survival activities such as sex work, drug trade, or theft, and are often subjected to discriminatory policing practices targeting homelessness and routine daily activities such as sleeping, sitting or lying in public spaces. Homeless youth are also at risk for arrest for status offenses such as running away, failing to attend school, and curfew violations that penalize them for being disconnected from unwelcoming families and communities.[123]

Safety net programs such as foster care are often ill-equipped to support LGBT youth, despite the fact that LGBT youth are much more likely to be placed in foster care than their non-LGBT peers. One study of youth aging out of the child welfare system in three Midwestern states found 23.8% of female respondents and 10.2% of male respondents reported a sexual orientation in a category other than completely heterosexual, and another found that 65% of all LGBT youth had lived in a foster or group home at some point.[124] Due to the ongoing effects of colonialism and mandated attendance at Indian residential schools in which widespread physical, sexual, cultural and spiritual abuse took place, Native youth experience rates of abuse and neglect twice as high as white children, and are thus much more likely to be placed in foster care.[125] If placed in foster care outside of their communities, Native youth who are LGBT or Two Spirit are often further harmed by the widespread ignorance and invisibility of Native history, traditions, and identity.

Once in foster care, LGBT youth often flee group homes and foster families because of homophobic and transphobic harassment and abuse. Involvement in the foster care and juvenile legal systems leads to negative health and education outcomes and likely involvement in the adult criminal legal system.[126] Compared with their heterosexual peers, LGBT youth in juvenile detention are:

- Twice as likely to have been removed from their homes because someone was hurting them.
- Almost twice as likely to have lived in a foster or group home.
- More than twice as likely to have been detained in juvenile facilities for running away from their home or placement.[127]

In 2011, the Department of Health and Human Services' (HHS) Administration on Children, Youth and Families (ACYF) issued guidance on supporting LGBT youth in foster care to child welfare agencies and others who work with foster children. As a next step, additional funding and resources should be made available to further train and support parents and practitioners to meet the unique needs of LGBT youth.[128] Additionally, Native LGBT and Two Spirit youth in the child welfare and the juvenile justice systems often experience harassment and mistreatment based upon both their heritage or political status and their actual or perceived sexual orientation or gender identity—with little recourse. Effective protections for LGBT youth require significant changes to the systems charged with their care.[129]

RECOMMENDATIONS:

- The Department of Justice's (DOJ) Office of Juvenile Delinquency and Prevention (OJJDP) should issue guidance discouraging the arrest and detainment of truant and homeless youth simply because they are truant and/or homeless.

- As a follow-up to the 2001 guidance issued by HHS for foster care agencies on eliminating discrimination on the basis of sexual orientation and gender identity, HHS should extend protections against discrimination based on HIV status and marital status in foster care facilities and placements, and provide support to staff and foster families to create safe and welcoming environments for LGBT youth.[130] HHS should continue to develop programs that foster family acceptance and increase permanency for youth.

- HHS should mandate elimination of exclusions of potential adoptive and foster parents solely because of their sexual orientation, gender identity, or marital status as a condition of receipt of federal funding (no matter which type of organizations states contract with to carry out services with the funding), and expand access to loving, permanent homes.

- HHS should dismantle policies that enable the promotion of gender conformity and/or suppress LGBT youth's ability to express their sexual orientation and gender identity while in state custody, specifically through clothing and grooming.

- HHS should mandate, as a condition of federal funding, that states ensure that LGBT youth are not required or forced to participate in counseling, reparative therapy, programming or religious activities that condemn LGBT people or enforce heterosexuality or normative gender expressions while in foster care.

- HHS should require child welfare agencies to adopt strict confidentiality policies, specifically with respect to a young person's sexual orientation, gender identity, and HIV status, including with respect to parents and guardians, as a condition of receipt of federal funding.

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012
IMAGE: S. NARASIMHAN

- HHS should strengthen home-based interventions to build strong supportive families to reduce LGBT youth homelessness, and support the Reconnecting Youth to Prevent Homelessness Act, which would improve permanency for older foster care youth and all homeless young people, LGBT or otherwise. Where home-based interventions are not possible, HHS should expand independent living programs focused on building skills for independence rather than mandatory group home-based programs that are frequent sites of violence and harm for LGBT youth. All federally supported programs should ensure LGBT youth have decision-making power regarding family reunification or independent living so that they are not relentlessly subjected to abusive homophobic or transphobic family environments.

SCHOOL CLIMATE

Schools are among the most hostile environments for LGBT youth. According to one study, 63.5% of LGBT youth felt unsafe at school because of their sexual orientation, and 43.9% reported feeling unsafe due to their gender expression.[131] LGBT students report extremely high rates of verbal (84%) and physical (40%) harassment at school,[132] including by school officials and law enforcement officers in schools.[133] Transgender youth in particular have been found to be more likely to experience verbal assault or searches by school security and police in schools.[134] This hostile climate is exacerbated for LGBT youth of color, half of whom also report often hearing racist taunts and slurs in schools, as well as for American Indian and Alaskan Native students. Eighty-six percent of American Indian and Alaska Native students expressing a transgender identity reported harassment, 51% physical assault, and 21% a sexual assault in school.[135]

> My mom [told the judge I was gay]. She told him I wouldn't go to school and I got kicked out. [But the problem was] I was getting harassed at school. My PO lied and said it wasn't as bad [at school] as it was.
>
> *Andrew, a 17-year-old Latino gay male youth*[143]

While many districts have moved to adopt anti-bullying policies, most are generic and miss an opportunity to adequately protect populations like LGBT youth by failing to enumerate them. Strict anti-bullying policies also have the unintended consequence of punishing victims who may be fighting back or protecting themselves, and often criminalize bullies rather than foster healthier interactions and address the underlying school climate. As such, the response to bullying in schools should never be criminalization, for any youth.[136]

In many cases, schools also lack support systems for LGBT youth such as gay-straight alliances and other welcoming groups, and are virtually devoid of culturally competent mental health supports to help LGBT young people cope with hostile school settings. Some go so far as to ban access to LGBT resources and information, including viewpoint-neutral websites that would provide educational information about sexual orientation and gender identity, and access to supportive online communities.[137]

What's more, zero tolerance school conduct policies and policing of sexuality and gender identity by the adults in schools further isolate LGBT youth and erode the overall school climate. For example, school dress codes that penalize students for wearing gender non-conforming attire unfairly punish non-normative gender identity and expression. Similarly, sanctions against students who express same-sex affection such as kissing or holding hands, where those same behaviors among different-sex partners are accepted as normal adolescent behavior, discriminates against LGB youth.[138]

According to one study, 63.5% of LGBT youth felt unsafe at school because of their sexual orientation, and 43.9% reported feeling unsafe due to their gender expression.

Hostile and unsafe school climates often cause LGBT youth to skip school and in some cases, fight back against physical and verbal assaults, increasing the likelihood that they will come into contact with the juvenile justice system through enforcement of truancy laws or other status offenses through police sweeps, fines, and arrests, or through enforcement of school disciplinary codes by law enforcement agents.

RECOMMENDATIONS:

- The Department of Education (ED) should require all districts to adopt enumerated anti-bullying policies that specifically include sexual orientation and gender identity as protected classes, and promote greater understanding and safety for all students without relying on punitive disciplinary measures that exclude students who engage in harassment.

- ED's Office of Civil Rights (OCR) should expand its data collection efforts to better understand the experience of LGBT youth in schools. This includes adding a question to the Civil Rights Data Collection (CRDC) measure to quantify incidences of bullying, and should also include efforts to collect data on the impact of school discipline policies on LGBT youth.[139]

- OCR should also further its research on the impact of implicit bias and the discriminatory application of school policies such as dress codes and codes of conduct on LGBT youth, and issue guidelines for teachers and administrators on fostering supportive environments that provide resources and reduce disparities for LGBT youth as a follow-up to the guidance on racial disparities in school discipline policies issued in January 2014.

- ED should create and disseminate materials to facilitate increased school programming on LGBT issues and HIV-related issues, featuring representations of LGBT and HIV-positive people, including LGBT and HIV-positive people of color and Indigenous peoples.

SCHOOL DISCIPLINE REFORM

The education and juvenile justice systems have become inextricably linked through increasingly harsh school sanctions and zero-tolerance policies that rely heavily on law enforcement to manage school discipline issues. These policies have a disproportionate impact on LGBT youth, particularly LGBT students of color, LGBT youth with disabilities, and LGBT Native American youth, often pushing them out of schools and into the juvenile justice system.[140]

One defender remarked that he had seen cases in which LGBT youth were bullied for long periods of time, and the school police responded by asking the bullied youth accusatory questions like, "Why were they calling you a faggot? Why would they think that?" This same defender said that school officials accused another one of her clients of being "so provocative that the kids couldn't help but pick on him" because he wore nail polish.[144]

LGB and gender non-conforming youth, especially gender non-conforming girls, are three times more likely to experience harsh disciplinary treatment and wind up in this "school-to-prison pipeline" than their non-LGB counterparts.[141] These differences in punishment cannot be explained by greater engagement in illegal or transgressive behaviors by LGBT youth, but rather by the reality that LGBT youth are punished more harshly when engaging in the same behavior as their peers.

There is little evidence that zero tolerance policies or policing tactics succeed in making schools safe or in reducing student misconduct. Yet we do know that the presence of police in schools significantly contributes to the high levels of suspensions, expulsions, and arrests for all youth—and LGBT youth in particular—which denies youth critical classroom time and perpetuates poor educational outcomes.[142] In addition, multiple studies show that suspensions and expulsions increase the likelihood that youth will become involved with the juvenile justice system.

ED issued landmark guidance on school discipline reform in January 2014 aimed at reducing the racial disparities in suspensions, expulsions, and arrests, which will go a long way towards improving outcomes for all youth. The disparities in discipline for LGBT youth were not addressed, however, because of the limited data on the experiences of this population, which further illuminates the need for additional data collection as noted above.

RECOMMENDATIONS:

- ED should eliminate funding of law enforcement officers in schools and promote alternatives including counseling, peer-to-peer accountability mechanisms, and family supports through federal funding.

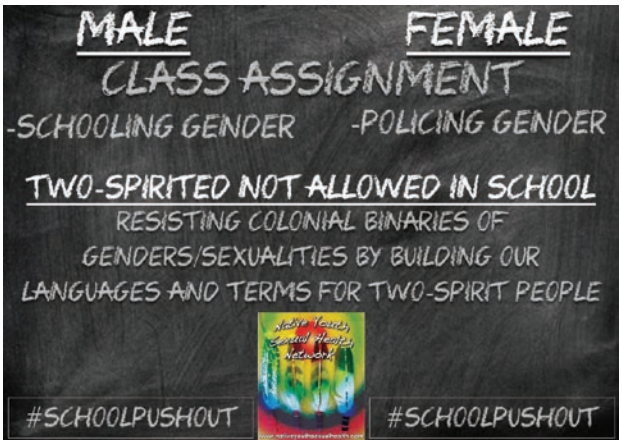
- DOJ should provide guidance to state and local legislators and law enforcement on truancy policies to stop penalizing youth for being out of school, loosen day-time curfew restrictions, and eliminate police enforcement of truancy laws through police sweeps and arrests of youth for minor offenses.

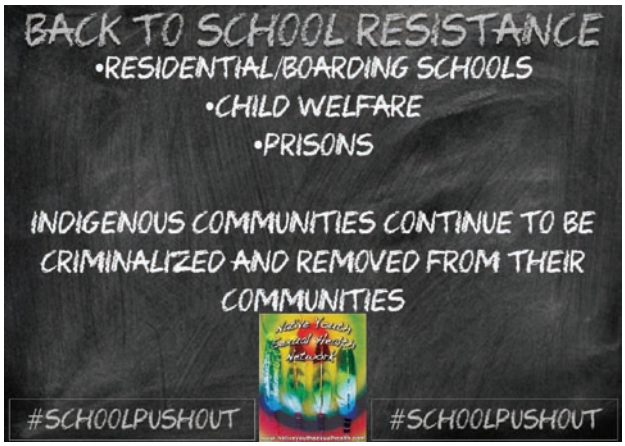
- ED should require the adoption of positive behavioral interventions as alternatives to punitive school discipline policies, including in the context of efforts to address bullying in schools, as a condition of federal funding to Local Education Agencies (LEA).

- ED should also promote restorative justice practices, and issue guidance on reentry to reconnect youth with schools rather than pipelining them into alternative programs. The administration should also promote and support passage of the Positive Behavior for Safe and Effective Schools Act (PBSESA),[145] the Ending Corporal Punishment in Schools Act,[146] and the Restorative Justice in Schools Act.[147]

- ED should also issue guidance to LEA, law enforcement agencies, and state legislators urging elimination of vague and subjective status offenses such as "willful defiance" and "ungovernability" which are susceptible to biased application by school resource officers.

- ED and DOJ should include LGBT youth and Two Spirit youth in all research and recommendations on dismantling the school-to-prison pipeline, including any future work of the Supportive School Discipline Initiative.





