

ARTICLE: BLUEPRINT FOR RESPECT: CREATING AN AFFIRMING ENVIRONMENT IN THE COURTS FOR THE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITIES

2015

Reporter

41 Wm. Mitchell L. Rev. 4 *

Length: 13943 words

Author: Honorable Paula J. Hepner (Ret.)+

+ Judge Hepner served as a judge of the New York State Family Court in Kings County from 1990-2012 and was the supervising judge of that court from 2008-2012, when she retired.

Text

[*4]

I. Introduction

Ten years ago if I asked anyone in the family court or juvenile justice system if they thought conducting a training on the needs of lesbian, gay, bisexual, and transgender (LGBT) youth would have been helpful, the universal response would have been, "We don't have any of those kids." If I followed that up with a question about what they thought the needs of LGBT youth were, the universal response would have been, "They're the same as any other kid in the system." If I asked a further question to explore whether any of the youth coming through the courts had disclosed their sexual orientations or gender identities, the universal response would have been, "Oh, we can't talk about that."

[*5] Fast forward to the year 2014. We now know that LGBT young people, who represent just 5% to 7% of the nation's overall youth population, ¹ make up between 13% and 15% of youth currently in the juvenile justice system, ² and 40% of the homeless youth population - 39% of whom become involved with the juvenile justice system. ³ We now know that 31.8% of LGBT students miss an entire day of school over the course of a month because of biased language, physical, verbal, and

¹ Nico Sifra Quintana et al., Ctr. for Am. Progress, On the Streets: The Federal Response to Gay and Transgender Homeless Youth 6 (2010).

² Katayoon Majd et al., Legal Servs. for Children, Nat'l Juvenile Defender Ctr. & Nat'l Ctr. for Lesbian Rights, Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts 10 (2009) (citing Angela Irvine, "We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, [19 Colum. J. Gender & L. 675, 676 \(2010\)](#)).

³ Nico Sifra Quintana et al., supra note 1, at 6; Jerome Hunt & Aisha Moodie-Mills, Ctr. for Am. Progress, The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System 3 (2012), available at http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf.

electronic harassment or physical and verbal assaults, and receive a higher rate of suspension and disproportionate sanctions for their infractions of school rules. ⁴ LGBT youth who experience high levels of family rejection during adolescence are 8.4 times more likely to have attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sex, as compared to peers reporting no or low levels of family rejection. ⁵ LGBT youth are [*6] "vastly overrepresented in the homeless youth population," and the existing data from several studies done throughout the United States reveals "shockingly disproportionate rates of homelessness among LGBT youth compared to non-LGBT youth," with estimates for LGBT youth ranging from 9% to 45%. ⁶

How did this happen? How was it possible to get from a place of total invisibility and ignorance to a place of awareness and understanding? This is the story of what the New York City (NYC) Family Court was able to do. These things did not happen because it was NYC. They happened because there was strong judicial leadership from individuals on the bench who took seriously the concept of "access to justice."

II. Recognizing the Issues

In August 1990, I was appointed to the New York (NY) State Family Court by then Mayor David Dinkins. Two months later, as I was in my courtroom reviewing my calendar after the lunch recess, three court officers were discussing one of their colleagues from another county and repeatedly referred to him - loudly and derisively - as a faggot. While I found their speech offensive, other than my clerk and I, the courtroom was empty. Since I had been an open lesbian when appointed by Mayor Dinkins, I viewed their actions as simply carrying out orders from their superiors to manufacture an issue to test me. Therefore, I did nothing. At the time, I did not know that the rules of our chief judge contained a code of ethics setting forth basic principles of conduct that all court employees should observe. ⁷ Discriminatory conduct based on sexual orientation was one prohibition, and in accordance with the Code of Judicial Conduct, I was responsible for enforcing it.

In 1997, I was assigned to preside over juvenile delinquency matters and cases involving "persons in need of supervision" (PINS) - children who are "truant, incorrigible, ungovernable or [*7] habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care." ⁸ For the next seven years, I heard hundreds of delinquency and PINS cases, but during 2003, I began to see examples of the differential treatment that LGBT youth on my caseload were receiving. These cases revealed systemic problems, not just individual biases. For example, in 2003, I placed a teenager into a detention facility for twelve months after she admitted to shoplifting two pairs of jeans from Macy's. As was my custom for all children I placed in care, I ordered a three-month adjustment report to make certain that the services I ordered for her were being provided and to learn how she was doing in state custody. When the report came, I learned that she had been held in

⁴ Joseph G. Kosciw et al., Gay, Lesbian & Straight Educ. Network, The 2011 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 21 (2012); Preston Mitchum & Aisha C. Moodie-Mills, Ctr. for Am. Progress, Beyond Bullying: How Hostile School Climate Perpetuates the School-to-Prison Pipeline for LGBT Youth 4 (2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/02/BeyondBullying.pdf>.

⁵ Alison Chrisler et al., Military REACH Team, Research and Outreach (REACH) Lab. & Univ. of Minn., Promoting Positive Development of Lesbian, Gay, Bisexual, and Transgender Youth: Research Brief 3 (2014) (citing Caitlin Ryan et al., Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults, 123 *Pediatrics* 346, 349 (2009)), available at [https://reachmilitaryfamilies.umn.edu/sites/default/files/rdoc/Promoting %20Positive%20Development%20of%20LGBT%20Youth.pdf](https://reachmilitaryfamilies.umn.edu/sites/default/files/rdoc/Promoting%20Positive%20Development%20of%20LGBT%20Youth.pdf).

⁶ Andrew Cray et al., Ctr. for Am. Progress, Seeking Shelter: The Experiences and Unmet Needs of LGBT Homeless Youth 4 (2013), available at <http://cdn.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf>.

⁷ See N.Y. Comp. Codes R. & Regs. tit. 22, § 50.1(II)(C) (Westlaw through 2014) ("Court employees shall not discriminate, and shall not manifest by words or conduct bias or prejudice, on the basis of race, color, sex, sexual orientation, religion, creed, national origin, marital status, age or disability.").

⁸ N.Y. Fam. Ct. Act § 712 (McKinney, Westlaw through 2014) ("'Person in need of supervision' [is a] person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority, or who violates the provisions of section 221.05 or 230.00 of the penal law ...").

solitary confinement for three months because she was caught kissing another girl on campus. During the processing of her case, this young woman had not disclosed her sexual orientation to her lawyer, the probation officer, or the mental health clinician who prepared reports to the court for the dispositional hearing. But for this incident, no one would have been aware that she was a lesbian.

When I calendared the case for the agency caseworker and the girl's attorney to appear, I discovered the agency had different rules for LGBT youth, and that this young woman's punishment for this rule infraction was more severe and longer in duration than any female teen would have received for kissing a boy. When I inquired about whether the agency had a nondiscrimination policy, I was given its "Policy and Position Statement on Sexuality and Sexual Preference." The policy specifically addressed "'sexual behavior,' 'sexual identity,' and 'sexual orientation' with an eye to what is best for the children in our care." ⁹ The policy stated, "Any client's feeling of sexual desire for individuals of one's own gender may be accepted as a valid current feeling. It must not be assumed [*8] that this determines one's desire pattern for life nor establishes one's 'lifestyle' or identity in society." ¹⁰ Another section of the policy stated:

Males whose mannerisms or behavior give the impression of their being "feminine" are often assumed to have a "homosexual identity." This assumption is usually false. Females whose mannerisms give the impression of being "masculine" are also often falsely assumed to have a same gender sexual preference. Mannerisms, habits, sexual experiences, preferences and fantasies can all be discussed as separate concerns, without making overarching conclusions about sexual "identity" or sexual "orientation." ¹¹

A third section in the policy stated, "Expressions of sexual desire from one youth to another are discouraged [as] this usually encourages prohibited behavior." ¹² The policy reflected the three conventional mythologies of the time - that same-sex relationships are situational (i.e., occurring when people are confined with persons of the same sex), that same-sex behavior is a phase that children will grow out of, and that this behavior is learned from others and therefore must be treated as inappropriate.

With help from a colleague, this young woman's attorney filed a motion to return her to the girls' cottage. The motion was filled with obsolete terminology and awkward phrases, but was sufficient to obtain the relief requested. It was silent, however, in regard to any relief addressed to the agency's policy.

In 2004, I remanded another teen to a detention facility pending his trial on charges of assaulting his father. When the detention staff discovered he was wearing feminine undergarments, the staff and fellow dorm residents ridiculed him. In reaction to being called names and spit upon by one of the residents, the teen tripped him. Three days later, when the teen returned to court for a probable cause hearing, both of his forearms were blistered and wrapped in bandages. I learned that, as a punishment for tripping the other resident, he was forced to crawl on his elbows and arms five times around the perimeter of the "quiet room," which had [*9] Berber carpet on the floor. Both of his arms had rug burns from his wrist to his elbow. I ordered an investigation into the incident. The consequence for the staff members who were responsible was a transfer to another juvenile detention facility without any mention of the reason in their personnel records. I also learned that there was no ombudsman or other formal means for this young man to complain about his care and treatment, the staff had never been trained to work with LGBT residents, and a nondiscrimination policy was nonexistent.

Later that same year, I was assigned to a case involving a teen who was arrested for committing a public sex offense with an older man. The teen's gender presentation was classically female though the petition was filed with a male name and contained male pronouns throughout. Every governmental entity with which she interacted, including the court, treated her as a male. When the officers brought her from detention, she was wearing a wig, makeup, long eyelashes, nail polish, a sundress, and high heels. The prosecutor objected to the defense attorney's application to have his client called by the name Robyn instead of Roberto. No parent or relative showed up on her case, and she was remanded to detention. While in detention she was housed

⁹ Leake & Watts Servs., Inc., Position and Policy Statement on Sexuality and Sexual Preference (2005) (on file with author).

¹⁰ Id.

¹¹ Id.

¹² Id.

in the special health unit with residents who were ill because she was unwilling to modulate her mannerisms or speech pattern, and the staff felt they could not assure her safety if she was assigned to a regular dorm. When she returned to court for trial, the adjustment report said that she was homeless since her stepfather had kicked her out of the family home after her mother discovered that she was cross-dressing and involved in sex work. She was taking street hormones to alter her physical appearance and was uncompromising in her gender identity and expression. The facility was not prepared to handle her medical needs, and the staff was not trained to handle a young transgender person.

Clearly something had happened between 1997 and 2004. Seemingly overnight, my caseload began to include lesbian, gay, and transgender teenagers charged with acts of juvenile delinquency or under PINS petitions. While I had often suspected, over the years, that many of the young people before me were lesbian, gay, bisexual, transgender, or questioning youth, none of them were open about their sexual orientations or gender identities, and if their family members knew, they surely were doing [*10] everything they could to avoid acknowledging or discussing it. What I thought was inexplicable was actually being documented by researchers who, from 2000 onward, collected data showing how early young people were becoming aware of their sexual orientations and gender identities,¹³ and that they were disclosing their sexual orientation to others at younger ages than in previous generations.¹⁴ The findings of these researchers certainly explained what we were beginning to see in the courts and added another dimension to my growing sense of urgency about attending to the [*11] needs of these young people instead of pretending they did not exist.

As I began making inquiries of lawyers practicing in family court, many disturbing examples of bias and prejudice on the part of judges, as well as court personnel, came to light:

. When a mother and her same-sex partner came to court for their son, who was a respondent on a delinquency case, the judge assumed that the woman accompanying the mother was a friend or neighbor and told her to sit in the back of the courtroom.

. When a lawyer entered the courtroom with his gender nonconforming lesbian respondent in a PINS case, the judge looked at her and said to the attorney, "Where's his mother?"

. After receiving permission to approach the bench with the prosecutor, the defense attorney for a transgender youth in female clothing and make-up told the judge that during a sidebar they had with the court on their last appearance, one of the court officers came over to her client and said, "Need a piece of hard candy, honey?" The judge laughed and motioned the attorneys back to their seats.

¹³ By age five, youth become aware of their sexual orientation, and at around age ten, youth become aware of same-sex attraction. Caitlin Ryan & Rafael M. Diaz, Family Responses as a Source of Risk and Resiliency for LGBT Youth, Presentation at the Pre-Conference Institute on LGBTQ Youth, Child Welfare League of America National Conference (2005). Around age thirteen, youth self-identify as gay or lesbian. Id. Caitlin Ryan, DSW, is the director of the Family Acceptance Project. She is a clinical social worker who has worked on LGBT health and mental health for nearly forty years. Dr. Ryan and her team have been developing a wide range of research-based materials and assessment tools to help families and caregivers to support their LGBT children. Dr. Ryan has developed an evidence-based family model of wellness, prevention and care to strengthen families and promote positive development and healthy futures for LGBT children and youth.

¹⁴ In a study of developmental and sexual expression milestones in lesbian, gay, bisexual, and transgender youth (with a mean age of seventeen), males first became aware of their same-sex attraction at the age of twelve and females at the age of thirteen. Arnold H. Grossman, Lesbian, Gay, Bisexual, and Transgender Youth, in Recreation and Youth Development 446 (Peter A. Witt & Linda L. Caldwell eds., 2005). Both sexes were identifying themselves as lesbian, gay, or bisexual by age fourteen and disclosing their sexual orientation to others around age fifteen. The mean age for male-to-female transgender awareness was 8.5 years, with self-identification occurring at thirteen years followed by disclosure at fourteen years. Id. at 449. The mean age for female-to-male transgender awareness was nine years, self-identification at fifteen, and disclosure occurring over the next two years. Id. This is in contrast to a study of the age of awareness and disclosure in gay and lesbian adults over sixty years of age. See Anthony R. D'Augelli & Arnold H. Grossman, Disclosure of Sexual Orientation, Victimization, and Mental Health Among Lesbian, Gay, and Bisexual Older Adults, 16 J. Interpersonal Violence 1008, 1014-16 (2001). While the age of first awareness for gay men (12.9 years) and lesbians (16.4 years) is quite close, the ages at which these older adults self-identified as LGB and disclosed their sexual orientations is markedly different. Id. at 1015, 1017. The age at which gay men self-labeled was 22.5 years and the age of first disclosure was 28.6. Id. at 1015. In lesbians, the age of self-labeling was 25.6 years and the age of first disclosure was 29.8 years. Id.

. After a finding was entered in the trial of an assault case between two teenage girls, the judge learned for the first time from the probation report that the complainant and the respondent were dating and in a same sex relationship, to which the mothers of both girls objected. Realizing that their relationship might have influenced whether a finding of assault could or should have been made in the case, and that this was neither disclosed by the prosecutor nor raised by the defense at the trial, the judge angrily inquired, "Why didn't you know those girls were lovers?" It did not occur to the judge that the prosecutor may have acquiesced to the demands from an unaccepting complainant's mother in filing the case. The probation officer's "investigation and report" that was submitted to the court contained a recommendation for placement of twelve months at an upstate detention facility. During the dispositional hearing, the probation officer was asked whether any less restrictive alternatives were explored, since the finding was to a misdemeanor of attempted assault. The probation officer testified that placement was recommended because that is "what the respondent's mother [*12] wanted." If this had been an assault case between opposite gendered teens, an adjournment in contemplation of dismissal or a disposition of probation supervision would have been the outcome.

. Without recounting what services were offered to avoid court action, which is required in all cases before they are referred for court intervention, a report from the child welfare agency simply referred a case to the Department of Probation for the filing of a PINS petition because the young man, who had taken his parent's credit cards to go shopping on the web, was "reportedly pursuing a homosexual lifestyle."

When I was appointed a family court judge in the 1990s, a copy of the Code of Judicial Conduct was distributed during orientation for new judges. After giving a few cautionary words about conflicts of interest, misconduct, ex parte communications, and the appearance of impropriety, the presenter told us to review the Code and acquaint ourselves with what was required of us. During the orientation, no reference was made to the obligation to perform the duties of judicial office without bias or prejudice, or to the additional obligation that judges have to require that lawyers in proceedings before them refrain from manifesting bias or prejudice by their words or conduct. Nor was it ever pointed out that judges have a duty to see that court staff, court officials, or others subject to their direction and control do not manifest bias or prejudice in their behavior or conduct. What the judicial codes of ethics specifically prohibit varies from state to state; the American Bar Association's Model Code of Judicial Conduct ¹⁵ and the New York Code of Judicial Conduct ¹⁶ are substantially similar. Each [*13] prohibits bias or prejudice on the grounds of sexual orientation, while neither includes gender identity or gender expression.

There was no discussion at our new judge orientation of what it means to manifest bias and prejudice by words, behavior, or conduct. As more cases involving LGBT teens came before me, the meaning of these phrases came into my consciousness in a most immediate and compelling way. The experiences of the LGBT youth on my caseload, and the treatment that they and their parents were receiving in courtrooms, detention facilities, probation offices, and residential treatment centers throughout NYC, were powerful and profound teachings for me. It became clear that I had a professional responsibility to see that LGBT youth were not discriminated against, or physically and emotionally harmed, while in the institutions where I placed them. I had a professional responsibility to see that our courtrooms and courthouses became safe and welcoming environments where LGBT youth and adults are treated with dignity and respect.

III. The Work Group's Early Years

In 2001, I was asked to serve as chair of the Family Court Advisory Council's Subcommittee on Juvenile Delinquency. After encountering the problems that LGBT youth were experiencing in custody, I resolved to do two things: visit the facilities where I was placing LGBT young people, and find a way to raise awareness about the presence of LGBT youth and parents in our courts so that improvements could be made concerning their contact with the judicial system.

¹⁵ Model Code of Jud. Conduct R. 2.3(B) (2011) ("A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation ...").

¹⁶ N.Y. Code of Jud. Conduct R. 100.3(b)(4) (2006) ("A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status ...").

Coincidentally, the program planned by the NYC Bar Association to celebrate Pride Month in June 2003 was titled "Suffer the Children: Are We Failing LGBT Youth in the Family and Criminal Courts?" Having been asked to be one of the presenters on the panel, this became the first opportunity for me to speak publically about the invisibility of LGBT youth in the family courts, the presumption of heterosexuality that almost everyone was operating under, and the need for those working in the juvenile justice system to become culturally competent ¹⁷ in order to [*14] properly serve LGBT communities. I knew that judges, clerks, court officers, attorneys, mental health professionals, probation officers, child welfare caseworkers, and detention staff, with proper training and education, could learn to look at the symptomatology they were seeing in a more inclusive way. Their perspective on the issues could broaden to include an understanding that behavioral problems in LGBT youth may stem from: (a) feeling isolated in an environment that is hostile to their sexual orientation or gender identity; (b) feeling afraid and ashamed of disclosing anything about their sexuality for fear of rejection; (c) feeling anxious about being "different," and experiencing confusion over whether their same-sex erotic impulses are normal; (d) enduring physical and emotional abuse as a consequence of their sexual orientation from their parents, guardians, and caretakers, the very people whom they depend on for food, shelter, clothing, emotional and financial support, and who are charged with protecting and promoting their well-being; (e) becoming homeless and being forced to live on the street or with strangers after being excluded from their homes by their parents, guardians, or caretakers - LGBT youth with adjustment problems often do not find havens in the homes of boyfriends and girlfriends like their heterosexual counterparts do; (f) having no options but to go AWOL to avoid harassment, verbal abuse, and threats of or actual physical assault in their foster homes or group homes because of their sexual orientations and gender identities; or (g) needing to commit survival crimes like petit larceny, robbery, and prostitution to support themselves.¹⁸

[*15]

A. Focus on LGBT Youth

Shortly after the NYC Bar Association Pride Month program, I asked the Honorable Joseph M. Lauria, the administrative judge for the family courts in NYC, if a work group could be created under the umbrella of the Subcommittee on Juvenile Delinquency that I could chair. The purpose of this work group would be to examine issues involving LGBT youth in the juvenile justice system, and more specifically, in the family courts. When this request was approved, I stepped down as chair of the subcommittee in order to develop and lead this work group for the NYC family courts. There is a power of persuasion that comes with being a judge. When judges organize meetings, the invitees come, sometimes not for long and sometimes not often, but generally 100% at the outset. Naturally, there are always dual questions about whether participation is driven by a sense of obligation and how fully committed their administrations will be. The first meeting of the Family Court's Work Group (Work Group) took place on February 24, 2004, and it was well attended. ¹⁹ Our focus was the citywide family court system, and the

¹⁷ The Wisconsin State Council on Alcohol and Other Drug Abuse has defined "cultural competency" as the following:

Cultural Competency is a process of developing proficiency in effectively responding in a cross cultural context. It is the process by which individuals, agencies, and systems integrate and transform awareness of assumptions, values, biases, and knowledge about themselves and others to respond respectfully and effectively across diverse cultures, language, socioeconomic status, race, ethnic background, religion, gender, sexual orientation, and ability. Cultural competence recognizes, affirms, fosters, and values the strengths of individuals, families, and communities and protects and preserves the worth and dignity of each.

Cultural Competency Definition, Wis. St. Council on Alcohol and Other Drug Abuse (Aug. 22, 2008), [http://scaoda.state.wi.us/docs/main/CulturalCompetencyDefinition .pdf](http://scaoda.state.wi.us/docs/main/CulturalCompetencyDefinition.pdf).

¹⁸ This list is an amalgamation of the author's own experiences working with LGBT youth.

¹⁹ In addition to another delinquency judge and myself, the members of the initial Work Group included: general counsel and two representatives from the executive branch agency responsible for operating statewide detention facilities in NY (the Office of Children and Family Services); general counsel to the NYC Department of Juvenile Justice; the executive assistant to the commissioner of the NYC Department of Probation; general counsel and two social workers from the NYC child welfare agency (Administration for Children's Services); an assistant district attorney from the Kings County District Attorney's office; the director of training and two social workers from the family court division of the NYC Law Department, Office of the Corporation Counsel; three defense attorneys and social workers from organizations representing children and indigent persons (Legal Aid Society, Lawyers for Children, and the Panel of Assigned Counsel); two private agencies providing child care to LGBT Youth (St. Christopher-Otilie and Green Chimneys); and representatives from three private

participation of the committee's membership remained steady at twelve to fifteen individuals from within as well as outside the judicial system.

The agenda for the first meeting was threefold: What brought us here? Who are we? Where do we begin? Understandably, everyone was nervous, wondering what this was all about, where this [*16] was going, and what would be expected of the agencies and organizations they represented. Lurking in the background, of course, was "The Topic." Sexuality is a very difficult topic to discuss. Same-sex relationships and gender transitions are even harder. Everyone brings to any discussion of sexual orientation their own understanding of its cause, their morality and fear of difference, as well as their cultural and religious beliefs. Before this conversation can be had, participants must confront each person's level of comfort with their own sexuality. It requires everyone to recognize that sexuality is a continuum spanning different-sex to same-sex activity and that not everyone is immutably lodged at its extremes. These are factors that can hamper the ability to have a meaningful dialogue about it. For this reason, the agendas for the initial meetings were exploratory rather than task oriented.

The Work Group was conceived as a vehicle to discuss the decisions that have to be made about the needs and services required by self-identified LGBT youth and their families upon their arrival in court and while on remand, probation, or in placement. As a plan for accomplishing this, the participants in the Work Group decided to begin with defining where we were, identifying where we wanted to be, and then planning how to get there. To get us all on common ground, each organizational entity was asked to make a presentation about "where they were," meaning what they considered the range of issues to be from their perspectives, how the problems came up, how they were addressed, how their agencies and organizations were presently serving LGBT youth, and whether any nondiscrimination policies existed or any staff training was taking place. Meeting once a month and hearing from only two or three participants per meeting, it took a long time to complete these reports. The dividend was that the participants became comfortable with each other, and the anxieties that were apparent at the outset gradually subsided. Despite presentations from the Urban Justice Center, the Correctional Association, and the Legal Aid Society - all documenting the experiences that their young LGBT clients were having in the courts and the juvenile justice system - there was a persisting undercurrent of considerable skepticism from the representatives of the governmental agencies in attendance. Even though the presentations included statistics on the LGBT youth these agencies were serving, many attendees believed that these examples reflected nothing more than a few [*17] isolated cases, insufficient to be considered a "real" problem in need of a solution.