IMAGES: NATIVE YOUTH SEXUAL HEALTH NETWORK

JUVENILE JUSTICE

Studies show that LGBT youth, and particularly LGBT youth of color and Native LGBT youth, often have their gender identities and expressions and sexualities policed, face punitive responses to typical adolescent behavior, receive inappropriate detention sentencing, and are otherwise unnecessarily criminalized by judges, prosecutors, defense attorneys, probation officers, and other legal professionals who lack understanding of the experiences of LGBT youth.[148] For example, LGBT youth are often removed from their homes by law enforcement for "willful defiance" or "incorrigibility"—charges made in many cases by disapproving parents or caregivers that criminalize them for simply being LGBT against their parents' wishes.

> My client, Marissa, was arrested for prostitution when she was 15. She was trying to raise money to buy feminizing hormones so she could express her gender. She was put into a youth prison, where she faced terrible treatment. She was the only girl in a boys' facility and was harassed by staff and other youth. She had a supportive mother who tried to help advocate for her to have access to hormones while she was in state custody, but, even with legal support from our agency and parental consent, the health care was denied. Marissa was consistently "written up" by facility staff for expressing feminine gender—wearing her hair long, growing her nails, asking people to call her Marissa—so her stay in the system kept being extended because she had a record of "misbehavior." She spent two and a half key years of her teenage development locked up—missing school and family life and being subjected to daily traumas of harassment and denial of her identity, all stemming from a search for gender affirming health care.
>
> *Dean Spade, Former Staff Attorney, Sylvia Rivera Law Project*

LGBT youth are also most vulnerable to arrest and detainment under truancy laws and other status offenses that essentially criminalize homelessness and poverty. Given that LGBT youth are more likely to have strained relationships with caregivers and wind up homeless and living on the street, they are likely to be arrested in police street sweeps and for unpaid fines.

LGBT youth who end up in the juvenile justice system also face harsher sentences overall, and are at greater risk of being prosecuted for consensual sexual activity than their non-LGBT peers, regardless as to whether they have committed a sex-related crime.[149] Such a conviction could have lifelong consequences for these youth who would be required to register as sex offenders in 29 states.[150] LGBT youth are also often mischaracterized as sex offenders regardless of the crime and are ordered by the courts to undergo sex offender risk assessments and treatment programs.

Of note, as with the adult criminal justice system, jurisdictional complexities and inadequacies have adverse impacts on the operation of the juvenile justice system in Indian country. The federal court system—which currently exercises jurisdiction over Indian reservations—has no juvenile division, specialized juvenile court judges, or juvenile probation system. The Federal Bureau of Prisons (BOP) has no juvenile detention, diversion, or rehabilitation facilities. In the event that Indian country youth are funneled into state juvenile justice systems, there is generally no requirement that a child's Tribe be contacted. As a result, the unique circumstances and outcomes of Native youth are often overlooked and difficult to track, and they effectively "go missing" from the Tribe.[151]

RECOMMENDATIONS

- The Administration should support and promote reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDPA) to include key items essential to LGBT youth:
    - Deinstitutionalize status offenses, including removal of the valid court order (VCO) and Interstate Compact exceptions.
    - Update Disproportionate Minority Contact mandate to require states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system, which will also benefit LGBT youth in the system who are predominately youth of color and Native.
    - Expand training, technical assistance, and research and evaluation to include LGBT and Two Spirit youth.
    - Mandate that juvenile justice facilities ensure that all policies, practices, and programs recognize the unique needs of LGBT and Two Spirit youth.

> [A]n attorney from the South represented a male-to-female (MTF) transgender youth who was detained in a boys' facility. The youth's "treatment plan" stated that she was to receive "help with gender confusion and appropriate gender identity," which included staff prohibiting her from growing her hair out or having any feminine accessories. The same attorney reported that another client—a gender non-conforming lesbian—had a similar treatment plan "even though she fully accept[ed] that she [wa]s a female, fe[lt] that she [wa]s a female, and seemed to have no confusion about her gender." In another case, a mental health evaluator encouraged the court and facility staff to help a transgender youth, who had been diagnosed with GID, to understand that it was not appropriate to "act like a girl" while incarcerated in a boy's facility.[157]

- DOJ should issue guidance to states with respect to age of consent laws. These laws expose adolescents to sanctions for engaging in consensual sexual behavior with other adolescents.
- DOJ should support and promote amendment of the Sex Offender Registration and Notification Act (SORNA) to exclude youth who are convicted of sex-based offenses from mandatory sex offender registration.
- DOJ should issue guidance on parole regulations that discourages the use discriminatory "special parole regulations" which restrict gender identity or sexual expression, such as restrictions on clothing.
- DOJ should provide guidance to states and localities regarding training and resources for juvenile professionals (including judges, defense attorneys, prosecutors, probation officers, and detention staff) regarding the unique societal, familial, and developmental challenges confronting LGBT youth and the relevance of these issues to court proceedings.
- DOJ should issue guidance to states on improvement of juvenile court procedures to streamline case processing, reduce length of stay in custody, expand the availability of non-secure program slots, and ensure that interventions with youth are timely and appropriate.

- DOJ should mandate automatic and free expungement of juvenile criminal records once youth turn 21.

- DOJ should provide federal guidance to states and localities regarding the development of alternatives to youth incarceration including prevention and diversion,[152] and elimination of excessive sentencing which effectively replicates sentences of juvenile life without parole struck down by the Supreme Court.

- DOJ should issue guidance with respect to the impacts of criminal gang injunctions, including the impacts of youth profiling and racial profiling, and constitutional challenges to curfew laws.[153]

- The Administration should support and promote passage of the Youth PROMISE Act.[154]

- DOJ should issue guidance to states encouraging judicial discretion to consider a young person's unique circumstances, such as age, maturity, role in the charged offense, and dependency on any adult involved in the offense.

- DOJ should issue guidance to states with respect to addressing "placement delay" where youth remain incarcerated despite a court order directing alternate placement. This is particularly important to LGBT youth in light of family rejection and the dearth of programs that are appropriate or welcoming to LGBT and gender non-conforming youth.

- DOJ should issue federal guidance to states encouraging them to change Medicaid procedures that pose a barrier to health care access for youth coming out of custody.[155]

LGBT youth are often removed from their homes by law enforcement for "willful defiance" or "incorrigibility"—charges made in many cases by disapproving parents or caregivers that criminalize them for simply being LGBT against their parents' wishes.

- Federal resources for Tribal juvenile justice should be consolidated in a single Federal agency within the DOJ, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies. Additionally, regardless of whether they are in federal, state, or Tribal juvenile justice systems, Native youth brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care within a reasonable distance from the juvenile's home which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in state and federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations.

- The Administration should initiate, support, and promote amendment of the Indian Child Welfare Act (ICWA) to provide that when a state court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in state delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.[156]

DETENTION CENTERS & REENTRY

Common misconceptions and homophobic and transphobic assumptions about sexual orientation and gender identity and expression underlie the discriminatory application of policies and punitive treatment faced by LGBT youth in the juvenile justice system.[158] Once in detention, LGBT youth often experience discriminatory and often harmful treatment, emotional, physical and sexual abuse, lack of access to sexual health care, and limited access to educational resources.[159]

It was horrible because I was the only one in detention that had my own room and everyone was wondering, "Why doesn't he have a roommate?" Of course, if you're smart you try to keep to yourself and not talk about why you are in there. But that is kind of a dangerous situation because then the rumors start. I remember being accused of all kinds of things that were not even close to the reasons I was in there. But I knew in my heart that the only reason I didn't have a roommate was because I'm gay. And it was their way of probably trying to protect me in some way. I think even more so they were making a statement that it's not okay to be gay.

Tyler, 22[161]

" I knew in my heart that the only reason I didn't have a roommate was because I'm gay."

Incarcerated youth in general are often denied access to quality education, which disrupts their learning and creates significant barriers to attaining a high school diploma. Upon release, they are often pushed into alternative school settings or continuation schools which serve more as day-time parole centers rather than institutions of learning. These schools are often run by departments of juvenile justice rather than departments of education. Importantly, there are no standards for educational attainment within juvenile justice systems, and youth reentering their communities still fail to earn high school equivalency degrees.

Further, incarceration of Native youth in the juvenile justice system often removes them geographically great distances away from their communities, support systems, and families. For all Native youth, including youth who are Two Spirit and LGBT, this distance can prohibit access to traditional ceremonies that may allow for youth to heal from the traumatic effects of violence, harassment, and isolation experienced in custody.

RECOMMENDATIONS

- DOJ and ED should promote better reentry programs to reconnect youth with schools rather than transitioning them to alternative education centers or continuation schools.
- Alternative education and continuation schools should be regulated by ED, rather than local juvenile justice systems. These schools should be required to adhere to ED's minimum curriculum standards and meet basic graduation and/or GED requirements.
- DOJ should issue guidance on how to ensure that all youth in custody have access to quality education that is inclusive of information and resources on sexual orientation and gender identity and LGBT histories, including histories of LGBT people of color and Native LGBT people.

> [My probation officer] used to think I was lower than everybody just because I was a lesbian … I want [probation officers] to understand we are the same, we are not different from anybody else.
>
> *Yvonne, a 15-year-old Latina lesbian*[162]

Streetwise and Safe (SAS) campaign staff speak out at Communities United for Police reform rally in support of Community Safety Act, New York City, July 2013
IMAGE: NEW YORK CIVIL LIBERTIES UNION

- DOJ should mandate adoption of anti-discrimination policies prohibiting harassment based on actual or perceived sexual orientation or gender identity by staff and juveniles at all juvenile detention centers and prisons with effective grievance procedures, as a condition of receipt of federal funding.
- HHS should mandate, as a condition of federal funding, that states ensure that LGBT youth are not required to, forced to, or incentivized to participate in counseling, therapy, programming or religious activities that condemn LGBT people or enforce heterosexuality or normative gender expressions while in state custody.
- DOJ should issues guidance on incorporation of LGBT-inclusive sexual health care, including condom access and education and access to gender affirming treatment, including hormone treatment, into basic medical services provided to all young people in state detention and juvenile facilities.[160]
- Juvenile justice facilities and law enforcement officers should not hold LGBT youth in isolation, even if it is intended as a means of protection. This type of isolation is a form of segregation and has the potential to cause extensive psychological damage.

6
CRIMINALIZATION OF HIV

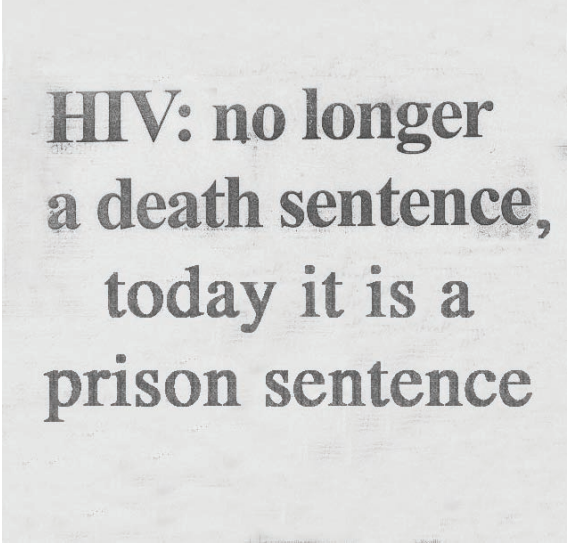


IMAGE: CAMILO GODOY

His name was Paul. I slid into the chair next to him in my examination room to console him as he cried. I had taken care of him for several years as he struggled to cope with his HIV infection. Paul had been diagnosed a decade earlier when he first developed Pneumocystis pneumonia. He was a musician and had contracted HIV through unprotected sex. I learned early that Paul hated taking pills. The sight of them made him retch; and it would take him hours to get down the four pills that made up his HIV treatment regimen. He would take them for months at a time but then would come to tell me he needed a break. After a bit, he would restart medications, once he could manage to think about swallowing pills again. And so it went.

And then, suddenly there he was, crying in my office. He had been indicted on charges brought by a partner of several months of having sex without disclosing his HIV status the night he was discharged sick and wasted from the hospital after a treatment interruption. Similar accusations, by the same partner brought in another county, had been dismissed. But that night they had stayed in a hotel in a different county and these charges stuck. Although Paul insisted he had disclosed and although the partner was tested for HIV and continued to test negative, the District Attorney in that county moved the case forward.

" HIV remains with us and will do so as long as those who are infected are not diagnosed and treated. And too often the discussion of preventing new infections is polarized, looking for blame and condemnation."

Shortly thereafter, while seeing patients in my office, I was interrupted with a subpoena requiring me to testify in criminal court regarding Paul's HIV status and his care. Surely, I thought naively, our conversations were protected by patient-client privilege statutes. Wasn't my office supposed to be the safe place where patients could talk frankly to me about their fears and joys, about their personal lives and sexual practices, their bodies and their symptoms? I called the attorneys at the health care system where I work only to be told that in cases involving HIV there were no protections. I would have to testify.