While this question is not a concern today, ²⁰ ten years ago the Work Group struggled with whether the city and state agencies caring for LGBT youth should be capturing data on the number of LGBT youth in the system. In particular, the group struggled with the questions of whether and how to affirmatively identify LGBT youth who are not self-identifying. Some members of the group felt that this would confirm the frequently quoted estimate that around 10% of the youth in care were LGBT, while others feared that because youth are not self-identifying in great numbers, the opposite would be confirmed. For the Work Group's April 2005 meeting, I invited Dr. Arnold H. Grossman, one of the major clinical researchers on risk and protective factors for LGBT youth and a professor in the Department of Applied Psychology at New York University. ²¹ This meeting was scheduled over the lunch recess in Brooklyn Family Court for anyone who wanted to attend: judges and their staff, clerks, court assistants, court officers, prosecutors, defense counsel, social workers, probation officers, detention staff and caseworkers, and agency attorneys and personnel. Dr. Grossman had just completed the first national longitudinal study of LGBT youth in an urban setting, and he spoke to us about his research findings and how they might help us answer questions about whether and when to affirmatively identify LGBT youth. Dr. Grossman described in detail what was known in 2005 about the awareness of sexual orientation, gender identity, and gender expression among LGBT young adults. Dr. Grossman

organizations working on behalf of LGBT youth (the directors of the juvenile justice projects at Urban Justice Center and the Correctional Association, and a social worker from Safe Space).

²⁰ Juvenile justice and child welfare agencies are beginning to collect sexual orientation, gender identity, and gender expression (SOGIE) data in their case management systems. Shannan Wilber, Esq., the Youth Project Director for the National Center for Lesbian Rights, has spearheaded data collection in several child welfare jurisdictions. Angela Irvine, PhD, the research director at the National Council on Crime and Delinquency, has provided technical assistance and training on collecting SOGIE data to the juvenile defender of New Orleans, violence prevention programs in Oakland, CA, and a dozen probation departments in California.

²¹ Dr. Grossman's research areas include sexual and gender identity development in gay, lesbian, bisexual, and transgender adolescents and adults. A list of Dr. Grossman's published research studies is available at Faculty, Arnold H. Grossman: Professor of Applied Psychology, N.Y.U. Steinhardt, http://steinhardt.nyu.edu/faculty_bios/view/Arnold_Grossman (last visited Nov. 2, 2014).

made it clear [*18] that the approach of young people in the millennium was moving toward living openly as they are, not relegated to a closet or impersonating heterosexuality in order to conform to societal expectations. Dr. Grossman's presentation was instrumental in ending the debate about collecting data and turning the Work Group's attention to what we could do. Dr. Grossman's advice to the Work Group was to begin by developing an in-service training program oriented toward agency staff, lawyers, and social workers.

As we listened during the monthly meetings to everyone's descriptions of their encounters with LGBT youth involved in delinquency and PINS cases, certain patterns slowly began to emerge:

- . Parents filing PINS petitions alleging their children were associating with "undesirable people" who, in fact, were their children's same-sex boyfriends or girlfriends;

- . Parents not appearing in court to support their LGBT children, thereby virtually assuring the outcome of the hearing would be out-of-home placement;

- . Parents expecting judges, attorneys, probation officers, detention staff, and others to validate their disapproval of their children's sexual orientations and gender identities;

- . Probation officers yielding to parental pressure to inappropriately refer for prosecution cases alleging sex offenses when parents have discovered same-sex, consensual relationships between their children and their same-sex dating partners;

- . Prosecutors filing cases against LGBT youth for assaulting their parents when, in fact, the behaviors of these young people were provoked by their parents' physical and verbal abuse, harassment, and name calling because their sexual orientations were not heterosexual;

- . Parents opposing relatives who made themselves available as custodial resources to avoid out-of-home placement because they were affirming of the young person's sexual orientation or gender identity.

Uncovering these patterns led to other recurring themes in the Work Group's meetings, notably the participants' discomfort with an awareness that sexuality might be involved in every one of their cases, their unfamiliarity with appropriate terminology, and a [*19] lack of skills for providing services to LGBT youth in a respectful and supportive way - all of which resulted in an inability to communicate effectively with LGBT youth to find out the answer to such basic questions as whether the juvenile is a victim or the aggressor. Through monthly presentations at the Work Group, it was possible to discern where each of the governmental agencies and private organizations stood with respect to their internal practices and procedures for serving LGBT communities, which in turn provided a window into what was needed. While some agencies and organizations were beginning to address LGBT communities through policies and training programs, everything was in its infancy. As a result of these views being repeatedly expressed by the participants, and a recognition that we could be a catalyst in bringing attention to the circumstances and needs of the LGBT youth coming through the courts, the Work Group decided that its primary focus should be twofold: (1) encouraging the member groups to develop nondiscrimination policies and in-house training programs for their staff, and (2) developing and presenting training programs to bring everyone in the court system to a place of cultural competence in serving LGBT youth and their families.

B. Nondiscrimination Policies

Once the Work Group settled on these two priorities, the agenda for each meeting allocated time for member agencies and organizations to report on in-house efforts related to initiative, training, and the development of antidiscrimination policies. During the course of the Work Group's existence, four governmental agencies adopted policies prohibiting nondiscrimination on the basis of sexual orientation and gender identity.

Herman Dawson, general counsel to Commissioner Neil Hernandez of the NYC Department of Juvenile Justice, began working on a nondiscrimination policy in August 2005. After two years of work, the policy was eventually issued in February 2007.²²

²² N.Y.C. Dep't of Juvenile Justice, Policies and Procedures Directive No. 02/07, Anti-Discrimination of LGBT Youth (2007), available at http://www.njjn.org/uploads/digital-library/resource_1097.pdf.

Under NYC's Administrative Code, it is unlawful for employers; [*20] labor organizations; employment agencies; providers of public accommodations; any persons or entities having the right to sell, rent, or lease any housing accommodation; and any lenders of money for the purchase, construction, rehabilitation, or maintenance of any housing accommodation or commercial space to discriminate based on "actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person."²³ The statute and case law provide qualified immunity to government officials and employees for discretionary conduct and decisions unless they act in bad faith or their actions lack a reasonable basis. The decisional law under this statute has held that detention facilities are not considered places of "public accommodation."²⁴ With these exclusions in place, the NYC Department of Juvenile Justice did not have to comply with the nondiscrimination provisions of the Human Rights Law. When the agency's final policy was presented to the Work Group, the commissioner's counsel indicated that the commissioner chose not to treat this as an obstacle because he felt it was the "right thing to do." The commissioner's counsel acknowledged the assistance of the Work Group in both helping the policy come to fruition and encouraging the agency to include LGBT issues in their in-house training program.

John Mattingly, PhD, appointed in 2004 as the new commissioner of the Administration for Children's Services (ACS), directed his general counsel, Ronald Richter, to create a strategic plan for LGBTQ²⁵ youth that was modeled on a policy created by its sister agency in Philadelphia, the Department of Human Services. The purpose of the plan was to determine what the agency and its providers might be able to do differently or better in meeting the needs of LGBTQ youth. As part of the process, ACS convened an LGBTQ Strategic Action Work Group comprised of members from inside the agency and advocacy groups outside the agency. While [*21] there was an existing policy statement regarding children in foster care, a restatement of it was issued in November 2004 "to reinforce ACS's commitment to respect the dignity of lesbian, gay, bisexual and transgender youth, and to clarify types of gender-based discrimination that were prohibited under NYC and State law."²⁶ The policy restatement offered no guidelines or definitive procedures to follow. Before the end of the year, ACS's strategic action plan was completed and issued, but implementation was slow to get underway. The Strategic Action Work Group recommended that ACS hire a Director of LGBTQ Policy and Planning, and after that position was filled, the plan gained forward momentum.

It was not until 2009 that the agency issued a nondiscrimination policy directive outlining specific procedures to be followed when assessing the safety of LGBTQ children and youth in foster care. After ACS merged with the Department of Juvenile Justice, it adopted a comprehensive policy, which committed the agency and their contract-provider agencies in both foster care and delinquency facilities to providing:

[A] safe, healthy, inclusive, affirming and discrimination-free environment ... [to] any child, youth or family member receiving services from Children's Services Protective, Preventive, Foster Care, Juvenile Justice Placement, Detention, or Alternative to Detention (ATD) and Alternative to Placement (ATP) settings, who self-identifies as or is perceived to be lesbian, gay, bisexual, transgender [or] questioning (LGBTQ).²⁷

²³ N.Y.C. Admin. Code tit. 8, § 107 (McKinney, Westlaw through 2013).

²⁴ See id.

²⁵ Recognizing that sexuality evolves during the maturational years, this acronym is frequently written as LGBTQ. In this setting, the "Q" is an acknowledgment that some youth are "questioning" in regards to what their sexual orientations and gender identities are. See Katayoon Majd et al., *supra* note 2, at 46.

²⁶ Memorandum from John B. Mattingly, Comm'r, Admin. for Children's Servs. (Nov. 16, 2004) (on file with author).

²⁷ N.Y.C. Admin. for Children's Serv., Policy No. 2012/01, Promoting a Safe and Respectful Environment for Lesbian, Gay, Bisexual, Transgender and Questioning (LGBTQ) Youth and their Families Involved in the Child Welfare, Detention and Juvenile Justice System (2012), available at http://www.nyc.gov/html/acs/downloads/pdf/lgbtq/LGBTQ_Policy.pdf. Unlike those preceding it, this policy specifically covered the following topics: nondiscrimination, coercion and imposition of beliefs, staff conduct, addressing incidents, guidelines for staff interaction with youth, LGBTQ identities, language and terminology, confidentiality, disclosure by youth and/or family members, use of preferred name, documentation, LGBTQ-affirming literature and written materials, advocacy, service referrals, medical and mental health assessments and services, and training. See id.

[*22] At the next meeting of the Family Court Work Group, held in April 2004, Leta D. Smith, PhD, gave a presentation on behalf of the NY State Office of Children and Family Services (OCFS), in which she announced the opening of a new twenty-two-bed facility in Red Hook that was to serve a mixed population, including transgender youth. She indicated that although OCFS receives only a "handful of transgendered youth in any given year,"²⁸ the agency had contracted with Hunter College Professor Gerald P. Mallon, DSW, to provide training for the staff of the facility. The Work Group learned in January 2006 that the newly appointed commissioner of OCFS, Gladys S. Carrion, had contracted with Dr. Mallon to develop a nondiscrimination policy titled "Guidelines for Good Childcare Practices with Gay, Lesbian, Bisexual, and Transgender Youth." However, the policy that was drafted was never implemented. At the Work Group's meeting in July 2006, it was mentioned that Dr. Mallon may have been asked to develop a nondiscrimination policy in conjunction with Dr. Smith.

In September 2006, the Human Rights Watch and the American Civil Liberties Union collaborated to produce a report highlighting the treatment of girls, including lesbians and gender nonconforming youth, in OCFS custody.²⁹ The report was the impetus for an investigation by the Civil Rights Division of the U.S. Department of Justice ("DOJ"). Their findings into the conditions of confinement, which were made public in August 2009, ultimately led to the filing of a complaint against the agency in federal court in July 2010. The case was concluded, on consent, with a comprehensive agreement intended to resolve the unconstitutional conditions at four juvenile justice facilities, two of which housed girls.³⁰ In 2007, during the pendency of the DOJ investigation, the agency formed a committee titled "The Working Group for LGBT Youth in State Custody." With the involvement of several members from the Work Group, the agency was able to finalize and adopt in [*23] 2008 an antidiscrimination policy designed to support and protect LGBT youth in state juvenile facilities. OCFS's policy became one of the most progressive of its kind in the country, especially in its sensitivity towards gender identity issues.

In 2008, the Chancellor of the NYC Department of Education issued a regulation titled "Student-to-Student Bias-Based Harassment, Intimidation and/or Bullying," which included protections for gender identity, gender expression, and sexual orientation.³¹ In 2012, the NYC Police Department completed major revisions to its Patrol Manual, which was drafted and negotiated with an LGBT advisory committee made up of community-based LGBT advocacy groups and service providers. The new policies mandated that police officers respect the gender identity and expression of transgender and gender nonconforming people and "explicitly prohibited NYPD officers from conducting any search for the purpose of determining a person's gender."³² The "changes ranged from establishing search procedures for transgender arrestees to requiring officers [to] address arrestees by their preferred name."³³

C. Creating an LGBT Training Program

By August 2005, the members of the Work Group were scouring the East and West coasts to see whether any training materials specifically about LGBT youth in the juvenile justice system already existed. Very little material was out there, and what was available was oriented toward best practices with LGBT youth in the dependency system. Three individuals were identified who were very involved with training around the experiences of LGBT youth and the issues associated with their

²⁸ Juvenile Justice Subcomm. of the NYC Family Court Advisory Council LGBT Work Grp., Meeting Minutes from Apr. 20, 2004 (on file with author).

²⁹ Human Rights Watch, Custody and Control: Conditions of Confinement in New York's Juvenile Prisons for Girls 75-77 (2006).

³⁰ Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, Justice Department Announces a Comprehensive Agreement with New York to Remedy Violations and Ensure Constitutional Rights at Four Juvenile Justice Facilities (July 14, 2010), <http://www.justice.gov/opa/pr/2010/July/10-crt-811.html>.

³¹ N.Y.C. Dep't of Educ., Regulation of the Chancellor No. 8-302, Student-to-Student Bias-Based Harassment, Intimidation, and/or Bullying (2008), available at http://rem.s.ed.gov/docs/repository/REMS_000056_0002.pdf.

³² Press Release, Council of the City of N.Y. Office of Commc'ns, Speaker Christine C. Quinn, NYPD Commissioner Kelly, Council Members and Advocates Celebrate Patrol Guide Reforms to Protect Transgender New Yorkers (June 12, 2012), <http://council.nyc.gov/html/pr/061312trans.shtml>.

³³ Id.

lives. Invitations to meet with the Work Group were extended to them, as we knew they could be instrumental in helping us shape our training program. Jody Marksamer, a staff attorney with the National Center for [*24] Lesbian Rights who was just beginning to work on a staff training curriculum for youth in juvenile detention centers, happened to be in NYC in October 2005 and fortunately had time in his schedule to speak with us. In May 2006, Miriam Yeung, Director of Public Policy and Government Relations at the LBGT Community Center in NYC, and Monroe France, Education and Training Manager for the Gay, Lesbian and Straight Education Network (GLSEN), gave presentations to the Work Group explaining the structure and content of their respective training programs about LGBT youth. With the support and guidance of these three individuals, the Work Group began developing a training program, even though there was uncertainty about how much interest there would be in receiving this training on the part of the court system, the governmental entities, the legal services organizations, and the community-based agencies connected to the family court.

When the Work Group convened in January 2006 to discuss what its focus for the coming year would be, the group settled on a plan to run a training program over the lunch recess in each of the five boroughs of NYC for all family court personnel and anyone working in the court. This plan was deferred when Harriet Weinberger, Esq., the director of the Law Guardian Program in the Appellate Division, Second Department, offered the Work Group a ninety-minute segment of her annual CLE training program for attorneys in the assigned counsel plan. With its timetable accelerated considerably, a subcommittee of the Work Group shifted into high gear to decide on the subject matter for the training and to compile whatever materials would complement it. On March 30, 2006, members of the Work Group delivered the first of dozens of PowerPoint presentations that it would eventually create.³⁴

This was followed, quite unexpectedly, by an invitation from the dean of the NY State Judicial Institute,³⁵ with whom I had had the opportunity to discuss the Work Group's activities and the training it hoped to provide. The assistant dean in charge of the [*25] training curriculum for the family courts in NY State related the dean's offer to incorporate the Work Group's LGBT training program into their annual educational program for judges in October 2006. An all-too-short time slot of sixty minutes was allotted for an introductory LGBT program, and although we tried, our efforts to get another half hour were not fruitful. Knowing how competitive the process was for securing time in the five-day schedule of training programs at the judges' summer school, it was more important to be included in the first place, rather than to quibble over the amount of time. Pulling together this first program and finding people to present the material sent the Work Group into high gear over the next five months.

After the judicial training was over, the Work Group returned to its original plan of conducting lunchtime training programs for everyone working in the NYC family courts. The presenters travelled this training circuit during the last quarter of 2006 and the first quarter of 2007, armed with a PowerPoint presentation, a laptop, and a projector.³⁶ The program was so successful that the Work Group repeated the training two years later.³⁷ Although personnel changes make repetition necessary, it has become clear that this is not the optimal way to attain cultural competence for the judges and court personnel on an ongoing basis. To be effective, this training should be incorporated into the orientation programs for all new employees of the court system, rather than being done on an ad hoc basis.

IV. Resistance Encountered

It would be unrealistic to undertake a project of this magnitude and not expect to be met with opposition along the way. The first resistance to continued participation in the Work Group came in July 2005, when the Office of Children and Family Services' Assistant Deputy Counsel Diane M. Deacon announced that her agency would no longer be attending the meetings or

³⁴ The presentation was so well received that the Work Group was asked to repeat it in September 2010 at the Annual CLE Training Program for the attorneys on the assigned counsel panel.

³⁵ Created through a partnership between the court system and Pace Law School, the NY State Judicial Institute provides statewide education and training for the judges and justices of the NY State Unified Court System.

³⁶ The Work Group presented on December 6, 2006 (sponsored by the Manhattan Family Court), January 24, 2007 (sponsored by the Brooklyn Family Court), March 6, 2007 (sponsored by the Bronx Family Court), and April 11, 2007 (sponsored by the Queens Family Court).

³⁷ Id. (training for all courthouse staff in Kings, Manhattan, Queens, and the Bronx from October through December 2008).

[*26] participating in the Work Group. She told everyone that her agency preferred simply to "receive the Work Group's recommendations and take them under advisement."³⁸ In October 2005, Commissioner John A. Johnson was contacted about his agency's absence from the meetings of the Work Group, and the importance of having someone from OCFS attend the meetings was stressed since all of the children adjudicated as juvenile delinquents and placed in custody for twelve or eighteen months are remanded to facilities operated by his agency.³⁹ That same month, two representatives from the regional office of OCFS returned to the meetings of the Work Group. However, in March 2006, the assistant deputy counsel informed the Work Group that because the agency had been "named as a defendant in a federal court lawsuit pertaining to transgender issues arising from a family court placement from the NYC area," she felt "compelled to suspend [its] participation."⁴⁰ This time, the agency did not return to the Work Group until 2007, after Gladys Carrion was appointed by Governor Spitzer as its new commissioner.⁴¹

The second encounter the Work Group had with resistance happened at the October 2006 training program for the delinquency judges. To say that it received a lukewarm reception would be an understatement. The judges were critical of the interactive format. They accused the presenters of "talking down" to them. They sighed, rolled their eyes, and read the newspaper throughout. When one becomes a judge, awareness develops that we are expected to know everything about everything, and so quite naturally we develop the mindset of an "expert." As judges, if we are presented with something new, most of us rarely admit it. Instead, we tend to sit mute until we can independently search out the answer or, conversely, some of us assume a defensive posture and become indignant about wasting our time on things we already know. When confronted with new and unfamiliar territory, as these [*27] judges were at the October training, their inability to receive the information with an open mind was not a surprise. Despite the negative feedback, the Work Group continued to develop and offer training programs tailored to specific audiences.

The third experience with resistance occurred in January 2007, after the Work Group began planning a citywide training for all the NYC probation offices in each of the five boroughs. The executive assistant to the commissioner of the NYC Department of Probation was a member of the Work Group from its inception and participated in developing the content, structure, and hypotheticals for the training program. We selected dates for each borough and were in the process of making the fliers when one of the assistant commissioners asked to preview the presentation with some of her deputies. The presenters from the Work Group gave the entire presentation and responded to all of their questions. Within a week, the assistant commissioner indicated that certain changes would have to be made if the program was to go forward. The presentation included three hypotheticals designed to look at the decision-making role a probation officer has during the intake, adjustment-parole/remand, and investigation stages of a delinquency case, and what additional factors need to be considered when working with an LGBT respondent. The NYC Department of Probation, as many other agencies do, relies on a risk assessment instrument to assist in making critical determinations about whether a youth should be remanded during the pendency of the proceeding or placed out-of-home at the conclusion phase of the case. Because many of the risk factors affecting LGBT youth are the same factors these instruments rely on in determining the risk of re-arrest if a youth is released (school attendance, warrant histories from home or foster care, a parental presence in court), LGBT respondents are disproportionately remanded to temporary or placed long-term as a result of the high scores they receive. Because the assistant commissioner feared that these hypotheticals would be too critical of the probation department and its officers, it took nearly a year to reach consensus on how this material could be presented. The training program was finally given between May and August of 2009.

[*28]

V. Making the Issues Visible

³⁸ Juvenile Justice Subcomm. of the NYC Family Court Advisory Council LGBT Work Grp., Meeting Minutes from July 12, 2004 (on file with author).

³⁹ Letter from author to John A. Johnson, Comm'r, Office of Children & Family Servs. (Oct. 3, 2005) (on file with author).

⁴⁰ Letter from Diane M. Deacon, Assistant Deputy Counsel, Office of Children & Family Servs., to author (Mar. 3, 2006) (on file with author).

⁴¹ E-mail from Diane M. Deacon, Assistant Deputy Counsel, Office of Children & Family Servs., to author (Mar. 22, 2007) (on file with author).

After the first training program at the Judicial Institute for the delinquency judges, it became apparent that making presentations to groups outside the family court was central to the Work Group's mission.⁴² The larger community of service providers needed this [*29] information just as much as those serving LGBT youth and families from within the courts. As more and more young people are open about their sexual orientations and gender identities, the gap in the availability of community-based services such as counseling, shelter care, mental health care, and recreational and social programming for LGBT youth becomes glaringly obvious, and it is a major factor in driving them into a life on the streets. Without first becoming culturally competent, neither the courts nor these agencies can begin to meet the needs of LGBT youth, adults, or families. These outside training programs made an important contribution to the Work Group's mission as well. By training everyone to recognize the presence of LGBT youth in their communities and to understand the risk factors that were bringing LGBT youth into the court system, these community agencies gained a level of comfort in speaking about the issues and could better examine what role they could play in preventing LGBT youth from coming into the court system in the first place. The visibility of this topic and the broader discussion of the issues made it less intimidating for the court system to follow suit.

The visibility of LGBT people is growing, along with research into all aspects of their lives. Statistics are being gathered not only on the more traditional areas of inquiry, such as in "Race/Ethnicity, Gender and Socioeconomic Wellbeing of Individuals in Same-sex Couples,"⁴³ but also on the number of local gay newspaper and magazine publications that there are in the United States.⁴⁴ The significance of this cannot be overlooked. Together with the dialogue around cultural competence that can be seen from the Fortune 500 to the neighborhood drug and alcohol program, it is evident that governmental agencies, as well as public and private organizations, are far more comfortable discussing matters pertaining to LGBT youth and adults now than they were in prior years.