I have practiced HIV medicine for more than 15 years. I have learned much about caring for patients with a chronic stigmatizing and potentially fatal infectious disease–one that takes a lifetime commitment to medications in a world where the mention of the word HIV brings

judgment and instantly changes interactions; one that conjures up images of victims and perpetrators.

In 15 years I have seen medical advances happen at an historic rate. Today, the life expectancy of a newly diagnosed patient with HIV is nearly indistinguishable from his uninfected neighbor. The risk of transmission of disease from a patient taking effective medical therapy is close to zero. Yet we continue to diagnose patients late, when disease is very advanced, after years of unrecognized and untreated infection. Despite many scientific breakthroughs and now a long list of highly effective medications, HIV remains with us and will do so as long as those who are infected are not diagnosed and treated. And too often the discussion of preventing new infections is polarized, looking for blame and condemnation.

Within the walls of my office, I have watched the young and old, men and women struggle after their diagnosis. There are stages of denial, blame, shame and, for some, acceptance. We talk about living with disease, staying in care, disclosure to partners, friends, parents and children. I strive to make my office a safe place, filled with trust and honesty. I believe strongly that such an environment can encourage patients to remain in care, remain on medications, remain hopeful and know there is always a place where they will be treated with compassion.

But the safety of my office was shattered and physician-patient privilege was lost by the intrusion of these criminalization charges against Paul. His name was released to the media. Friends found out about his HIV status and the criminal charges, increasing his shame. He was depressed, withdrawn, and in disbelief but felt hopeful as there was nothing to support the claim against him and the case boiled down to his ex-partner's word against his.

" Criminalization laws do nothing to advance individual or public health, but rather enhance stigma, embrace blame, discourage testing and have the potential to corrupt the physician-patient relationship ..."

The trial date came. I arrived at the courthouse and after the requisite wait, was ushered into the courtroom. I testified about his HIV infection, risks of transmission, definition of AIDS, and details of our visits. Finally I was free to go. I drove the forty-five minutes back to the hospital feeling a sense of betrayal I haven't felt in my professional life.

When I arrived in the hospital parking garage, the district attorney called me. Paul had been found guilty. The prosecutor congratulated me on my testimony and told me I should be proud that I had put a "scumbag" behind bars that day. I felt nauseated.

Although this was my first criminalization experience, it was not to be my last. Nearly thirty percent of my colleagues confirm that they too have had criminal prosecutions invade their patient relationships.

There are more effective means to combat this epidemic. Criminalization laws do nothing to advance individual or public health, but rather enhance stigma, embrace blame, discourage testing and have the potential to corrupt the physician-patient relationship which I believe can be a powerful tool in the armamentarium to address the epidemic.

DR. WENDY ARMSTRONG

From the beginning of the HIV epidemic, prevailing public misperceptions about the routes, risks and consequences of HIV transmission have reflected homophobia, transphobia, and the stigma associated with drug use, resulting in wildly inaccurate risk assessments that have remained largely unaddressed in 30 years of public health responses to the disease. In turn, stigma and fear have fueled mistreatment of people living with HIV (PLWH). One of the more troubling, persistent issues for PLWH has been the prospect of criminal prosecution for acts of consensual sex and for conduct, such as spitting or biting, which pose no measurable risk of HIV transmission.

March Against HIV Criminalization, Washington, D.C.
IMAGE: QUEEROCRACY

The use of the criminal legal system to stop or slow HIV transmission is both ineffective and devastating to those targeted, and to public health as a whole. Criminalization results in imprisonment and public humiliation from sensationalized and demonizing media coverage, and routinely leads to loss of housing, employment opportunities, and negative health outcomes.

Nearly three dozen states and U.S. territories have laws that criminalize the conduct of PLWH without requiring any evidence of an intent to do harm, including HIV transmission.[163] In the ten states that add mandatory sex offender classification and registration to those convicted under these laws, defendants suffer additional, irreparable damage to most aspects of their lives: their ability to work, to choose where they live, even to continue relationships with their own children and other minor relatives.[164] There is no evidence that criminalization has any positive impact on disclosure or risk-taking behavior.[165] In fact, research suggests that HIV criminalization may in some cases delay HIV testing and, in turn, entry into care.[166]

ADDRESSING WIDESPREAD IGNORANCE ABOUT THE ROUTES, RISKS AND CONSEQUENCES OF HIV

Although more than 30 years have passed since physicians reported the first cases of HIV in the U.S., HIV-related stigma continues to be prevalent and well-documented.[167] "A consequence of HIV-related stigma and discrimination is a negative effect on both HIV prevention efforts as well as care for individuals living with HIV."[168] Studies show that many people do not get tested because of stigma and their fear of discrimination.[169] Widespread ignorance about HIV and how it is transmitted is "often translate[s] into biased and discriminatory actions,"[170] including by law enforcement.

HIV stigma and its relation to misconceptions about HIV transmission have been repeatedly documented.[171] These extensive misperceptions about the most basic facts of the routes and relative risks of HIV transmission are entrenched and persistent. A 2008 survey also found that "levels of knowledge about HIV transmission have not improved since 1987."[172] Ignorance about HIV must be aggressively addressed as the public health crisis it is, and as part of the federal government's strategy on HIV/AIDS.

RECOMMENDATIONS

- The Surgeon General should create a public awareness campaign including detailed information that both explains the specific routes, relative risks, and modern-day consequence of HIV and STI infection, and dispels myths and ignorance contributing to criminalization of people with HIV.[173] The campaign should reflect the substantial input of medical and research experts on current HIV risk/transmission data in the context of everyday risks and events, and consultation with people affected by HIV and their advocates.

- The Department of Health and Human Services (HHS) and the Centers for Disease Control and Prevention (CDC) should mandate development and support of accurate, age-appropriate and LGBT-inclusive HIV and STI literacy programs for students and staff of all federally supported school systems as a condition of federal funding.

- HHS, the Health Resources and Services Administration (HRSA), and other responsible federal agencies should require proof of written policies and standards for the provision of sexual health care and HIV-inclusive sexual health literacy programs for police lock-ups, juvenile, corrections and detention facilities receiving federal funds. Staff education should include training on avoiding discriminatory enforcement of regulations against PLWH and on maintaining confidentiality about prisoners' HIV statuses.

- CDC must develop and distribute more direct and explicit public service announcements on the routes, risks and consequences of all sexually transmitted diseases, including HIV, dispelling myths that fuel HIV criminalization, via mainstream and new media.

On September 18, 2006 I was jailed and eventually sentenced to a ten-year state prison term for aggravated assault on a police officer with a deadly weapon or dangerous instrument. According to the county Supreme Court the deadly weapon was my "HIV infected saliva". After a six year fight through the court system the charge was vacated by the New York State Court of Appeals, and I was released.

After my arrest I lost many things I had worked hard for: I lost my business, my home, and most importantly my reputation. I have had to start my life all over, and finding employment has been impossible with the nature of the alleged crime. This has followed me right up to today: I have found myself having to explain my criminal history over and over again, from applying for housing to registering for classes at my local college.

I remain on parole until this coming September, this has created an even bigger burden finding employment - I am not allowed to leave my small county without my parole officer's permission, I cannot drive, and I am under a 9:00 pm curfew.

I lost my private insurance while incarcerated. This has forced me to rely on Medicare and Medicaid - finding physicians now that can care for my health needs and obtain the medications I need is a continuing battle.

All these things are a consequence of being charged with an HIV related crime. At 43 years old I never imagined how different my life would be because of my arrest and incarceration. I also never realized the stigma attached to those with HIV and especially those who also have a criminal record. From then until now I should have been able to focus on my health and career, not battling a system that incarcerates those who live with a chronic illness, and remain uninformed about the nature and transmission of the HIV virus.

David Plunkett

- CDC's and other related websites (e.g., AIDS.gov) should prominently include information on the actual routes, likely relative risks, and consequences of HIV and other STI transmission that reflect real-life risk reduction choices (e.g., oral sex as a very low-to-no-risk alternative; the impact of drug therapies on the already low transmission risk of HIV).

ADDRESSING GOVERNMENT-SUPPORTED STIGMA AND DISCRIMINATION IN THE CRIMINAL JUSTICE SYSTEM

Most U.S. states and territories and the U.S. military have HIV-specific criminal laws that target consensual sex and other conduct involving theoretical contact with any bodily fluid (e.g., via spitting, biting, vomiting or sex) of people diagnosed with HIV and increase the classification and/or penalties for offenses such as solicitation for prostitution if the defendant has HIV.[174] "Exposure" prosecutions for spitting and biting are almost entirely initiated against prisoners or arrestees following an altercation with corrections staff or police. The most common prosecutions of HIV-specific criminal law hinge liability on the failure of an HIV-positive person to demonstrate disclosure of his or her HIV status to a sexual partner prior to sexual intimacy. Actual transmission or even evidence that the contact posed a significant risk of transmission is not required for convictions. Although unprotected sex between persons who do not know their HIV status is the cause of most new HIV infections,[175] these laws penalize only those who get tested and consequently know their HIV status, thus creating a potential deterrent to testing.[176]

RECOMMENDATIONS

- CDC and the Department of Justice (DOJ) should fund and support trainings and information sharing about HIV transmission risks and myths to criminal justice personnel, state health departments, and the general public.

- CDC and DOJ should release the long-promised joint publication on the current state of HIV criminal law in the U.S., including recommendations for how states should evaluate and modernize current laws and prosecution policies relating to HIV.

- The Department of Defense (DOD) should discontinue use of a service member's HIV diagnosis as the basis for prosecution, enhanced penalties, or discharge from military service.

- CDC should create incentive mechanisms, such as research and prevention project grants, that will encourage states to modernize existing laws criminalizing HIV.[177]

Although unprotected sex between persons who do not know their HIV status is the cause of most new HIV infections, these laws penalize only those who get tested and consequently know their HIV status, thus creating a potential deterrent to testing.

SEX OFFENDER REGISTRATION: SNAPSHOT OF POTENTIAL HARMS

Sex offender registries list the names, addresses and photographs of people convicted of certain offenses on public websites. Research shows that sex offender registration is ineffective at protecting public safety, and imposes obstacles to employment, housing, and overall re-entry into society.[178] Sex offender laws and prosecutions can affect a wide range of people, especially LGBT people.[179] Prosecutions for solicitation, having sex in public, being underage and having sex with another underage person, indecent exposure, streaking, or formerly enforced sodomy laws,[180] for example, can lead to placement on a sex offender registry.[181] PLWH are at additional risk because of the existence of HIV-specific criminal laws that target otherwise-legal conduct when engaged in by people with HIV; nearly a third of these laws include sex offender registration in the penalties imposed on those convicted under them.[182]

Employment

Sex offender registration status makes it difficult to find or keep a job, and may result in the loss of professional licenses. Community notification requirements limit employment opportunities for roughly half of registered sex offenders (RSO).[183]

Housing

Registered individuals face significant limitations in access to housing, particularly public housing options. Most states prevent people who are registered sex offenders from living near schools, day care centers, parks or bus stops.[184] In many cities, these restrictions apply to anywhere from 93% to 99% of residential housing.[185] Decreased housing availability increases likelihood for homelessness.

Education

A registered individual may face restrictions to participating in his or her children's education and activities, including school functions.

Immigration

Criminal convictions and sex offender registration may adversely affect eligibility for immigration protection and relief, and individuals may be subjected to deportation or removal.

Family Relationships

Most people who are registered sex offenders are not permitted unsupervised contact with minors, including relatives. Notification and supervision procedures cause family and intimates of people who are registered sex offenders intense shame as well as family, housing, and employment disruption.[186]

7
DRIVERS OF INCARCERATION

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012
IMAGE: A. RITCHIE

The criminalization of LGBT people has been a consistent part of our experience within the U.S. since before the 1969 Stonewall Rebellion. The realization that sexual and gender outsiders must navigate daily interactions with police violence led leaders from the Stonewall era, such as Marsha P Johnson and Sylvia Rivera, to form organizations like Street Transvestites Action Revolutionaries (STAR) and the Gay Liberation Front to build resistance to the police violence, discrimination, homelessness, and poverty that permeated their communities.

This focus on police and prisons as some of the most significant dangers facing LGBT people was reflected across early gay liberation organizations. New York City's first gay pride march in 1970 ended at the Women's House of Detention to bring focus upon the high rates of incarceration of people of color, poor people, immigrants, and people who are involved in sex work and other criminalized economies.

LGBT people, especially people of color, face persistent and severe discrimination in employment, housing, health care and education leading to disproportionate poverty and increased engagement in sex and drug work in order to survive. Because trans and gender non-conforming people of color are already commonly profiled by the police, these factors lead to greater entry into the criminal justice system, where LGBT people suffer additional harms, including harassment, violence, and denial of health care.

At the same time, LGBT people, especially transgender people, continue to be turned away outright from essential services like homeless shelters, drug treatment or mental health services, while others experience harassment or violence in these settings. Those who seek legal and social services often encounter ignorance or discrimination at the door. When LGBT people are released from prison, they face these same conditions with the additional stigma of a criminal conviction, and often find themselves cycling back through poverty and into jails and prisons.