[*30] The Williams Institute on Sexual Orientation Law and Public Policy at the UCLA School of Law⁴⁵ and the Judicial Institute became partners in 2010 by putting together an unprecedented full day training program for judges, referees, and court

⁴² The author and members of the Work Group were panelists or presenters at lectures, workshops, and training programs around the country where the topics of sexual orientation and gender identity were discussed with reference to youth involved in the juvenile justice and child welfare systems. These presentations, workshops, and training programs included the following: Culturally Competent Practices for Meeting the Needs of LGBTQ Youth in the Dependency & Juvenile Justice Systems, Presentation at the 74th Annual Conference of the National Council of Juvenile & Family Court Judges in NYC (July 25, 2011); Culturally Competent Practices for Meeting the Needs of LGBTQ Youth from Detention Through Post-Disposition, Presentation at the 5th Annual Models for Change National Working Conference in Washington, D.C. (Dec. 6, 2010); Domestic Violence in the LGBTQ Community: Myths, Facts, and Challenges, Presentation at the ABCNY & NYS Division of Human Rights at New York Law School (Oct. 28, 2010); Nanette Dembitz, The Changing Faces of Domestic Violence: Expanding Access for Non-traditional Litigants, Lecture at New York County Lawyer's Association (May 3, 2010); Improving Outcomes for LGBT Youth in the Juvenile Justice System, Presentation at the Child Welfare League of America Annual Conference in Tennessee (Jan. 27, 2010); Best Practices in Representing & Serving LGBTQ Youth in the Juvenile Justice System, Presentation at the Practicing Law Institute (July 30, 2008); NYC Bar Ass'n, Culturally Competent Lawyering for At-Risk LGBTQ Youth: Advocating Effectively in the Foster Care & Juvenile Detention Systems, Presentation at the City Bar Center for CLE Programs (Apr. 15, 2008); Pride in the System: Serving LGBTQ Court-Involved Youth: Challenges & Strategies, Presentation at the New York University School of Law (Feb. 7, 2008); Youth At Risk: Legal & Community Responses, Presentation at the Center for Children, Families, and the Law at Hofstra University School of Law (Nov. 2, 2007); System Roles & Responsibilities: LGBT Youth in Detention, Presentation at the Juvenile Detention Alternatives Initiative National Inter-Site Conference in Dallas, Texas (Sept. 26, 2007); Improving the Response to LGBTQ Youth in the Dependency and Delinquency System, Presentation at the 30th National Juvenile and Family Law Conference of the National Association of Counsel for Children in Colorado (Aug. 17, 2007); Judicial Responsibility and Oversight for LGBTQ Youth in Delinquency Cases, Presentation at the Training-of-Trainers Program in Washington, D.C. (June 22, 2007); Youth Involved in the Juvenile Justice System: Train the Trainers, Presentation at the Annual Meeting of the Equity Project: Sexual Orientation in Washington, D.C. (Apr. 11, 2007); Addressing the Needs of LGBTQ Youth in the Juvenile Justice System, Presentation at the National Conference of the Child Welfare League of America in Tennessee (Nov. 15, 2006); Improving the Legal System's Approach to LGBTQ Youth in Foster Care, Presentation at the Opening Doors Project Listening Forum in New York City (Nov. 29, 2006).

⁴³ See Angeliki Kastanis & Bianca Wilson, Williams Inst., Race/Ethnicity, Gender and Socioeconomic Wellbeing of Individuals in Same-sex Couples (2014), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-Compare-Feb-2014.pdf>.

⁴⁴ See generally Local Gay/Lesbian Publications, gaydata.com, <http://www.gaydata.com/gmd2.htm> (last visited Nov. 2, 2014) (listing gay/lesbian publications in the United States).

attorneys, focusing on LGBT issues in the family, criminal, civil, and supreme courts. This presented another opportunity to create a two-hour training program, which would be given at the Judicial Institute on March 22, 2011. Because there was time, the training could focus on what it means to be "culturally competent" in meeting the needs of LGBT youth in care. Rather than being limited to local presenters, funds were advanced to bring in speakers from other parts of the country with expertise in working with LGBT youth in detention facilities. The program was videotaped and uploaded to the Judicial Institute's website along with the PowerPoint presentation and accompanying printed materials so that it would be available for viewing by all court personnel.

VI. Expanding the Focus

In September 2009, a new administrative judge was selected to lead the NYC Family Court, and with the passing of that baton, the Work Group officially came to an end. In due course, I reached out to our new administrator, the Honorable Edwina Richardson-Mendelson, to discuss the possibility of reinstating the Work Group, of which she had been extremely supportive. At the beginning of Pride Month, whose theme for 2010 was "Liberty and Justice for All," Judge Richardson-Mendelson announced that she would reactivate the Work Group as a subcommittee within the NYC Family Court Advisory Council to the Administrative Judge and give it a broader focus. Her intention was to have the committee work to address the needs of all LGBT participants - youth as well as adults - involved in any type of litigation in the family courts, whether it be family offense or domestic violence, foster care or detention settings, guardianship, custody or access issues, adoption, or PINS. She designated me as the chairperson for [*31] the newly created Committee for Lesbian, Gay, Bisexual & Transgender Matters. Membership in the committee was by invitation of the administrative judge.

Judge Richardson-Mendelson came to the committee's first meeting on September 16, 2010, to personally address the members and thank them for their participation. She communicated the importance of this work through her explanation of the purpose and goal she set for the committee. The goal was to see that LGBT litigants receive equal access to liberty and justice and be treated with dignity and respect in all of their interactions with the family court, from the moment they step inside the courthouse to the issuance of a decision in the matter. She envisioned that the committee would raise and discuss all of the issues confronting the family court as it endeavored to serve the needs of LGBT children, teenagers, and adults. The invitations to join the committee were based on her recognition that the family court's ability to serve LGBT communities is connected to the manner in which every governmental agency, private agency, lawyer, and social worker involved in these proceedings responds to the needs of LGBT communities.⁴⁵ Putting its purpose and goal in [*32] this context, Judge Richardson-Mendelson charged the committee with two tasks: (1) identifying the policies and practices of the court and the agencies and organizations outside the court that contribute to the family court's ability to meet this goal, and (2) finding solutions for those that detract from it.

⁴⁵ The Williams Institute at the UCLA School of Law is dedicated to conducting "high-quality, independent research with real-world relevance" that is disseminated to judges, legislators, policymakers, media, and the public. See Mission, Williams Inst., <http://williamsinstitute.law.ucla.edu/mission> (last visited Nov. 2, 2014).

⁴⁶ Because of its expanded mission, the membership of the advisory committee increased accordingly. In addition to several family court judges, support magistrates, and court attorney referees, Judge Richardson-Mendelson extended membership invitations to the following people - all of them accepted: the NYC Law Department's Family Court Division Chief and a social worker from that office; a representative from the chancellor of the NYC Department of Education; the deputy commissioner from the First Deputy Chief Clerk of the NYC Family Courts; the vice president of Safe Horizons; the LGBTQ coordinator for the Commissioner of the Administration for Children's Services; the major and a captain of the NYC Court Officers; the general counsel to the NYC Commissioner of Police; the associate commissioner of the Chief Psychiatrist for the NY State Office of Children and Family Services; the executive director of the NY Society for the Prevention of Cruelty to Children; the deputy commissioner for the NYC Department of Probation; the executive director of the NYC Anti-Violence Project; the attorney-in-charge of the Legal Aid Society's Juvenile Rights Practice and several staff attorneys; the law guardian directors for the First and Second Departments of the Appellate Division; the director of the NYC Family Court Mental Health Services; the director of the Peter Cicchino Youth Project and the director of the Domestic Violence Project at Urban Justice Center; the executive director of the Sylvia Rivera Law Project; the executive director of Advocates for Children; the executive director of the NYC Chapter of GLSEN; the director of the Juvenile Justice Project at the Correctional Association of New York; the executive director of the Ali Forney Center; the director of Youth Justice Programs at the Children's Defense Fund in NY; and the executive director of Lawyers for Children.

At the outset of the first meeting on September 16, 2010, every participant was asked to reflect on how he or she perceived the court was serving the members of LGBT communities, what issues he or she had identified for the committee to work on, and what she or he hoped the committee would be able to accomplish within the parameters of its mission. As expected, the list of suggestions was extensive, touching on numerous areas not previously recognized. Generally, the issues expressed fell into these categories: documenting the problems encountered by LGBT adults and youth when coming to court; collecting data on the LGBT users of the court process; training, policies, and practices; identifying issues related to LGBT adults in same-sex relationships and LGBT biological and adoptive parents; addressing issues related to youth and older teens; identifying resources available to serve diverse LGBT communities; and networking. With respect to the myriad training needs that were identified, the committee members immediately recognized the danger of advertising the court as LGBT-friendly before having the staff trained to be culturally competent and responsive in an appropriate and respectful way.

In preparation for the second meeting in November 2010, the lengthy list of items that the committee could direct its efforts towards was prioritized into four major categories:

- . Making the courthouse environment friendly and welcoming
- . Assuring the safety of LGBT adults and youth in the courthouse
- . Creating training and outreach programs
- . Developing resource guides to community-based programs and services

Subcommittees with co-chairs were created for each category. Each member was asked to serve on one of the subcommittees. The co-chairs were reminded about the importance of maintaining an [*33] awareness of the reality that the court is serving both a community of adults as well as children and adolescents. As the subcommittees analyzed the work to be done by the court in each of these areas, their inquiry was to be comprehensive, meaning that they were to consider all types of cases under the court's jurisdiction. In reflecting on how the court can improve its services to LGBT adults and youth, the subcommittees were charged with recognizing that LGBT communities are not a homogeneous group, but rather, an extremely diverse population that varies from one neighborhood to the next.

Inasmuch as the family court's ability to serve LGBT communities is directly impacted by the manner in which every governmental agency, private organization, lawyer, and social worker involved in these proceedings responds to the needs of LGBT communities, a practice of the former Work Group was reinstated at the committee's second meeting: having the members report on what steps they have taken to become gender-neutral and where they were with respect to implementing antidiscrimination policies and in-house LGBT training programs. When the committee met on January 26, 2011, it was possible to see that movement in a positive direction was happening. With regard to gender neutrality, there was much discussion among the governmental entities and private agencies about inventorying their intake, case management, and personnel forms, and revising them to be more inclusive. The city and state agencies spoke about how they were bound by the state's antidiscrimination policy, which only included sexual orientation as a protected classification. However, the representative from the Health and Hospitals Corporation, which provides mental health assessments in child protective and delinquency cases, reported that as a result of changes to the standards by the Joint Commission on Accreditation of Hospitals, nondiscrimination on the basis of gender identity would be required. The NYC Police Department reported on changes that were being made to its training program for new recruits. Several governmental and private agencies reported on the development of staff training programs or CLE programs about LGBT communities and best practices for serving them. A number of private agencies spoke about reviews that had been undertaken of employment practices and employee manuals and whether benefits provided are available equally to people in domestic [*34] partnerships. Ironically, throughout all the years that the Work Group was operational, and for many months after the committee was formed, while the focus was on the development of nondiscrimination policies by their members, no one raised the fact that the judicial system was operating with a nondiscrimination policy that did not include gender identity and gender expression until January 2011.

Between January 2011 and March 2011, the co-chairs were asked to convene a meeting of their members and begin discussing the substantive and procedural issues that would arise within the categories they were assigned. In March, a new agenda was followed: the committee continued to receive announcements and updates from the members but, in addition, time was set aside for the subcommittees to meet. Before the meetings ended, the co-chairs were asked to give a synopsis of their progress in

defining the scope of their work, including identifying the issues in need of immediate attention, prioritizing those issues, and formulating recommendations to address them. As the issues were refined, the committee resolved to develop the material into a formal report to the administrative judge. In thinking this through, an important question about the organization of the report arose - should it be designed as a five-year plan or a one-shot deal? With the work of the subcommittees beginning to take shape, it became clear that we were creating a five-year plan. All of the recommendations could not be undertaken at once.

The committee set November 21, 2011, as a target date for the submission of each subcommittee's final draft of their piece of the report. Once all of the drafts were received, the subcommittee chairs and I sat down to write the final report. The report began by discussing the committee's review of the family court's existing policies, practices, and procedures, and the areas of concern that the committee identified in how the NYC Family Court serves LGBT communities. To address each of the concerns, a series of recommended action steps were developed. Aware that the judiciary was in a period of fiscal austerity, the committee's recommendations were described as a continuum of measures, ranging from those that could be done immediately at no or minimal cost to those that were more extensive and would require budgetary outlays or other funding. Ironically, the recommendations of paramount importance in the report, and the [*35] ones upon which every other was dependent, were (1) the revisions of New York's Code of Judicial Conduct and the Code of Ethics for Non-Judicial Personnel that would prohibit judges and personnel from engaging in conduct manifesting bias or prejudice on the basis of gender identity and gender expression, (2) a revision of the New York's Lawyer's Code of Professional Responsibility to include "gender identity" and "gender expression" ⁴⁷ as forms of unlawful discrimination in the practice of law, and (3) a revision of the Rules of the Chief Judge to include gender identity and gender expression in the Unified Court System's policy for ensuring equal employment opportunity.

VII. Action Steps

When the report was finished, thirty-three action steps were decided upon within the four subject matter categories. ⁴⁸ The major ones are listed here:

Making the Courthouse Environment Friendly and Welcoming by:

- . Amending the Code of Judicial Conduct, the Lawyer's Code of Professional Responsibility, the Unified Court System's Code of Ethics for Non-Judicial Personnel, and the judicial system's policy for ensuring equal employment opportunity to include "gender identity" and "gender expression"

- . Posting the court's antidiscrimination statement - printed with culturally accepted, commonly known LGBT visual symbols on it - in all of its courthouses, on its website, on its Do It Yourself [*36] (DIY) public access computers, and in public areas throughout the courthouse

- . Providing each litigant who files a case with a copy of a standard written notice explaining that the court's antidiscrimination policy covers sexual orientation, gender identity, and gender expression; giving each person the right to identify his/her gender and have the court correct it if it is inaccurately listed on the court's documents; and giving each litigant the right to have court documents reflect the person's preferred name along with their legal name so long as it would not be inappropriate (as in the case of a street name or a gang name)

- . Requiring each petitioner/plaintiff to serve a copy of the standard written notice on the respondent/defendant

⁴⁷ Joel Baum et al., Human Rights Campaign Found. & Gend. Spectrum, Supporting and Caring for Our Gender Expansive Youth: Lessons from the Human Rights Campaign's Youth Survey 3 (2012), available at <http://www.hrc.org/youth-gender> ("Sexual orientation describes an individual's enduring physical, emotional, romantic and/or spiritual attraction to another person. Gender identity and sexual orientation are not the same. Gender identity [reflects] one's innermost concept of self as male, female, a blend of both or neither - how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth. While most people develop a gender identity aligned with their biological sex, for some gender identity is different from their biological or assigned sex.").

⁴⁸ Report from the Comm. for Lesbian, Gay, Bisexual & Transgender Matters to the Admin. Judge of the NYC Family Court (Dec. 19, 2011) (on file with author).

. Requiring that, when balancing the right of public access and the right to privacy, judges be sensitive to a request to close the courtroom to prevent "outing" someone if there are safety concerns

. Revising the court's forms to be gender neutral by replacing "mother" and "father" with "parent," replacing "sex" with "gender/gender identity," and providing the option for people to identify as lesbian, gay, bisexual, heterosexual, male, female, and other

. Designating "Single use/Family-type" accessible bathrooms in every courthouse with signs identifying the bathroom as an "All Gender/Family/Unisex/Accessible Restroom" and noting the location of these bathrooms on all printed floor plans

Assuring LGBTQ Adult and Youth Safety in the Courthouse by:

. Developing techniques for safeguarding the privacy of LGBT adults and young people during court proceedings by keeping confidential any LGBT-related information disclosed to the Department of Probation, the petition clerks, the Corporation Counsel's office, ACS, the Mental Health Services, and other agencies, unless the person has given permission to disclose the information

. Creating a uniform procedure for addressing and responding to all complaints of bias/discrimination or harassment and informing users of the court about its existence

[*37] . Working jointly with independent community-based organizations that have offices in the family courts and training culturally competent staff to provide LGBT-specific materials, referrals, and a safe space in the courthouse for LGBT adults and young people

. Creating interim policies that address how LGBT individuals entering the courthouse may be searched, when a hand scanner, pat down, or body search is required because a person is subsequently arrested or remanded to secure detention; and, once the revisions to the NYC Police Department's patrol manual are completed, reviewing their new policies and procedures to determine if they are suitable for adoption by the family court

. Making judges aware of the revised policies of ACS and OCFS for working with LGBT youth in foster care and delinquency placements and training them to review the conditions and the environment at each facility where the court has placed LGBT youth

. Training judges, when making their mandated visits to residential child care and detention facilities, to inquire about the LGBT cultural competence of the staff, their nondiscrimination policies and practices for working with LGBT youth, and their receptivity to working with and meeting the needs of LGBT youth and their families

Requiring Training and Education, and Providing Outreach by:

. Mandating basic LGBT training for all judges, clerks, court officers, and other court personnel to become culturally competent in serving LGBT communities

. Developing tools and teaching skills that will enable judges to intervene and effectuate their responsibilities under the Code of Judicial Conduct to take appropriate action when witnessing overt behaviors directed toward LGBT individuals in the courtroom that are disparaging (e.g., derogatory remarks, pointing, staring, visibly chuckling, snickering, or grimacing)

. Teaching judges, clerks, and other court personnel about the importance of not using heterosexist speech and how to substitute gender-neutral language that does not presume heterosexuality and is inclusive of everyone

[*38] . Teaching judges, clerks, and other court personnel to prepare court documents and orders that are free of heterocentric language and to scrutinize reports submitted by ancillary agencies for heterocentrism and address it with them

. Incorporating the tools necessary to become proficient in serving LGBT adults and youth into new judge/staff orientation programs, in the court officer academy for new recruits, and at staff development programs and judicial seminars

- . Conducting a self-assessment and inspection to determine LGBT cultural competence training needs for all judges and court personnel and having those results reviewed by an expert in LGBT cultural competence who could then assist the court in developing training modules tailored to the duties required of each specific job title
- . Engaging trainers and facilitators from organizations serving LGBT communities who have demonstrated proficiencies and experience in LGBT cultural competency training to provide this training and videotaping it so that the training can be replicated without additional cost
- . Incorporating LGBT cultural competency into future training programs offered to judges and court personnel rather than continuing to offer separate programs on LGBT issues
- . Sponsoring ongoing CLE trainings that focus on LGBT substantive law and/or issues that impact LGBT communities for legal, mental health, and social work professionals involved with the court and videotaping them for online viewing
- . Maintaining regular contact with local bar associations, LGBT community centers, advocacy groups, and nonprofit organizations to get feedback regarding the experiences of members of LGBT communities when coming to family court and soliciting suggestions on how to improve services to LGBT communities

Providing Information to LGBT Adults, Families and Youth by:

- . Compiling directories of community-based agencies and organizations that serve LGBT youth and adults
 - . Disseminating a single page information sheet that directs people to the resource guides and organizations that provide legal and social services for LGBT families, youth, and adults
- [*39] . Making court clerks and other court personnel aware of the availability of these materials and utilizing their contact with the public as a means of distributing these materials to all who enter the family court
- . Uploading these documents to the family court's website and public access terminals
 - . Periodically reviewing and updating these materials to keep them current

The final version of the report was delivered to Judge Richardson-Mendelson on January 23, 2012. She then submitted copies of the report to the leadership of the judiciary in New York: the chief judge and chief judicial officer of the state, the chief administrative judge, the first deputy chief administrative judge, the deputy chief administrative judge for the NYC courts, and the deputy chief administrative judge for the courts outside NYC. They, along with the administrative board consisting of the presiding justices of the four appellate divisions, are the individuals who can make the policy changes set forth in the committee's report, particularly the amendments adding gender identity and gender expression to the judges', lawyers', and non-judicial personnel's codes of conduct.

While awaiting further direction from Judge Richardson-Mendelson, the committee planned and organized a celebration for Pride Month in June 2012. Banners for the five courthouses were created by teen probationers in an arts program operated by the Department of Probation. Literature tables were placed in the courthouses to distribute materials from agencies and community organizations providing services to LGBT individuals and families. A CLE program was created and delivered in each of the five boroughs by members of the committee. With Judge Richardson-Mendelson giving an introduction to its content, a video was filmed with twelve representatives from community organizations, each of whom gave a two-minute statement about their programs and the services they offer. The video was to run on the courthouse TV monitors for the people in the courthouse to view while waiting for their cases to be called. Resistance was again encountered, this time from the Office of Court Administration, who would not permit the [*40] "Celebrate Pride Month" banners to be hung or the video to be aired.

49

After reviewing the report, Judge Richardson-Mendelson directed the Committee for Lesbian, Gay, Bisexual & Transgender Matters to prioritize the action steps across the categories and present her with a plan to effectuate them. I retired at the end of

⁴⁹ The same Pride Month activities were planned for June 2014, and in that year approval was given to show the video.

2012, and two family court judges were asked to co-chair the committee beginning in 2013. The committee remains vibrant and active, and its work is continuing. In some respects, getting to this point was just the beginning. There are many hurdles and possibilities for resistance ahead. For every step forward, two or three in the opposite direction can be anticipated because change is not typically welcomed and is therefore difficult to implement.

VIII. Going Forward

Over the past ten years, there has been a major shift in the audiences to whom we have presented our LGBT training programs and the receptions our programs have received. At the Child Welfare League of America conference in 2010, only fourteen people came to our presentation. They were extremely guarded, fearful of using LGBT terminology when speaking, and when we arrived at the Q&A portion of the presentation, they had little to say. They asked no questions about how to serve LGBT youth and left us with the impression that very few had any LGBT teens on their caseloads. Just the opposite was true for our presentation about LGBT youth in detention facilities at the Models for Change conference in 2013. Every seat in the room was taken and people were standing outside the doors in the hall. Members of the audience were conversant with the terminology and acknowledged that there were LGBT youth on their caseloads. Throughout the entire presentation, the audience asked questions and sought information about how to handle the problems raised in the cases of their LGBT clients, as well as what to do in areas where there is a dearth of community-based services that would permit probation officers to divert appropriate PINS and delinquency cases involving LGBT youth early on.

[*41] It is evident that LGBT families, adults, and children are now being recognized throughout the family court in NYC, and the issues associated with their circumstances are more widely understood, not only in NYC but around the country as well. That is the driving force behind the burgeoning number of training requests coming to The Equity Project, with which I have been affiliated since 2007 as a member of their Advisory Council.⁵⁰ Cultural competency is on everyone's radar screen, and that is one of the major areas that private foundations and governmental entities have targeted for grant funding. They are aware that becoming culturally competent is the keystone for individuals and systems in order to move beyond blindness, avoidance, and intolerance of difference based on sexual orientation, gender identity, and gender expression, and, instead, to reach an understanding of, respect for, and acceptance of each person's right to express their gender identity as they choose and to live their lives consistent with that identity.

But the task of making our courthouse environments friendly, welcoming, and safe for the members of diverse LGBT communities we serve is far from finished. Conducting training programs for judicial and non-judicial personnel is a major undertaking given their work schedules and the nature of their assignments. Pursuing these goals and objectives requires strong judicial leadership.

Judges are in a unique position to bring about systemic change within their state and local judicial systems through coalition building, by coordinating education and training programs for judges, clerks, court officers, prosecutors, defense attorneys, law guardians, guardians ad litem, attorneys for children, probation officers, caseworkers, and court-appointed forensic mental health evaluators. In addition, judges have the ability to participate in legislative and policy reform through various committees in state [*42] and local bar associations. While all of these are permissible judicial activities under state Codes of Judicial Conduct,⁵¹ not all judges will be willing to take on a project such as this. It is possible some will opt for a safe harbor in the

⁵⁰ The Equity Project

is an initiative to ensure that lesbian, gay, bisexual and transgender (LGBT) youth in juvenile delinquency courts are treated with dignity, respect, and fairness. The Equity Project examines issues of sexual orientation, gender identity, and gender expression (SOGI/E) that impact youth during the entire delinquency process, ranging from arrest through post-disposition.

Equity Project, <http://www.equityproject.org/> (last visited Nov. 2, 2014).