After decades of erosion of social safety net and poverty alleviation programs and drastic expansion of criminal and immigration enforcement systems, many people are looking for a new path that will address the economic inequality and mass imprisonment that characterize the current moment. LGBT communities are very invested in that inquiry, because our lives have been so severely impacted by these trends. Today we stand on the shoulders of those who bravely fought back against police violence at Stonewall in 1969, still daring to dream of a world in which none of us face rejection, discrimination, or violence for being ourselves.

REINA GOSSETT AND THE SYLVIA RIVERA LAW PROJECT

Several of the factors leading to the criminalization and imprisonment of LGBT people and people living with HIV (PLWH) can be addressed by federal interventions. Family rejection combined with discrimination in employment, government benefits, housing, and health care cause disproportionate numbers of LGBT people and PLWH to experience poverty, homelessness, addiction, and involvement in criminalized efforts to meet basic survival needs. Laws and policies that criminalize poor people for activities that result from poverty are significant drivers of incarceration for LGBT people and PLWH. Importantly, laws and policies that reduce poverty and make housing, health care, and drug treatment more available reduce criminalization in these populations.

" LGBT people, especially transgender people, continue to be turned away outright from essential services like homeless shelters, drug treatment or mental health services, while others experience harassment or violence in these settings. Those who seek legal and social services often encounter ignorance or discrimination at the door."

Reina Gossett and the Sylvia Rivera Law Project

DRUG POLICY

Many of the 2.3 million people behind bars (and 5 million under criminal justice supervision) in this country are being punished for a drug offense.[187] Over 1.6 million people are arrested, prosecuted, incarcerated, placed under criminal justice supervision, and/or deported each year for a drug law violation. It is estimated that 20-30% of LGBT people use drugs, compared with 9% of the general population.[188] Problematic drug use may result from ongoing experiences of stigma, discrimination, and violence compounded with barriers to health care.[189] For this reason, LGBT people are disproportionately impacted by harmful drug policies. Instead of reducing problematic drug use, drug-related disease transmission, or overdose deaths, the enforcement of drug laws has actually done more harm than problematic drug use itself, breaking up families, putting millions of people behind bars, burdening more people with a life-long criminal record, worsening the health prospects for people who use drugs, and significantly compromising public health.

RECOMMENDATIONS:

- The Administration should initiate, support, and promote legislation to reduce and eliminate mandatory minimum sentences for drug offenses at the federal and state levels, and specifically support passage of the Smarter Sentencing Act.[190]

- The Department of Health and Human Services (HHS) should expand funding for evidence-based health approaches to drug use, including harm reduction and drug treatment, and reduce reliance on punishment-centered approaches, which consistently increase costs and harms of drug use.[191]

- President Obama should use his pardon power to release individuals convicted of drug offenses.[192]

- HHS should support the development of Supervised Injection Facilities to improve the health and safety of people using injection drugs and the communities in which they live and reduce criminal activity.[193]

- The Administration should work with Congress to restore federal funding to syringe exchange programs. The Centers for Disease Control and Prevention (CDC) and other agencies should promote syringe exchange as a useful tool for reducing HIV infection and drug use.[194]

- HHS should develop anti-LGBT discrimination guidelines for substance use treatment programs and ensure that no one is denied access to treatment because of their sexual orientation or gender identity, and that residential substance use programs receiving federal funds are respecting the gender identities of their participants.[195]

- The Administration should oppose drug testing for food stamps and other benefits. Drug testing is costly and ineffective.[196]

Kay, a transgender woman in New York City, was sentenced to eight months at a men's drug treatment facility, as an alternative to a three-year sentence for drug possession charges. At first, the facility told her she could not be admitted at all because she was trans. After advocacy, they agreed to admit her, but told her that in order to enter she would be forced to shave her head. When she was released, she lived in a women's shelter in Harlem but experienced harassment there because she was trans. Then she was placed in the Bronx Addiction Center where an employee harassed her almost every day about her gender. Because each drug treatment program she has tried has been a place where she has faced harassment and denial of her gender identity, she has not been able to get to the root causes of her addiction issues via effective treatment. The last time I heard from her, she was in Rikers.

Alisha Williams, Staff Attorney, Sylvia Rivera Law Project

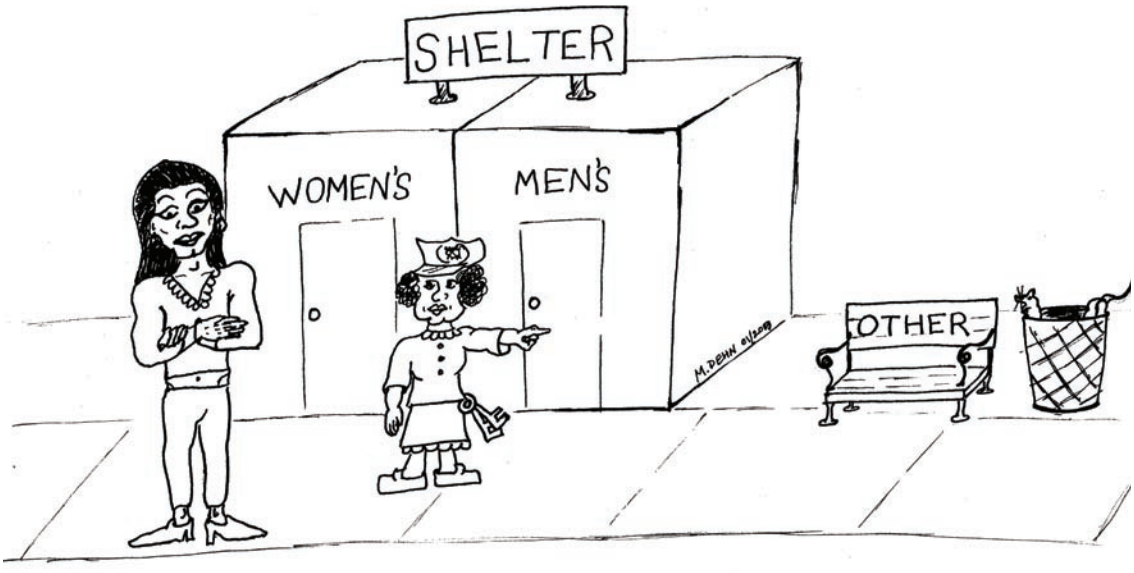


IMAGE: MICKEY DEHN

COLLATERAL CONSEQUENCES OF CRIMINALIZATION AND INCARCERATION

LGBT people and PLWH are disproportionately impacted by poverty, drug use, policing, and criminalization. Conviction and incarceration often lead to collateral consequences that increase the harms of criminalization, such as loss or restriction of a professional license, ineligibility for public housing and public benefits including welfare benefits and student loans, loss of voting rights, ineligibility for jury duty, ineligibility for federal jobs, and deportation for immigrants, including those who, while not U.S. citizens, hold permanent resident status.[197] These consequences increase the vulnerability of people who have had contact with the criminal justice system to homelessness, joblessness, and poverty, and fail to increase safety or well-being of vulnerable populations.

RECOMMENDATIONS:

- The Administration should work with Congress to repeal the Souder Amendment and restore access to federal financial aid to students with drug convictions.

- The Administration should work with Congress to eliminate the exclusion of people with a felony drug conviction from receiving food stamps and public assistance.[198]

- The Department of Housing and Urban Development (HUD) should eliminate public housing guidelines that terminate leases of people convicted of crimes and/or ban people from accessing housing who have criminal convictions.

- The Administration should ban questions about criminal history in applications and interviews for federal jobs, and initiate, support and promote federal "ban the box" legislation to prohibit such practices nationally.[199]

Sign by People's Justice at Silent March to End Stop and Frisk, New York City, June 2012 *IMAGE: S. NARASIMHAN*

- The Administration should develop, support and promote legislation that would eliminate federal bans on access to public housing, Temporary Assistance for Needy Families (TANF) benefits, and Medicaid for people with criminal convictions.[200]

- The Administration should lead efforts to eliminate sex offender registries. The Department of Justice (DOJ) should provide guidance to states about the efficacy of shifting resources from registration programs toward prevention programs.[201]

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

LGBT youth and adults disproportionately live in poverty.[202] Additionally, LGBT people, especially youth, and PLWH are disproportionately represented in the U.S. homeless population.[203] Approximately 40% of all homeless youth identify as LGBT, and 39% of LGBT youth report involvement with the juvenile justice system at some level.[204] This is due in part because youth homelessness is itself criminalized—missing school and running away from home are often the triggers for judicial intervention that leads LGBT youth into the justice system. LGBT youth living on the streets are more likely to resort to criminalized activities as a means of survival, placing them at greater risk of coming on contact with law enforcement. A significant driver of incarceration for LGBT people of all ages are laws and policies that lead to the criminalization of poor and homeless people. Expanding access to poverty alleviation programs, increasing homelessness prevention efforts, and eliminating laws and law enforcement practices that have increased in recent years that lead to arrests and imprisonment of homeless people would reduce the criminalization of LGBT people and PLWH.[205]

I am a homeless transgender woman, and I have faced ongoing harassment from staff at women's shelters when I have tried to stay there. Recently, a group of women threatened to cut off my penis while I was sleeping at a shelter. At another shelter, a woman flipped over a table at me and threw apples at me while yelling anti-trans epithets. The other women are never punished or kicked out for these incidents—I am always the one transferred to a new and equally unsupportive shelter. Recently, I went into a store to buy some tea and was harassed by the store owner and his son who eventually chased me down the street with a bat and broke my nose. Some people nearby came to break it up, but when the cops arrived they arrested me as well as the men who were attacking me.

Krystle L

" I am a homeless transgender woman, and I have faced ongoing harassment from staff at women's shelters ..."

RECOMMENDATIONS:

- The Administration should reduce obstacles to public benefits for people in need by taking the following actions, or encouraging state and local agencies to take these actions, to the greatest extent possible under current law:
    - Provide guidance to states to remove barriers to LGBT individuals and families applying for public assistance and expanding eligibility criteria for public assistance to recognize LGBT families.[206]
    - Increase and expand eligibility for cash assistance, remove time limitations and family caps on receiving cash assistance, and remove restrictions on immigrants receiving assistance.
    - Remove the requirement for states to implement measures to control welfare fraud established by the Personal Responsibility and Work Opportunity Reconciliation Act.

- Increase Supplemental Nutrition Assistance Program (SNAP) benefits.[207]

- Shift the Department of Agriculture's (USDA) Food and Nutrition Service (FNS) priorities away from food stamp fraud. The current focus on food stamp fraud is producing sweeping prosecutions in some states resulting in lost benefits to many beneficiaries. FNS should also direct states that two people who use the same address should not be presumed to share the same household for the purpose of investigating food stamp fraud.[208]

- Enhance enforcement of language access requirements in the food stamp program to prevent programs from turning people away who do not speak English.

- Provide guidance to states encouraging them to reduce or eliminate sanctions regimes that suspend TANF and SNAP to people in need, and encouraging them to entirely eliminate sanctions tied to housing subsidies which contribute to homelessness.[209]

- Eliminate work requirements in TANF, retaining job training and other skills building services. While work requirements remain, students should be exempted.

- Develop new HUD guidelines that eliminate barriers to public housing for people based on a history of criminalization.[210]

- Increasing funding for homeless shelters, supportive housing programs, voluntary drug rehabilitation, and mental health services, earmarking some funding for training programs to reduce discrimination against LGBT people and PLWH in such programs.[211]

IMAGE: KEVIN CALICKI

- HHS should provide guidance to states to encourage states to stop taking driver's licenses away from people who are behind on child support.

- HHS should make it optional, rather than mandatory, for applicants for aid to identify co-parents who can be pursued for child support.

- DOJ should issue guidance encouraging the use of crisis response teams that can direct people to services and away from law enforcement and the criminal justice system.[212]

- HUD should provide extra points on the annual homeless assistance funding application to communities that avoid criminalization by instead adopting positive alternatives like housing and supportive services.[213]

- The federal government should review its grant programs, particularly community policing grants at DOJ, to ensure that federal funds support positive efforts to end homelessness, and are not being used to support criminalization. The DOJ Civil Rights Division should actively support legal challenges to ordinances that unconstitutionally criminalize homeless people.[214]

- HHS should fund preventative and educational programs about HIV/AIDS at shelters, soup kitchens, and other locations that are easily accessible to homeless people.

- HHS should provide federal funding to implement public hygiene centers, public bathrooms,[215] and syringe access and overdose prevention programs that significantly improve health outcomes for low-income and homeless people.

- HUD should create enforcement mechanism for the Home Affordable Modification Program (HAMP) loan modification to hold banks accountable and require them to actually modify mortgages to amounts that people can afford to pay.

- The Department of Labor (DOL) should establish sexual orientation and gender identity and expression non-discrimination guidelines for Job Corps sites and One-Stop Career Centers.

- The Administration should lead efforts to reassess the federal poverty measure to better capture the realities of individuals and families in need.[216]

- Expand the Earned Income Tax Credit to reach more workers, including childless workers.[217]

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

A majority of states still practice discriminatory exclusions in Medicaid programs prohibiting transgender and gender non-conforming people from accessing gender confirming health care services.

A number of barriers in government services, including access to identity documents with accurate gender markers and homeless shelters and health care benefits, significantly impact transgender, Two Spirit, and gender non-conforming people and contribute to increased contact with the criminal legal system. Only 21% of this population has ID that matches their current identity, meaning that four-fifths are in danger of disclosure of transgender status every time they apply for a job or housing, or interact with the police. Transgender and gender non-conforming people have twice the rate of unemployment compared to the national average, and 90% report having experienced harassment or discrimination on the job or taking actions to hide their identity in order to avoid it. As a result, transgender and gender non-conforming people are nearly four times more likely to have an annual income of under $10,000/year than the general population.

A majority of states still practice discriminatory exclusions in Medicaid programs prohibiting transgender and gender non-conforming people from accessing gender confirming health care services. The transgender population has over four times the national average rate of HIV infection, and 28% report they have postponed necessary medical care because of discrimination. 55% of those attempting to access homeless shelters experience harassment, and 29% are turned away altogether.[218]

RECOMMENDATIONS:

- The Administration should finalize the updated Model State Vital Statistics Act and include an administrative process for gender change on birth certificates based on certification by a licensed health care provider (similar to recent District of Columbia legislation).

- The Department of Defense (DOD) should adopt clear policies to permit transgender veterans to obtain proof of service that does not show their enlisted name but rather shows their current legal name, in order to protect personal privacy and prevent discrimination and victimization.

- The State Department, Social Security Administration (SSA), Office of Personnel Management (OPM), Veterans Health Administration (VHA), and Department of Homeland Security's (DHS) Citizenship and Immigration Services (USCIS) should update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.

Talia is a 37-year-old transgender woman who has been an SRLP client since 2002. She was incarcerated for 15 years, and experienced severe sexual violence in prison. She's a veteran and gets Veterans Administration (VA) health care. She experiences significant discrimination in accessing VA services because she is trans. She has been in and out of the shelter system and has had multiple suicide attempts. She is intensely traumatized because of her experience in prison. She in stuck in a cycle of trying to access shelters, having suicide attempts, being placed in men's psychiatric wards, being released to the streets, being profiled by police, and then often ending up back in jail. None of the services available to her are trans aware, and she is not getting help addressing her underlying experiences of trauma.

Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project

- HUD should clarify that homeless shelter programs receiving federal funding must provide placement based on a resident's current gender identity, rather than birth assigned gender, unless the individual requests a different placement because of safety concerns, consistent with the Fair Housing Act and the HUD Equal Access Rule.[219]

- DOJ should provide guidance to state criminal courts regarding ensuring that mandatory programs, such as drug treatment programs, are non-discriminatory and place transgender patients according to current gender identity.

- HHS should direct states to eliminate bars to gender confirming health care for transgender people in Medicaid programs, which violate the federal Medicaid statute's prohibition on diagnosis discrimination.[220]

- The Veteran's Administration (VA) should eliminate bars to gender confirming health care for transgender people receiving their healthcare through VA benefits.[221]

- HHS should issue clear guidance mandating provision of gender confirming health care for transgender people in private insurance programs in compliance with the Affordable Care Act's non-discrimination clause.[222]

- HHS should provide guidance to state welfare agencies about establishing clear and accessible procedures for changing name and gender on public benefits records and preventing discrimination in welfare offices and mandatory job training programs.

- The Substance Abuse and Mental Health Services Administration (SAMHSA), VA, and other federal agencies should follow the example HUD has set by using their general authority over grant program administration to adopt regulations expressly prohibiting discrimination based on sexual orientation and gender identity in federally funded programs.[223]

I have represented many clients in cases where their food stamp or Medicaid benefits are being cut because they are accused of breaking the rules of the program. I have heard the same story many times. Usually a client finds me after they have been to a meeting with an investigator, in which they were bullied and intimidated into signing something. Sometimes they are threatened with jail if they don't sign or are vaguely told something worse will happen if they don't sign. Sometimes they are individuals who do not understand English who were not provided with an interpreter. Almost always they don't know what they've signed. Most often, it turns out they have unknowingly signed a pre-written statement that they have intentionally lied or concealed information in order to receive benefits for which they knew they weren't eligible. The result is that that they receive a penalty of at least one year without benefits and now while living in poverty must pay back the benefits they allegedly fraudulently received. When it is about Medicaid benefits, they are forced to pay back thousands or tens of thousands of dollars in medical costs.

I had a client who had applied for food stamps when she left her job because of a high-risk pregnancy. She was a single mother eligible for food stamps with her only source of income being disability benefits through her job. Her child was born with a rare lymphatic disease, which was a stressful and overwhelming experience. Eventually, my client returned to work, continued to parent her children and handle the demands of a raising a special needs baby. While managing all of this, she failed to inform the state agency that she had returned to work and her income had changed. She continued to receive food stamps through the end of the year. When she didn't recertify for the benefits, her benefits stopped. Less than a year later, she was arrested for food stamp fraud, facing jail time and losing her children. In my experience, the working poor and people with sporadic work are the subject of these questionable investigations. Because LGBT people are disproportionately poor and experience disproportionate under- and unemployment, these issues are of particular concern for LGBT people.

Belkys Garcia, Staff Attorney, Legal Aid Society

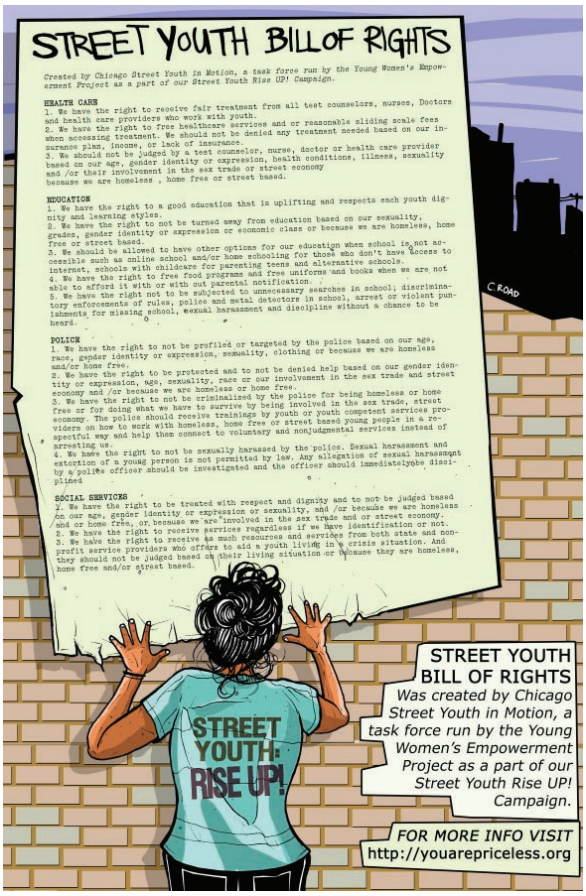


IMAGE: YOUNG WOMEN'S EMPOWERMENT PROJECT

Marcia, a 35-year-old black trans woman, was in Rikers when I met her, and has been a client of the Sylvia Rivera Law Project for several years. She currently lives in shelter system and sometimes on the streets because she has not been able to get effective treatment for her alcoholism. There are no trans-welcoming and competent treatment programs. Marcia gets profiled a lot and gets arrested for being on the street, for being who she is. Each time she is arrested and goes to Rikers, she gets raped there. When she has gotten sent to rehab she has always either been rejected because she is trans, or gotten kicked out after incidents of harassment and attack directed at her because she is trans. She got kicked out of shelter recently because she was attacked by the other residents. She lives under so much stress and has experienced so much ongoing trauma that her substance abuse and mental health issues worsen rather than being addressed.

Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project

CRIMINALIZATION OF SEX WORK AND RESPONSES TO TRAFFICKING IN PERSONS

Due to widespread discrimination in schools, the workplace, family courts, social services, medical care, immigration benefits, and the criminal legal system, LGBT youth and adults are disproportionately homeless[224] and involved in the sex trades and other forms of criminalized, unregulated, and poorly regulated employment to meet their basic needs. An even greater number of LGBT people, and particularly transgender women of color, LGBT youth of color, and gay men of color, are routinely profiled by law enforcement as being involved in the sex trades.[225]

Law enforcement-based responses to involvement in the sex trades and to trafficking in persons—which includes direct targeting through both anti-prostitution initiatives and anti-trafficking raids[226]—further increase the social and economic marginalization of individuals in the sex trades, sex workers, and of individuals who are vulnerable to all forms of trafficking, including labor trafficking, while failing to meet basic needs, address the root causes of involvement, or reduce vulnerability to violence and exploitation.[227] Additional barriers faced by LGBT youth and adults involved in the sex trades include profiling and indifference from police[228] and service providers who do not recognize LGBT people as survivors of violence regardless of actual circumstances or the complexities and nuances of LGBT experiences in the sex trades which may place them outside predominant narratives. Another significant barrier is the conditioning of access to services on mandatory collaboration with law enforcement, compliance with services offered by religious agencies, participation in family courts,

referral to gender-segregated facilities, and mandating "exit" from the sex trades. Additionally, policies contributing to the defunding of community-based harm reduction organizations or criminalization of non-exploitative peer networks have the effect of further harming and penalizing LGBT people who are or are profiled as being involved in the sex trades.[229]

Resources currently directed to law enforcement-based responses and "End Demand" initiatives could be better utilized by meeting the basic needs identified by individuals in the sex trades and prioritizing the self-determination and agency of survivors of trafficking, including the right to identify their own experiences and name the type of services they which to receive, if any, and whether or not to seek or participate in efforts to bring traffickers to justice. The demand that drives sex work and involvement in the sex trades—whether by choice, circumstance or coercion—as well as labor trafficking, is essentially the demand for safe, affordable, and LGBT affirming housing, nonjudgmental and gender affirming health care, living wage employment options, and pathways to immigration status. These are the needs that must be prioritized to address harms to LGBT individuals involved in the sex trades.

RECOMMENDATIONS:

- The Administration should develop, promote, and support legislation that would increase federal funding for affordable housing and improve access to public housing Section 8 vouchers for LGBT youth and adults as part of anti-trafficking efforts.

- HHS should eliminate discriminatory Medicare and Medicaid exclusions that limit transgender people's access to medically appropriate health coverage as part of anti-trafficking efforts.

- The Administration should support and promote passage of immigration reform legislation that does not place LGBT immigrants at greater risk of enforcement action or deportation by condoning or legitimizing profiling, or through implementation of the S-Comm Program and Criminal Alien Program (CAP).

- Federal funding to combat human trafficking allocated through the Federal Strategic Action Plan on Services for Victims of Human Trafficking (SAP) should prioritize meeting critical needs identified by survivors of trafficking themselves over law enforcement-based responses.[230] Grants awarded pursuant to the SAP should prioritize resourcing non-judgmental, harm reduction-based services which recognize the uniqueness and complexity of each individual's experiences, as well as the multiple gender, racial, and cultural identities of survivors of all forms of trafficking. Access to services should not be premised on recognition or identification as a "victim," a status that continues to be denied LGBT survivors of trafficking and other forms of violence due to predominant narratives.

- The Administration should develop, promote, and support an amendment to the Trafficking Victims Protection Reauthorization Act (TVPRA) to eliminate mandatory collaboration with law enforcement in order to obtain immigration relief or services. Such collaboration often presents a significant barrier to access to services for all survivors of trafficking, and particularly for LGBT youth and adults who are routinely denied help by law enforcement agencies, profiled as perpetrators of violence, or subjected to dual arrest even as they are targets of violence.[231]

- The Administration should involve survivors of all forms of trafficking, including LGBT youth and adults, in every aspect of implementation of SAP—from awareness raising to assessment and evaluation of outreach materials and identification practices, to identification of barriers to housing, immigration

benefits, legal services, and medical care, to identification of research priorities. Mechanisms to ensure involvement of LGBT survivors of labor trafficking and coerced involvement in the sex trades as well as of LGBT youth who have experienced homelessness, involvement in the sex trades, or both, should take place through transparent public processes rather than closed, "invitation only" events.

- DOJ should offer guidance to local law enforcement agencies with respect to policies and practices that place survivors of trafficking, people in the sex trades, and sex workers at greater risk, such as the widespread confiscation and use of condoms as evidence of intent to engage in prostitution-related offenses.[232]

Trans Day of Action, organized annually by the Audre Lorde Project, New York City, June 2012 *IMAGE: S. NARASIMHAN*

- The Administration should seek additional input for SAP from organizations working with Two Spirit and Indigenous youth and adults.

- Partnerships with faith-based organizations promoted through SAP must be premised on an established track record of LGBT affirming services and approaches, excluding faith-based organizations which promote "reparative therapy" or otherwise offer anti-LGBT services.

- The Administration should establish a task force to investigate the impact of criminalization of involvement in the sex trades on public health, safety, budgets, and the economy, and examine alternative approaches to addressing harms to individuals in the sex trades by reducing poverty, homelessness, and basic needs in populations most represented in the sex trade.