⁵¹ See Model Code of Judicial Conduct R. 3.7A (2010).

Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

language of the Codes cautioning them to maintain "independence, integrity, [and] impartiality" in their conduct.⁵² Given the considerable visibility that LGBT youth have received, in particular those in foster care and detention facilities, and the visibility that the marriage equality movement has brought to same-sex relationships, there may be less hesitancy now than there would have been ten years ago when the Work Group started. My purpose in writing this article was to set forth a blueprint of concrete steps that judiciaries around the country could take to [*43] improve the experiences of LGBT families, adults, and children when some aspect of their lives brings them into court. I am hopeful that this blueprint will provide the encouragement needed for judges in other jurisdictions to undertake a collaborative effort such as this in achieving meaningful reforms.

William Mitchell Law Review
 Copyright (c) 2015 William Mitchell College of Law
 William Mitchell Law Review

End of Document

...

Appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice; ... making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and ... serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity: ... will be engaged in proceedings that would ordinarily come before the judge; or ... will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Id. Most state codes have been shaped by the ABA Code.

⁵² Model Code of Judicial Conduct R. 3.1 (2010) ("A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not: (A) participate in activities that will interfere with the proper performance of the judge's judicial duties; (B) participate in activities that will lead to frequent disqualification of the judge; (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;" (commentary omitted)).

ARTICLE: PREA'S ELUSIVE PROMISE: CAN DOJ REGULATIONS PROTECT LGBT INCARCERATED PEOPLE?

Spring, 2014

Reporter

15 Loy. J. Pub. Int. L. 343 *

Length: 5833 words

Author: By Giovanna Shay ¹

Text

[*343]

In this symposium contribution, I have been asked to address current issues regarding incarcerated lesbian, gay, bisexual, and transgender (LGBT) people. A major development affecting LGBT prisoners over the past couple of years is the promulgation of new federal regulations pursuant to the Prison Rape Elimination Act of 2003 (PREA). ² The PREA statute, passed in 2003, mandated regulations to address prison sexual violence, which were issued by the Department of Justice (DOJ) in 2012. ³

PREA represents an unprecedented national reformist effort in corrections regulation. Although incarceration rates have begun to decline in recent years, ⁴ the United States remains the nation with the largest incarcerated population in world history. ⁵

[*344] Administrative interventions in corrections bureaucracies play an increasingly important role in safeguarding human rights because prisoners' court access is severely restricted by the Prison Litigation Reform Act (PLRA). ⁶ Against this

¹ Professor of Law, Western New England University School of Law. This piece is based in part on written testimony submitted to the Review Panel on Prison Rape, November 7, 2013. My testimony and this symposium piece have benefited from exchanges with many individuals, including Valerie Jenness, Jason Lydon, Joey L. Mogul, Chase Strangio, Amy Whelan, Alisha Williams, Amy Fetting, Chris Daley, Hope Metcalf, Margo Schlanger, Megan Quattlebaum, Deborah Golden, Andrea Armstrong and others. Thanks too to Prof. Andrea Armstrong and the members of the Loyola Journal of Public Interest Law for inviting me to participate in their symposium, "Prison Reform: Progress, Policies, Practices," an amazing gathering of academics, advocates, and activists.

² [42 U.S.C. §§15601-09](#) (2006).

³ [28 C.F.R. §§115.5-115.501](#) (2006).

⁴ Claire Abbadi, In Decline of Prison Populations, Convict Moms May Be a Key Beneficiary, Christian Science Monitor (Feb. 3, 2014), <http://www.csmonitor.com/USA/Justice/2014/0203/In-decline-of-prison-populations-convict-moms-may-be-a-key-beneficiary> ("After peaking in 2009, the U.S. prison population has declined annually - something that has been attributed to several factors including the recession, changes in public attitudes, and the courts.").

⁵ Incarceration, Sentencing Project, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Feb. 4, 2014) ("The United States is the world's leader in incarceration with 2.2 million people currently in the nation's prisons or jails - a 500% increase over the past thirty years.").

backdrop, the PREA rule-making process suggests the possibility that corrections regulations can help us to confront "mass imprisonment,"⁷ or at least provide a last resort for safeguarding human dignity. It remains to be seen, however, whether PREA will fulfill its potential, or become just another facet of our over-sized corrections bureaucracies.

This is the first installment in a two-part series on PREA that I plan for 2014. In this first piece, I describe how PREA is a unique federal regulatory corrections initiative, with the potential to protect LGBT inmates. The second article in the series is forthcoming later this year in the *Northeastern Law Review*. In that piece, I plan to further examine some of the challenges to PREA's successful implementation, as well as some of its possible unintended consequences.

I. LGBT Incarcerated People and Prison Sexual Violence

PREA affects all incarcerated people, not only LGBT people. However, PREA has particular importance for LGBT individuals because LGBT detainees and prisoners suffer a heightened risk of sexual victimization. One of the provisions of the PREA statute requires the Bureau of Justice Statistics (BJS) to conduct national inmate surveys regarding sexual victimization annually.⁸ A Review Panel housed in the Department of Justice is charged with holding annual hearings about the facilities with the highest and lowest reported rates of sexual victimization.⁹ [*345] BJS has conducted National Inmate Surveys (NIS) in 2007, 2008-09, and 2011-12.¹⁰ Some observers have argued that PREA's single largest contribution is this data collection.¹¹ Every BJS national inmate survey to date has confirmed that non-heterosexual inmates report higher rates of sexual victimization than their straight counterparts.¹² For reasons that I will discuss later in this article, the BJS surveys provide information about lesbian, gay, and bisexual respondents, but not transgender incarcerated people.

Non-heterosexual incarcerated people report to BJS higher levels of prison sexual victimization than heterosexual inmates in both prisons and jails, across every subgroup that is measured by BJS (e.g., sex, race, age, education).¹³ In the 2011-12 National Inmate Survey, 12.2% of non-heterosexual people in prison and 8.5% of non-heterosexual people in jail reported inmate-on-inmate sexual assaults within the last 12 months, compared with 1.2% of their straight counterparts in both institutional settings.¹⁴ With respect to staff sexual abuse, 5.4% of non-heterosexual people in prison reported victimization,

⁶ The PLRA is codified at [18 U.S.C. § 3626](#) (2006), [28 U.S.C. § 1915](#) (2006), and [42 U.S.C. § 1997e](#) (2006).

⁷ See David Garland, *Mass Imprisonment: Social Causes and Consequences* (2001); Marie Gottschalk, *The Prison & the Gallows: The Politics of Mass Incarceration in America* (2006); James Forman, Jr., *Why Care About Mass Incarceration?*, [108 Mich. L. Rev. 993 \(2010\)](#).

⁸ [42 U.S.C. § 15603\(a\)\(1\)](#) (2006).

⁹ [42 U.S.C. § 15603\(b\)](#) (2006). Witnesses at the Review Panel hearings have submitted testimony regarding LGBT incarcerated people and prison sexual violence. See, e.g., Russell K. Robinson, *Testimony to the Review Panel on Prison Rape* (Sept. 16, 2011) (written testimony) (criticizing the model utilized by the L.A. County Jail to protect LGBT inmates).

¹⁰ Allen J. Beck, et al., *Bureau of Justice Statistics, Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, at 8 (2013). But see James E. Robertson, *The Mentally Ill Inmate and Sexual Victimization: A Review Essay*, 49 No. 6 *Crim. Law Bull.* ART 11 (2013) (reviewing the National Inmate Survey-3, Bureau of Justice Statistics, *Sexual Victimization Prisons and Jails Reported by Inmates, 2011-2012* (2013) and arguing that the real news in the report is the higher victimization rate of the mentally ill, although non-heterosexual inmates experiencing "serious psychological distress" report the highest rates of victimization).

¹¹ Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, [39 New Eng. L. Rev. 391, 427 \(2005\)](#) (quoting Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, *MSN Slate* (Oct. 1, 2003), <http://slate.msn.com/id/2089095>).

¹² Beck et al., *supra* note 10, at 30.

¹³ *Id.* at 7, 30.

¹⁴ BECK ET AL., *supra* note 10, at 18-19.

compared with 2.1% of straight people in prison.¹⁵ A little more than four percent (4.3%) of non-heterosexual respondents in jail reported staff sexual misconduct, compared with 1.7% of the people in jail who identified as straight.¹⁶

The category of BJS respondent reporting the highest [*346] incidence of sexual victimization was the group of non-heterosexual inmates with "serious psychological distress" (SPD), evaluated on a scale that measures mental health and emotional issues.¹⁷ Twenty-one percent of non-heterosexual people in prison and 14.7% of people in jail with SPD reported sexual victimization by another incarcerated person.¹⁸

As I described in written testimony submitted to the Review Panel on Prison Rape in January 2014, the 2011-12 National Inmate Survey was silent on one important subgroup that we know is particularly vulnerable to sexual victimization - transgender people. Apparently, too few NIS respondents chose "transgender" in response to the question "are you male, female or transgender" for the BJS to reach statistically significant conclusions regarding the rates of victimization of incarcerated people who are transgender.¹⁹ We know that this group is particularly vulnerable in part because sociologist Valerie Jenness and her collaborators have done important research in California interviewing every transgender prisoner held by the California Department of Corrections and Rehabilitation.²⁰ As I told the Review Panel, if BJS cannot make statements regarding the statistical rate of victimization of transgender prisoners, it should at least acknowledge that fact in a more visible way in its report.²¹ The omission of transgender incarcerated people in the report acts as an inadvertent erasure in an area in which trans experiences are particularly salient.

II. PREA as a Case Study in the Potential of Corrections Regulations

PREA is an important case study for those interested in the potential of corrections regulation. As I argued in my 2009 article, *Ad Law Incarcerated*, corrections regulation is a consequential and frequently overlooked area of law-making.²² In [*347] a nation with over two million incarcerated people, corrections regulations can have significant effects not only on the rights of the imprisoned, but also on their families and communities,²³ and even on public health more broadly.²⁴

Prison rules garnered some attention during the prisoners' rights movement of the 1970s,²⁵ and important scholarship identified the role of corrections regulations in the professionalization and bureaucratization of the prison.²⁶ In recent years, however, a new group of observers has pointed out the salience of corrections regulation in an era of "mass incarceration."²⁷

¹⁵ Id. at 18.

¹⁶ Id. at 19.

¹⁷ BECK ET AL., supra note 10, at 25-27.

¹⁸ Id. at 7.

¹⁹ Giovanna Shay, Testimony Submitted to the Review Panel on Prison Rape (Nov. 7, 2013) (written testimony).

²⁰ Valerie Jenness, Lori Sexton, Jennifer Sumner, *Transgender Inmates in California Prisons: An Empirical Study of a Vulnerable Population* (2009) (Table 7) (concluding that 58.5% of the transgender prisoners who were interviewed had been sexually assaulted while incarcerated).

²¹ Shay Testimony, supra note 19.

²² Giovanna Shay, *Ad Law Incarcerated*, [14 Berkeley J. Crim. L. 329 \(2009\)](#).

²³ Shay, supra note 22, at 353-58.

²⁴ Id. at 358-61.

²⁵ See, e.g., Jonathan Brant, Prison Disciplinary Procedures: Creating Rules, 21 Clev. St. L. Rev. 83 (1972) (noting in 1972 that "... prison disciplinary procedures are being scrutinized for their conformance with an emerging strict notion of due process." Id. at 85.).

²⁶ See, e.g., James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts, 1960-80*, in *Crime and Justice: An Annual Review of Research* 429 (Norval Morris & Michael Tonry, eds., 1980); Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* 39-40 (1998); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, [142 U. Pa. L. Rev. 639, 665-68 \(1993\)](#).