- DOJ should provide guidance for local law enforcement agencies with respect to enforcement of prostitution and anti-trafficking laws encouraging deprioritization of arrest-based responses.

- The Administration should ensure full implementation of Recommendation 86 of the UN Human Rights Commission pursuant to the 2011 Universal Periodic Review of the U.S. government's compliance with international human rights instruments and take concrete steps to eliminate violence against sex workers.

> ***"Today we stand on the shoulders of those who bravely fought back against police violence at Stonewall in 1969, still daring to dream of a world in which none of us face rejection, discrimination, or violence for being ourselves."***
>
> *Reina Gossett and the Sylvia Rivera Law Project*

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8 This document represents an aggregation of viewpoints, and the recommendations herein may not reflect, or be attributed to, individual authors, reviewers, or convening participants.

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27 Id. at ¶ 184.

28 Nico Sifra Quintana, Josh Rosenthal, and Jeff Krehely, "On the Streets: The Federal Response to Gay and Transgender Homeless Youth" (Washington: Center for American Progress, 2010), (LGBT youth make up 5-7% of the youth population but 40% of the homeless youth population).

29 National Coalition for the Homeless, "HIV/AIDS and Homelessness" (2009), available at http://www.nationalhomeless.org/factsheets/hiv.html (It is estimated that 3.4% of homeless people were HIV-positive in 2006, compared to 0.4% of adults and adolescents in the general population.); Alan Greenblatt, "In Some Cities, Gays Face Greater Risk of Becoming Homeless," *National Public Radio*, August 7, 2013, available at http://www.npr.org/2013/08/06/209510271/in-some-cities-gays-face-greater-risk-of-becoming-homeless (A recent census in San Francisco found that 29% of the city's homeless population identifies as gay.); Human Rights Campaign, "HRC Issue Brief: Housing and Homelessness" (2012), available at http://www.hrc.org/files/assets/resources/HousingAndHomeless_Document.pdf ("Homelessness and housing insecurity is a growing problem confronting LGBT individuals of all ages across the country."); Welfare Warriors Research Collaborative, "A Fabulous Attitude: Low Income LGBTGNC People Surviving and Thriving with Love, Shelter, and Knowledge" (New York: Queers for Economic Justice, 2010), available at http://d3n8a8pro7vhmx.cloudfront.net/q4ej/pages/22/attachments/original/1375201785/compressed_afabulousattitudefinalreport.pdf?1375201785.

30 Welfare Warriors Research Collaborative, "A Fabulous Attitude".

31 For instance, the Department of Justice could intervene in litigation such *Pottinger v. Miami* which is now being challenged by the City of Miami, in which a settlement reduced the ability of police to arrest homeless people for "life sustaining activities'' (such as loitering, littering, and blocking sidewalks) that homeless people without recourse to shelter need to carry out in public, without fear of arrest, to survive. The result was a drastic increase in services to homeless people and decrease in the downtown Miami homeless population. Similar policies could be included in federal consent decrees and promoted through federal guidance to law enforcement agencies. Charles Rabin and Andres Viglucci, "Miami to go to federal court to undo homeless-protection act," *Miami Herald*, April 11, 2013, available at http://www.miamiherald.com/2013/04/11/3339297/miami-to-go-to-federal-court-to.html.

32 Legislation offering protection from discriminatory treatment by police based on housing status or homelessness has been enacted in the State of Rhode Island, the District of Columbia, and the Municipality of Cook County, IL. D.C. Code §2-1402.31 (2012); Cook Cnty., Ill. Code of Ordinances § 42-31, 42-37 (2012); R.I. Gen. Laws § 34-37.1-3 (2012). Additionally, a number of police departments across the country have adopted policies prohibiting discriminatory law enforcement action based on housing status or actual or perceived homelessness.). *See e.g.*, Metro. Police Dep't Gen. Ord. 308-14 (2011); S.F. Police Dep't DGO 5.03, Investigative Detentions (2003).

33 Courts have struck down such laws. *See Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013); *Wilkinson v. Utah*, 860 F. Supp. 2d 1284 (D. Utah 2012); *State v. Boehler*, 262 P.3d 637 (Ariz. Ct. App. 2011); National Law Center on Homelessness & Poverty, "Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities" (2011), available at http://www.nlchp.org/Criminalizing_Crisis.

34 *See*, Comprehensive Report on Homelessness, State of Utah 2013, Utah Housing and Community Development Division, available at: http://jobs.utah.gov/housing/documents/homelessness2013.pdf.

35 National Prison Rape Elimination Commission, "National Prison Rape Elimination Commission Report" (2011), available at http://static.nicic.gov/UserShared/2013-03-29_nprec_finalreport.pdf.

36 United Nations Office on Drugs and Crime, "Handbook on Prisoners with Special Needs" (2009), available at https://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf; Amnesty International, "Rights for All" (1998), available at http://www.amnesty.org/en/library/asset/AMR51/035/1998/en/0440cd04-da99-11dd-80bc-797022e51902/amr510351998en.pdf; "Survivor Testimony," available at http://www.justdetention.org/en/survivor_testimony.aspx (last accessed December 2013); Jamie Fellner, "Sexually Abused: The Nightmare of Juveniles in Confinement" (Washington: Human Rights Watch, 2010), available at http://www.hrw.org/news/2010/02/02/sexually-abused-nightmare-juveniles-confinement.

37 Amnesty International, "Stonewalled": 40.

38 Amnesty International, "Stonewalled"; Alex Coolman, Lamar Glover, and Kara Gotsch, "Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners" (Los Angeles and Washington: Stop Prisoner Rape and ACLU National Prison Project, 2005), available at http://www.justdetention.org/pdf/stillindanger.pdf; Terry Schuster and Will Harrell, "Prisons: The Next Frontier for LGBTI Rights," *The Life of the Law*, August 9, 2013, available at http://www.lifeofthelaw.org/prisons-the-next-frontier-for-lgbti-rights/.

39 Invasive and degrading genital searches conducted by law enforcement as "gender checks" are unfortunately commonplace, as documented by Amnesty International in "Stonewalled." The current language in PREA, which prohibits such searches "unless part of a broader medical examination," leaves too much discretion as to what constitutes a "broader medical examination," given the ongoing problem of harassing and assaultive genital searching of LGBT detainees.

40 *See*, Frequently Asked Questions, PREA Resource Center, http://www.prearesourcecenter.org/faq.

41 *See, e.g.*, Harris County Texas Sheriff, Policy No. 413: Lesbian, Gay, Bisexual, Transgender and Intersex (2013).

42 International Association of Chiefs of Police, "Addressing Sexual Offenses and Misconduct by Law Enforcement Officers: An Executive Guide" (2011), available at http://www.theiacp.org/Portals/0/pdfs/.

43 Ibid.

44 NOPD Consent Decree, ¶129,149,187.

45 Id. at ¶ 184,185, 187.

46 Acacia Shields, "Criminalizing Condoms: How Policing Practices Put Sex Workers and IV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe" (New York: Open Society Foundations, 2012), available at http://www.opensocietyfoundations.org/reports/criminalizing-condoms; PROS Network and Leigh Tomppert, "Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City" (New York: PROS Network and Sex Workers Project, 2012), available at http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf; Human Rights Watch, "Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities" (2012), available at http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf; Make the Road New York, "Transgressive Policing."

47 National Prison Rape Elimination Commission, "National Prison Rape Elimination Commission Report:" 74-75.

48 See generally, Department of Justice, National Standards To Prevent, Detect, and Respond to Prison Rape, 77 FR 37105 (June 20, 2012), available at https://www.federalregister.gov/articles/2012/06/20/2012-12427/national-standards-to-prevent-detect-and-respond-to-prison-rape.

49 Jessi Lee Jackson, "Sexual Necropolitics and Prison Rape Elimination," *Signs* 39 (1) (2013): 198.

50 Parker Marie Molloy, "WATCH: CeCe McDonald Makes First Television Appearance Following Release From Men's Prison," *Advocate.com*, January 21, 2014, available at http://www.advocate.com/politics/transgender/2014/01/21/watch-cece-mcdonald-makes-first-television-appearance-following.

51 See, e.g., Fields v. Smith, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1810 (2012); Battista v. Clarke, 645 F.3d 449 (1st Cir. 2011); Allard v. Gomez, 9 Fed. Appx. 793, 795 (9th Cir. 2001).

52 De'Lonta v. Johnson , 708 F.3d 520, 526 (4th Cir. 2013).

53 Series of letters from prisoner on file with Chase Strangio, American Civil Liberties Union.

54 Pascal Emmer, Adrian Lowe, and R. Barrett Marshall, "This is a Prison, Glitter Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania's Prison System" (Philadelphia: Hearts on a Wire Collective, 2011): 12, available at http://www.galaei.org/documents/thisisaprison.pdf.

55 Idaho Dep't of Corr., Procedure Control No. 325.02.01.001, Prison Rape Elimination 5 (2009) (prohibiting prisoners in women's prisons from having masculine haircuts and prisoners in men's prisons from having effeminate haircuts under guise of compliance with PREA).

56 Mogul, Ritchie, and Whitlock, *Queer (In)Justice*; Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12* (Washington: Department of Justice, 2012): 18-19, 30-31, available at http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf; Craig Haney, Testimony before the Senate Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, "Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences," June 19, 2012; Grant, Mottet, and Tanis, "Injustice at Every Turn"; Jerome Hunt and Aisha C. Moodie-Mills, "The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System" (Washington: Center for American Progress, 2012), available at http://www.americanprogress.org/issues/lgbt/report/2012/06/29/11730/the-unfair-criminalization-of-gay-and-transgender-youth/; Barry Zack and Katie Kramer, "What is the Role of Prisons and Jails in HIV Prevention?" University of California, San Francisco Center for AIDS prevention Studies, March 2009 http://caps.ucsf.edu/uploads/pubs/FS/pdf/revincarceratedFS.pdf.; Morgan Bassichis, "'Its War in Here': A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons" (New York: Sylvia Rivera Law Project, 2007), available at http://srlp.org/files/warinhere.pdf; Emmer, Lowe and Marshall, "This Is a Prison, Glitter Is Not Allowed"; Wesley Ware, "Locked Up and Out: Lesbian, Gay, Bisexual and Transgender Youth in Louisiana's Juvenile Justice System" (New Orleans: Juvenile Justice Project of Louisiana, 2010), available at http://equityproject.org/pdfs/Locked-Up-Out.pdf.

57 Gabriel Arkles, "Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention," *Temple Political & Civil Rights Law Review* 18 (515) (2009); Helen M. Eigenberg, "Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons," *Prison Journal* 80 (4) (2000): 415- 433 (finding that half of officers said that some prisoners deserve to be raped).

58 See, e.g., Everson v. Cline, No. 101,914, 2009 WL 3172859 (Kan. App. Oct. 2, 2009) (plaintiff placed in PREA segregation after writing note inviting consensual sexual relationship); Waller v. Maples, 1:11CV00053 JLH-BD, 2011 WL 3861370 (E.D. Ark. July 26, 2011) report and recommendation adopted, 1:11CV00053 JLH-BD, 2011 WL 3861369 (E.D. Ark. Aug. 31, 2011) (plaintiff placed in isolation following PREA investigation into allegedly sexual consensual relationship with childhood friend); McKnight v. Hobbs, 2:10CV00168 DPM HDY, 2010 WL 5056024 (E.D. Ark. Nov. 18, 2010) report and recommendation adopted, 2:10-CV-168-DPM HDY, 2010 WL 5056013 (E.D. Ark. Dec. 6, 2010) (plaintiff placed on PREA status indefinitely after found guilty of having had consensual sex, which allegedly caused him to lose certain privileges and access to mental health care); Idaho Dep't of Corr., Procedure Control No. 325.02.01.001, Prison Rape Elimination 5 (2009) (prohibiting prisoners in women's prisons from having masculine haircuts and prisoners in men's prisons from having effeminate haircuts under guise of compliance with PREA).

59 Lori Sexton, Val Jenness, and Jennifer Sumner, "Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men's Prisons," *Justice Quarterly 27* (6) (2010): 835-866, available at http://ucicorrections.seweb.uci.edu/files/2013/06/A-Demographic-Assessment-of-Transgender-Inmates-in-Mens-Prisons.pdf; Mogul, Ritchie, and Whitlock, *Queer (In)Justice*.

60 "Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs." 28 C.F.R. § 551.90 (2013).

61 Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011 ("Recent

evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in Lawrence and Romer), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives.").

62 Umber v. Murphy, 304 A.D.2d 931, 931-32 (N.Y. App. Div. 2003).

63 The agency should commit to a multi-year pilot project implementing the recommended policies in a substantial number of BOP facilities. This policy could then serve as a model for other federal, state, and local detention agencies.

64 *See, e.g.*, 28 C.F.R. § 115.15(e)-(f) (2012) (restricting searches of transgender people), § 115.15.31 (a)(9) (requiring "professional" and "efficient" communication with LGBTI people).

65 *See* Frequently Asked Questions, PREA Resource Center, http://www.prearesourcecenter.org/faq.

66 *See e.g.*, Harris County Texas Sheriff, Policy No. 413: Lesbian, Gay, Bisexual, Transgender and Intersex (2013).

67 Invasive and degrading genital searches are a source of trauma for many people in prison. In recent years, increasing attention has been paid to the issue, in part because of advocacy efforts in Michigan to stop a routine invasive search at the Michigan Women's Huron County Correctional Facility. *See* American Civil Liberties Union, "Invasive Searches," available at https://www.aclu.org/invasive-search. Invasive genital searches are, unfortunately, a common experience for LGBT prisoners, especially trans prisoners who are often searched in this way when corrections staff do "gender checks" of them. The current language in PREA, which prohibits such searches "unless part of a broader medical examination" leaves too much discretion as to what constitutes a "broader medical examination," given the ongoing problem of harassing and assaultive genital searching of LGBT prisoners and detainees.

68 Such reforms have been advocated by many, including the Chairman of the National Prison Rape Elimination Commission, the American Bar Association and the Commission on Safety and Abuse in America's Prisons. See, American Bar Association, Criminal Justice Section, "Report to the House of Delegates: Recommendation," approved by the House of Delegates February 12, 2007; Commission on Safety and Abuse in America's Prisons, "Confronting Confinement," pp. 86-87; Letter from Reggie B. Walton, chairman, National Prison Rape Elimination Commission, to Representatives Bobby Scott (D-VA) and Randy Forbes (R-VA), January 24, 2008; Human Rights Watch, "No Equal Justice: The Prison Litigation Reform Act in the United States" (2009), available at http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf; "Reform the Prison Litigation Reform Act: Top 10 Harmful PRLA Results," Stop Abuse and Violence Everywhere Coalition, http://www.savecoalition.org/top10.html.

69 See e.g., The Center for HIV Law and Policy, Teen SENSE model policies and standards for sexual health care, sexual health literacy, and staff training for youth in state custody, available at http://www.hivlawandpolicy.org/initiatives/teen-sense.

70 Properly used condoms reduce the risk of HIV transmission by as much as 90% and access to condoms has been found not to increase sexual activity or security risks. Alexander McKay, "Sex Research Update," *Canadian Journal of Human Sexuality* 15 (1) (2006): 47, 49; John P. May & Earnest L. Williams, Jr., "Acceptability of Condom Availability in a U.S. Jail," *AIDS Education and Prevention* 14 (5) (2002): 90 ("The experience in the Washington, DC jail has found condom access to be unobtrusive to the jail routine, no threat to security or operations, no increase in sexual activity, and accepted by most inmates and correctional officers."); Mary Sylla, Nina Harawa, and Olga Grinstead Reznick, "The First Condom Machine in a US Jail: The Challenge of Harm Reduction in a Law and Order Environment," *American Journal of Public Health* 100 (6) (2010). Meeting sexual health and prevention needs supports the health of prisoners and the partners and communities they return to after release.

71 Economic and Social Council Res. 663C, Res. 2076, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex 1, ESC Res. 663C, (XXIV) (1957), UN ESCOR, Supp. No. 1, at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076, (LXII) (1977), UN ESCOR, Supp. No. 1, at 35, UN Doc. E/5988 (1977) (Dec. 11, 2013); World Health Organization Europe, "Health in Prisons: A WHO guide to the essentials in prison health" (2007): 21, available at http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf; United Nations Office on Drugs and Crime, "Handbook on Prisoners with Special Needs"; Diane L. Adams and Brenda A. Leath, "Correctional Health Care: Implications for Public Health Policy," *Journal of the National Medical Association* 94 (5) (2002): 297, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2594357/pdf/jnma00322-0031.pdf.

72 "Methadone Maintenance Treatment and the Criminal Justice System", April 2006, National Association of State Alcohol and Drug Abuse Directors, http://www.nasadad.org/resource.php?base_id=650; Drug Policy Alliance, "Methadone Maintenance Treatment-A Common Sense and Cost Effective Treatment Option for Bernalillo's Metropolitan Detention Center," January 2013; World Health Organization Europe, "Health in Prisons" (listing methadone as an essential medication and advising corrections systems, including prisons, to make methadone maintenance treatment available in order to significantly reduce adverse health and criminogenic consequences); Mark Parrino, "Methadone Treatment in Jail," *American Jails* 14 (2) (2000): 9-12; Rebecca Boucher, "The Case For Methadone Maintenance Treatment in Prisons," *Vermont Law Review* 27 (2002-2003), available at https://www.drugpolicy.org/docUploads/boucher_prison_methadone.pdf.

73 Clothing, including undergarments, permitted or provided in female facilities should also be permitted and provided in male facilities, and vice versa. Staff should not prevent a prisoner from, or discipline a prisoner for, possessing or wearing an article of clothing because it does not match gender norms. Grooming rules and restrictions, including rules regarding hair, make-up, shaving, jewelry, etc., should be the same in male and female facilities. Staff should not prevent a prisoner from, or discipline a prisoner for, a form of personal grooming because it does not match gender norms. *See* N.Y. State Office of Children & Family Services, "Lesbian, Gay, Bisexual, Transgender, and Questioning Youth (PPM 3442.00)" (2008): 8, available at http://srlp.org/files/LGBT_Youth_Policy_PPM_3442_00.pdf.

74 Center for Nutrition Policy and Promotion, "Dietary Guidelines for Americans, 7th Edition" (Washington: United States Department of Agriculture, 2010); Aglaee Jacob, "Adult Vs. Teen Nutrition," *SFGate*, available at http://healthyeating.sfgate.com/adult-vs-teen-nutrition-1083.html.

75 David M. Reutter, Gary Hunter, and Brandon Sample, "Appalling Prison and Jail Food Leaves Prisoners Hungry for Justice," *Prison Legal News*, March 30, 2014, available at https://www.prisonlegalnews.org/displayArticle.aspx?articleid=22246&AspxAutoDetectCookieSupport=1.

76 Glennor Shirley, "Prison Libraries and the Internet," (Chicago: American Library Association's Office for Literacy and Outreach Program, 2004), available at http://olos.ala.org/columns/?p=117; Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders, and Jeremy N. V. Miles, "Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults" (Santa Monica: RAND Corporation, 2013), available at http://www.rand.org/pubs/research_reports/RR266.html.

77 *See, e.g.*, 28 C.F.R. § 115.15(e)-(f) (2012) (restricting searches of transgender people), § 115.15.31 (a)(9) (requiring "professional" and "efficient" communication with LGBTI people).

78 "Frequently Asked Questions," available at http://solitarywatch.com/facts/faq/ (last accessed December 2013); Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention, 18 Temp. Pol. & Civ. Rts. L.Rev. 515 (2009).

79 "The Committee Against Torture, official governing body of the UN Convention Against Torture that the United States ratified in 1994, has recommended that the practice of isolation be abolished. The UN Human Rights Committee has, in 1992, suggested that prolonged isolation may amount to a violation of international human rights law. Similarly the UN committee on the Rights of the Child has urged for an end to the use of solitary confinement against minors." "Frequently Asked Questions," http://solitarywatch.com/facts/faq/. *See also*, "Growing up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States" (Washington: Human Rights Watch and ACLU, 2012), available at http://www.hrw.org/reports/2012/10/10/growing-locked-down; Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf, p. 19, section J.

80 Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(c) (2012).

81 Id.; BOP Program Statement 5324.09, Sexually Abusive Behavior Prevention and Intervention Program (2012).

82 Gary Gates, "LGBT Adult Immigrants in the United States" (Los Angeles: Williams Institute, 2013) at http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-lgbt-immigrants-mar-2013/ (This likely is a low estimate as many people do not self-identify and data are not systematically collected.). See also, Crosby Burns, Ann Garcia and Philip E. Wolgin, "Living in Dual Shadows: LGBT Undocumented Immigrants," (Washington: Center for American Progress, 2013), available athttp://www.americanprogress.org/issues/immigration/report/2013/03/08/55674/living-in-dual-shadows/.

83 Personal communication from Keren Zwick, Managing Attorney for LGBT Immigrant Rights Initiative and Adult Detention Program, National Immigrant Justice Center, September 30, 2013; see also website of Immigration Equality at http://immigrationequality.org/about/ ("Each year, Immigration Equality fields inquiries from over 1,000 LGBT or HIV-positive foreign nationals and their loved ones about their options under U.S. immigration law.").

84 LGBT people were inadmissible to the U.S. for much of the 20th century, and excludable from naturalization as persons "afflicted by a psychopathic personality." People living with HIV were banned from visiting and immigrating until 2010. (See, Siobhan Somerville, "Queer Alienage: The Racial and Sexual Logic of the 1952 Immigration and Naturalization Act," Working Papers on Historical Systems, Peoples and Cultures, No. 12, September 2002, p. 4, Department of Ethnic Studies, Bowling Green State University, available at http://www2.bgsu.edu/downloads/cas/file46880.pdf.). Until the *Windsor* decision in 2013, LGBT families were denied recognition of marital ties, which represent a key pathway to achieving lawful immigration status. People with HIV were barred from visiting or immigrating until 2010 (See Centers for Disease Control, "Final Rule Removing HIV Infection from US Immigration Screening," available at http://www.cdc.gov/immigrantrefugeehealth/laws-regs/hiv-ban-removal/final-rule.html).

85 "Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ) Organizations Call for the Immediate Elimination of ICE's 'Secure Communities' Program," October 11, 2011, available at http://www.cuav.org/LGBTQ-organizations-come-out-for-the-immediate-elimination-of-ices-secure-communities-program/; Andrea Ritchie, "Coming Out Against ICE Secure Communities Program," October 11, 2011, available at http://andreajritchie.wordpress.com/2011/10/11/coming-out-against-ice-secure-communities-program/.

86 Padron et. al. v. ICE, February 2013, at http://www.immigrantjustice.org/court_cases/padron-et-al-v-ice-et-al. The National Immigration Forum (NIF) reports that in FY2013, ICE contracted with 244 state and county facilities and seven (7) privately run Contract Detention Facilities, and itself operated six (6) detention facilities, known as Service Processing Centers. (National Immigration Forum, "The Math of Immigration Detention: Runaway Costs For Immigration Detention Do Not Add Up To Sensible Policies" (2013): 4, available at http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf.)

87 Ibid.: 1, 3. (DHS requested nearly $2 billion dollars in FY 2014 for immigration detention alone. The cost of detention is estimated at $159 per person per day, while the cost of alternatives to detention range from 70 cents to $17 dollars per person per day.)

88 Michael Shear, "Obama, Citing Concern for Families, Orders Review of Deportations," *New York Times*, March 13, 2014, available at http://www.nytimes.com/2014/03/14/us/obama-orders-review-of-deportations.html.

89 See, for example, Adriana Maestas, "Deportations are Down but Calls to Stop the Removals Continue," *Politics* 365, December 10, 2013, available at http://politic365.com/2013/12/20/deportations-are-down-but-calls-to-stop-the-removals-continue/; "American Federation of Teachers Calls for Moratorium on Deportations," February 10, 2014, available at http://www.notonemoredeportation.com/2014/02/14/american-federation-of-teachers-calls-for-moratorium-on-deportations/.

90 Sharita Gruberg, "Dignity Denied: LGBT Immigrants in US Immigration Detention" (Washington: Center for American Progress, 2013): 4 ("The complaints include incidents of sexual assault, denial of adequate medical care, long-term solitary confinement, discrimination and abuse, and ineffective complaints and appeals processes."), available at http://www.americanprogress.org/wp-content/uploads/2013/11/ImmigrationEnforcement.pdf; National Center for Transgender Equality, "Our Moment For Reform: Immigration and Transgender People" (2013), available at http://transequality.org/Resources/CIR_en.pdf; Ian Thompson, comment on "Trauma Compounded: The Plight of LGBT Immigration Detainees," American Civil Liberties Union Blog, posted October 31, 2011, available at https://www.aclu.org/blog/prisoners-rights-immigrants-rights/trauma-compounded-plight-lgbt-immigration-detainees; American Civil Liberties Union of Arizona, "In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers" (2011): 23-28, , available at http://www.acluaz.org/sites/default/files/documents/detention%20report%202011.pdf. Advocates have noted significant gaps in staff training, medical access and overuse of segregation at the Santa Ana City Jail, the only facility designated to house LGBT immigrants in protective custody. See, for example, Christina Fialho, "Who Is Overseeing Immigration Detention?" *Huffington Post*, July 22, 2013, available at http://www.huffingtonpost.com/christina-fialho/who-is-overseeing-immigration-detention_b_3632009.html.

91 Sharita Gruberg, "Dignity Denied": 13; see also Burns, Garcia, and Wolgin "Living in Dual Shadows": 5.

92 National Immigrant Justice Center, "NIJC Principles and Priorities for Reforming the U.S. Immigration System" (2012), available at http://www.immigrantjustice.org/immigrationreformpriorities#.UqEsKcRUeWk.

93 Gruberg, "Dignity Denied":,n.4; National Center for Transgender Equality, National Center for Lesbian Rights, ACLU, NGLTF, Sylvia Rivera Law Project, Immigration Equality, Human Rights Campaign, Lambda Legal, Transgender Law Center, "Protecting Lesbian, Gay, Bisexual, Transgender, Intersex, and Gender Nonconforming People From Sexual Abuse and Harassment in Immigration Detention" (2013), available at http://immigrationequality.org/wp-content/uploads/2013/03/DHS-PREA-LGBT-comments-final.pdf; American Civil Liberties Union, "Sexual Abuse in Immigration Detention" available at https://www.aclu.org/sexual-abuse-immigration-detention; Human Rights Watch, "Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Detention" (2010), available at http://www.hrw.org/node/92629/section/1; American Civil Liberties Union, "Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem," October 19, 2011, available at http://www.aclu.org/immigrants-rights- prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse; National Center for Transgender Equality, "Our Moment For Reform": 20, available at http://transequality.org/Resources/CIR_en.pdf.

94 Gruberg, "Dignity Denied": n.4, at pp. 3-5. In April 2011, the National Immigrant Justice Center (NIJC) filed a civil rights complaint with the DHS office of Civil Rights and Civil Liberties (CRCL) on behalf of sexual minorities in immigration detention, several of whom were victims of sexual abuse in U.S. immigration custody. As of the writing of this report, CRCL has not responded to this complaint.

95 Government Accountability Office, "Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse," GAO-14-38, November 2013, available at http://www.gao.gov/assets/660/659145.pdf (This report was requested by 28 members of Congress in January 2012. Of the 15 incidents substantiated in the GAO review, three involved transgender detainees; see "Appendix II: Summary of Substantiated Sexual Abuse and Assault Allegations October 2009 Through March 2013," pp. 60-62.).

96 These deficiencies included: inconsistent procedures for receiving, investigating and tracking sexual abuse and assault complaints; poor documentation of investigations of complaints; inconsistency in the various standards governing the care of persons in detention with respect to sexual assault and lack of clarity among operators of detention facilities and investigators about which standards apply; and difficulty in the ability of detainees to access hotlines and resources created to facilitate reporting of an assault. Government Accountability Office, "Immigrant Detention."

97 Ibid., Appendix IV and V pp. 66-75.

98 Department of Homeland Security, "Standards to Prevent, Detect and Respond to Sexual Abuse and Assault in Detention Facilities, Final Rule, 79 FR 13099,", March 7, 2014, available at https://www.federalregister.gov/articles/2014/03/07/2014-04675/standards-to-prevent-detect-and-respond-to-sexual-abuse-and-assault-in-confinement-facilities. A coalition of LGBT organizations filed detailed comments to the Proposed DHS rules covering, among others, expanding the definition of sexual abuse, insuring time-delimited implementation of regulations, expanding the rules on cross-gender searches to include adult and juvenile males, adding language to ensure investigation of incidents of abuse, providing training for all medical providers, insuring safe shower access, and limiting automatic housing assignments and protective custody based on sexual orientation and gender identity. See NCTE et al., "Protecting Lesbian, Gay, Bisexual, Transgender, Intersex, and Gender Nonconforming People."

99 National Prison Rape Elimination Commission, "Standards for the Prevention, Detection, Response and Monitoring of Sexual Abuse in Adult Prisons and Jails" (2009): 67-68.

100 We recognize a danger that this recommendation, like many others in this document, could be applied in a biased way that would limit its use to LGBT prisoners and prisoners living with HIV. We recommend that the agencies implementing these recommendations establish procedures to review such implementation and address any potential bias.

101 NCTE, "Our Moment For Reform": 20; Arkles, "Safety and Solidarity Across Gender Lines."

102 Alexis Perlmutter and Mike Corradini, "Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigrant Detention" (Chicago: National Immigrant Justice Center, 2012), available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf.; Christy Fujio, "Buried Alive: Solitary Confinement in the U.S. Detention System" (Cambridge: Physicians For Human Rights, 2013), available at http://physiciansforhumanrights.org/library/reports/buried-alive-solitary-confinement-in-the-us-detention-system.html.

103 Laurel Anderson, "Punishing The Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment," *Berkeley Journal of Gender. Law and Justice* 25 (1) (2010).

104 United States Immigration and Customs Enforcement, "Directive 11065.1: Review of the Use of Segregation for ICE Detainees," September 4, 2013, available at http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

105 National Immigrant Justice Center, "NIJC Welcomes New ICE Directive To Improve Oversight of Solitary Confinement in Immigrant Detention," September 5, 2013, available at http://www.immigrantjustice.org/press_releases/ice-directive-solitary-confinement#.UjjEWhbWOS1 ("We are concerned that the new directive does not eliminate the use of extended solitary confinement, and that the reporting period exceeds the 15 days which the United Nations Special Rapporteur on Torture has observed can have detrimental and irreversible effects on individuals' mental health," McCarthy said. "We will continue to work with the administration and Congress to reduce the use of solitary confinement, and eliminate the use of extended solitary confinement.").

106 Recommendations 4 and 5 on segregation were also made by the ACLU of Arizona in its report documenting the experience and incidents of sexual abuse of vulnerable immigrants in the Arizona ICE facilities (including women, transgender persons and LGBT persons). See, ACLU of Arizona, "In Their Own Words": 4.

107 Government Accountability Office, "Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse," GAO-14-38, November 2013, available at http://www.gao.gov/assets/660/659145.pdf.

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A Congressional Hearing on Immigrant Detainee Health Care in 2007 surfaced a wide range of problems and challenges associated with the provision of health care to immigrant detainees. ("Detention and Removal: Immigration Detainee Medical Care," Testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, 2007). These problems included the fact that there was no law requiring health care in immigrant detention facilities, multiple standards that were not uniformly enforced, and poor enforcement of existing standards. (See also, Brianna M. Mooty, "Solving The Medial Crisis for Immigration Detainees: Is the Proposed Detainee Basic Medical Care Act Of 2008 The Answer?" Law & Inequality 28 (1) (2010): 223.)

A 2009 DHS report found many problems with medical care delivery in immigration detention, including: "…[M]edical care services provided vary considerably by location, as does the staffing in the specialty areas…on-site provider staff is comprised predominately of contract employees, who face more relaxed professional credentialing procedures than regular employees…. ICE does not have an electronic medical records system for all facilities or uniform paper reporting requirements and little reliable medical care information is available about the population as a whole. There is no medical classification system other than a limited use coding of healthy and unhealthy, and there is no mental health classification system. There is no policy on the maintenance, retention, and centralized storage of medical records; instead, a new medical record is opened each time a detainee is transferred to another detention facility. After the detainee is transferred from the facility the file remains on site. While a medical summary should accompany detainees upon their transfer, it does not routinely occur." (Dr. Dora Schirro, "Immigration Detention Overview and Recommendations" (Washington: Department of Homeland Security, ICE, 2009), 25-26, at http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf).

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APPENDIX A
CONTRIBUTORS & COLLABORATORS

The following individuals participated in the convening held at Columbia Law School on May 6-7, 2013, which informed the recommendations contained in this policy roadmap:

- Alexis Agathocleous, Senior Staff Attorney, Center for Constitutional Rights
- Gabriel Arkles, Professor, Northeastern University School of Law
- John Blasco, Lead Organizer, FIERCE
- Joshua Block, Staff Attorney, LGBT Project, American Civil Liberties Union
- Cynthia Chandler, Adjunct Professor, Golden Gate University Law School
- Cecilia Chung, Senior Strategist, Transgender Law Center
- Jessica Danforth, Executive Director, Native Youth Sexual Health Network
- Eleanor Dewey, Co-Executive Director, Colorado Anti-Violence Program
- Ejeris Dixon, Deputy Director, New York City Anti-Violence Project
- Ivan Espinoza Madrigal, Staff Attorney, Lambda Legal
- Kenyon Farrow, Board Member, Streetwise and Safe (SAS)
- Katherine Franke, Center for Gender and Sexuality Law, Columbia Law School
- Cassidy Gardner, Co-Director, QUEEROCRACY
- Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project
- Christina Gilbert, Director, The Equity Project, National Juvenile Defender Center
- Catherine Hanssens, Executive Director, Center for HIV Law and Policy
- Darby Hickey, Policy Analyst, Best Practices Policy Project
- Mara Keisling, Executive Director, National Center for Transgender Equality
- Colby Lenz, Member, California Coalition for Women Prisoners
- Kali Lindsey, Legislative and Public Affairs Director, National Minority AIDS Council
- Rev. Jason Lydon, Black and Pink
- Miss Major, Executive Director, Transgender, Gender Variant, and Intersex Justice Project
- Rickke Mananzala, Facilitation and Meeting Design
- Owen Daniel-McCarter, Transformative Justice Law Project

- Joey Mogul, Partner, People's Law Office; Director, Civil Rights Clinic, DePaul University College of Law
- Aisha Moodie-Mills, Senior Fellow and Director, FIRE Initiative, Center for American Progress
- Mitchyll Mora, Researcher and Campaign Staff, Streetwise and Safe (SAS)
- Sarah Munshi, Public Policy Associate, Gay, Lesbian, and Straight Education Network
- Chanravy Proeung, Co-Director, PrSYM
- Andrea Ritchie, Co-Director, Streetwise and Safe (SAS)
- Russell Robinson, Professor, University of California Berkeley Law School
- Samantha Rogers, Member, California Coalition of Women Prisoners
- Maya Rupert, Policy Director, National Center for Lesbian Rights
- Amanda Scheper, Co-Director, Justice Now
- Dean Spade, Associate Professor, Seattle University School of Law
- Robert Suttle, Assistant Director, The Sero Project
- Laura Thomas, Deputy State Director—San Francisco, Drug Policy Alliance
- Everette R. H. Thompson, Field Director, Rights Working Group
- Norio Umezu, Programs Co-Director, Community United Against Violence
- Urvashi Vaid, Center for Gender and Sexuality Law, Columbia Law School
- Wesley Ware, Director, BreakOUT!
- Trisha Wilson, Member, Transgender, Gender Variant, and Intersex Justice Project
- Geoffrey Winder, Senior Manager, Racial & Economic Justice Program, GSA Network
- Margaret Winter, Associate Director, National Prison Project, American Civil Liberties Union
- Causten Wollerman, Leadership Programs Manager, National Gay and Lesbian Task Force
- Margaret Wurth, Researcher, Human Rights Watch
- Keren Zwick, Managing Attorney, National Immigrant Justice Center

The following individuals reviewed in full or in part a draft of this document:

- Gabriel Arkles, Northeastern University School of Law
- Joshua Block, Staff Attorney, LGBT Project, American Civil Liberties Union
- John Boston, Prisoners' Rights Project, Legal Aid Society of New York
- Angélica Cházaro, Visiting Professor, University of Washington School of Law
- Phillip Chinn
- Cecelia Chung, Senior Strategist, Transgender Law Center
- Jessica Danforth, Executive Director, Native Youth Sexual Health Network
- Chris Daley, Deputy Executive Director, Just Detention International
- Laura Durso, Director, LGBT Research and Communications Project, Center for American Progress
- J. Gann, Incarcerated leader, Black and Pink
- Belkys Garcia, Staff Attorney, Legal Aid Society
- Christina Gilbert, Director, The Equity Project, National Juvenile Defender Center
- Hayley Gorenberg, National Deputy Legal Director, Lambda Legal
- Sharita Gruberg, Policy Analyst, LGBT Immigration Project, Center for American Progress
- Darby Hickey, Policy Analyst, Best Practices Policy Project
- Niaz Kasravi, Director, Criminal Justice Division, NAACP
- Mik Kinkead, Attorney, Prisoners' Legal Services of New York
- Clement Lee, Attorney, Immigration Equality
- Colby Lenz, Member, California Coalition for Women Prisoners
- Melissa Loomid
- Rev. Jason Lydon, Black and Pink
- Megan Maury, Policy Counsel, National Gay and Lesbian Task Force
- Joey Mogul, Partner, Peoples' Law Office; Director, Civil Rights Clinic, DePaul University College of Law
- Sarah Jo Pender, Incarcerated Leader, Black and Pink
- Giovanna Shay, Professor, Western New England University School of Law
- Sharon Stapel, Executive Director, New York City Anti-Violence Project
- Chase Strangio, Staff Attorney, LGBT Project, American Civil Liberties Union
- Cole Thaler, Staff Attorney, Georgia Legal Services Program
- Laura Thomas, Deputy State Director, San Francisco, Drug Policy Alliance
- Rachel Tiven, Executive Director, Immigration Equality
- Harper Jean Tobin, Director of Policy, National Center for Transgender Equality
- Norio Umezu, Programs Co-Director, Community United Against Violence
- Krysta Williams, Advocacy and Outreach Coordinator, Native Youth Sexual Health Network
- Geoffrey Winder, Senior Manager, Racial & Economic Justice Program, Gay-Straight Alliance Network
- Keren Zwick, Managing Attorney, National Immigrant Justice Center