This scholarship highlights the wide-ranging effects of prison policy, given America's over-reliance on incarceration. For example, bringing long-overdue attention to one area of corrections regulation, in 2013 Chesa Boudin, Trevor Stutz, and Aaron Littman authored a fifty-state survey of prison visitation policies. These rules affect the families and children of the incarcerated in direct and important ways.²⁸ Megan Comfort has argued that prison regulations can affect norms and behaviors in the families of the incarcerated, producing "secondary prisonization."²⁹ Others have focused on the role of corrections regulation in the construction of gender norms and identities. Gabriel Arkles has written about how corrections grooming rules restrict the expression of gendered and racial identities.³⁰ Cassandra Shaylor and others have argued that [*348] corrections policies can contribute to the reinforcement of gender stereotypes.³¹

The regulations promulgated under PREA are among the most comprehensive and ambitious federal rules ever to affect state and local adult facilities.³² Most corrections rule-making is state-by-state, or at the facility level. Indeed, corrections systems and facilities will need to promulgate rules and policies in order to implement PREA fully.³³ Some states have passed statutes that expressly incorporate the PREA regulations, in part or in whole.³⁴ Others are referencing the PREA regulations in their

²⁷ See supra note 7 (articles discussing "mass imprisonment"); Dean Spade, *Normal Life: Administrative violence, Critical Trans Politics, and the Limits of Law* (2011) (discussing corrections regulations and policies).

²⁸ Chesa Boudin, et al., Prison Visitation Policies: A Fifty State Survey, 32 Yale L. & Pol'y Rev. (forthcoming 2013).

²⁹ Megan Comfort, Punishment Beyond the Legal Offender, 3 Ann. Rev. L. & Soc. Sci. 271, 279 (2007).

³⁰ Gabriel Arkles, Correction Race & Gender: Prison Regulation of Social Hierarchy Through Dress, [87 N.Y.U. L. Rev. 859 \(2012\)](#).

³¹ Cassandra Shaylor, Neither Kind Nor Gentle: The Perils of "Gender Responsive Justice," in Phil Scraton & Jude McCulloch, *The Violence of Incarceration* 145-48 (2009).

³² The Juvenile Justice and Delinquency Prevention Act (JJDP) of 1974 required states to de-institutionalize juvenile status offenders and to stop housing juveniles in adult facilities as a condition of receiving federal funding for juvenile justice programs. See [42 U.S.C. §§5601-5792a](#) (2006); see also Donald T. Kramer, Legal Rights of Children § 20:13 (October 2013).

³³ I would like to thank ACLU Attorney Chase Strangio for drawing my attention to this point in exchanges that contributed to my testimony to the Review Panel on Prison Rape.

³⁴ See Chase Strangio & Amy Fettig, Am. Civil Liberties Union, ACLU Prison Rape Elimination Act (PREA) Toolkit: End the Abuse, Protecting LGBTI Prisoners From Sexual Assault (2014) (describing a Colorado bill applying PREA to people under 18 housed in adult facilities; a Texas statute adopting PREA training for officers in juvenile facilities; a comprehensive PREA statute in Connecticut requiring the adoption of national standards by all corrections facilities for adults and juveniles, including jails and immigration facilities; as well as other bills pending in states including California, New York, North Carolina, Texas, Nevada, New Mexico, and West Virginia).

own corrections or juvenile justice regulations.³⁵ The PREA [*349] regulations themselves are atypical in that they are a set of federal regulations designed to create change in local corrections policies and culture.

The enforcement mechanism for PREA is essentially the power of the federal purse. State and local jurisdictions that fail to comply with the PREA regulations risk losing 5% of their federal funding for prisons.³⁶ As others including David Kaiser and Lovisa Stannow have pointed out, this enforcement mechanism is highly imperfect,³⁷ an issue that I will address further in the second of this two-part series on PREA.

PREA did not begin as a gay rights initiative. Indeed, Valerie Jenness and Michael Smyth described how the PREA statute was passed by a counter-intuitive coalition, including not only prisoners' rights groups but also faith-based organizations.³⁸ [*350] However, once PREA became law, free-world LGBT organizations became involved in the PREA rule-making process.³⁹ The PREA statute provided for a National Prison Rape Elimination Commission (NPREC) to hold hearings and propose standards to the Department of Justice (DOJ) for adoption as federal regulations,⁴⁰ a task the Commission completed

³⁵ See, e.g., 004 Ark. Code. R. § 00.2-413 (LexisNexis 2013) (requiring annual review of policies associated with prison rape and referring to PREA); Fla. Admin. Code. Ann. r. 33-103.006 (2013) (incorporating special grievance rules about sexual abuse in order to comply with PREA); Idaho Admin. Code rr. 05.01.01.216, 05.01.01.224, 05.01.02.220, 05.01.05.213, 11.11.05.102 (2013) (adopting PREA for juvenile facilities); La. Admin. Code tit. 22, § 341 (2013) (adopting PREA regulations); La. Admin. Code tit. 22, § 325(D)(2) (2013) (establishing an administrative remedy procedure for inmate grievances including PREA complaints); 103 Mass. Code Regs. 505.05 (2013) (assigning responsibility for PREA to Deputy Comm'r of Prison Division); Mont. Admin. R. 20.9.635 (2013) (in a state regulation entitled "Prison Rape Elimination Act," directing facilities for juveniles to adopt policies and procedures to assist victims of sexual assault); Mont. Admin. R. 20.7.910 (2013) (requiring PREA compliance by community corrections providers); Mont. Admin. R. 20.9.602 (2013) (defining PREA in rules governing youth detention facilities); N.J. Admin. Code § 10A:31-14.2 (2013) (requiring adult county correctional facilities to adopt a zero tolerance policy for sexual abuse); N.J. Admin. Code §§13:94-1.3, 13:95-12.3 (2013) (applying PREA to juvenile facilities, pursuant to PREA); N.J. Admin. Code § 13:103-2.4 (2013) (requiring information about PREA to be included in the community corrections resident handbook); N.M. Code R. §§8.14.4.8, 8.14.5.24 (LexisNexis 2013) (adopting PREA policies for juvenile facilities); N.D. Admin Code 75-03-17-16 (2013) (requiring written personnel policies on PREA for residential treatment facilities for children); Ohio Admin. Code 5139-36-09, 5139-37-06(A)(1)(f), 5139-37-17, 5139-37-01 (2013) (applying PREA to youth services training and providing PREA information to youth upon admission); 37 Tex. Admin. Code §§343.208, 343.412, 343.606, 344.620, 348.134, 348.136, 355.400, 380.9337 (2013) (adopting PREA for juvenile facilities and supervision); 37 Tex. Admin. Code §§163.39, 195.41 (2013) (providing that community residential facilities must protect residents from abuse pursuant to PREA); 12-3 Vt. Code. R. § 508:300 (2013) (requiring that residential treatment facilities under DCF must comply with statutes including PREA); 6 Va. Admin. Code § 15-70-60 (2013) (prohibiting fraternization and referencing PREA); Wash. Admin. Code §§137-25-030, 137-48-020 (2013) (defining disciplinary infractions for PREA reporting purposes and defining mail to PREA coordinator as legal mail).

³⁶ 42 U.S.C. § 15607(e)(2) (2006) (stating that unless the chief executive of the state certifies that the state is in full compliance with PREA or will use 5% of federal funding for prisons to achieve full compliance, the state will lose that portion of its federal funding for corrections).

³⁷ See David Kaiser & Lovisa Stannow, Prison Rape: Obama's Program to Stop It, N.Y. Rev. of Books, Oct. 11, 2012, <http://www.nybooks.com/articles/archives/2012/oct/11/prison-rape-obamas-program-stop-it/> (describing PREA enforcement mechanism and challenges of ensuring compliance).

³⁸ Valerie Jenness & Michael Smyth, The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road From Symbolic Law to Instrumental Effects, 22 Stan. L. & Pol'y Rev. 489 (2011) (arguing that it is "both predictable and surprising that the evangelical sector has taken up the cause of prison rape." Id. at 503). See also Jessi Lee Jackson, Sexual Necropolitics and Prison Rape Elimination, 39 Signs 197 (2013) (describing how a "coalition of strange bedfellows ranging from Focus on the Family to the American Civil Liberties Union came together in support of an unlikely goal: protecting prisoners from sexual violence.").

³⁹ Shay, *supra* note 22 at 365-66.

⁴⁰ 42 U.S.C. § 15606(a) (2006).

in 2009.⁴¹ The DOJ solicited public comments on the NPREC proposed standards, and sought notice-and-comment on its own proposed rules before promulgating its final PREA regulations in May 2012.⁴²

Organizations attuned to **LGBT** issues were involved in both the NPREC and the DOJ stages of this rule-making process. As I noted in *Ad Law Incarcerated*, **LGBT** advocacy groups submitted testimony and testified at hearings before the NPREC, ultimately affecting the rules it proposed to the Department of Justice.⁴³ When the DOJ began its notice-and-comment period on the PREA regulations, this participation continued.⁴⁴ Ultimately, the final DOJ PREA regulations were shaped in important ways by these contributions.⁴⁵

III. Provisions of PREA Affecting **LGBT** Incarcerated People

Generally-applicable PREA regulations may be particularly important for **LGBT** prisoners, given their high rates of victimization. PREA mandates a "zero tolerance" policy towards [*351] sexual abuse and harassment;⁴⁶ requires training for staff, investigation of allegations, and discipline of wrong-doers;⁴⁷ and states that survivors of abuse should receive medical and mental health care as well as outside victim support services.⁴⁸ PREA also requires that corrections agencies investigate complaints of sexual abuse, even if the prisoner has missed an institutional grievance deadline, and accept reports from people other than prisoners.⁴⁹ Agencies must submit to independent audits every three years, dated from August 2013.⁵⁰

Other aspects of the PREA regulations specifically concern **LGBT** incarcerated people. Under PREA, corrections agencies must screen for heightened vulnerability to sexual abuse at intake.⁵¹ One of the factors to be addressed in screening is "whether the inmate is or is perceived to be gay, lesbian, bisexual, transgender, intersex, or gender nonconforming,"⁵²

⁴¹ Nat'l **Prison** Rape Elimination Comm'n, National **Prison** Rape Elimination Commission Report (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

⁴² Justice Department Releases Final Rule to Prevent, Detect and Respond to **Prison** Rape, Dep't Just., (May 17, 2012) <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html>.

⁴³ Shay, *supra* note 22 at 365-66.

⁴⁴ See, e.g., Nat'l Ctr. for Transgender Equal. et al, Preventing the Sexual Abuse of **Lesbian, Gay, Bisexual, Transgender**, and Intersex People in Correctional Settings, Comments on the National Standards to Prevent, Detect, and Respond to **Prison** Rape (2010), available at http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/exec_us_20100510_preventing-the-sexual-abuse-of-lgbti-people-in-correctional-settings.pdf.

⁴⁵ Giovanna Shay, [Including But Not Limited To] Violence Against Women, 42.4 Sw. U. L. Rev. (forthcoming 2013).

⁴⁶ [28 C.F.R. § 115.11 \(2013\)](#); see also Dep't of Justice, Docket No. OAG-131, National Standards to Prevent, Detect, and Respond to **Prison** Rape 13 (May 16, 2012) (providing a summary of the rule-making process), available at http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf.

⁴⁷ 28 C.F.R. §§115.21-22, 115.71-73 (2013); [28 C.F.R. §§115.31](#), 115.76-78 (2013).

⁴⁸ 28 C.F.R. § 115.81-83 (2013); [28 C.F.R. § 115.53 \(2013\)](#).

⁴⁹ [28 C.F.R. § 115.52\(b\)\(1\) \(2013\)](#); [28 C.F.R. § 115.54 \(2013\)](#).

⁵⁰ [28 C.F.R. §§115.93, 115.401 \(2013\)](#). See also Chase Strangio & Amy Fetting, ACLU **Prison** Rape Elimination Act (PREA) Toolkit, *supra* note 35 (describing the PREA audit system).

⁵¹ [28 C.F.R. § 115.41\(a\) \(2013\)](#).

⁵² [28 C.F.R. § 115.41\(d\)\(7\) \(2013\)](#).

although officials are forbidden from disciplining inmates for refusing to answer questions about sexual orientation.⁵³ Corrections agencies are to use this information in housing, work, education, and program assignments.⁵⁴

Unless provided by a "consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates," PREA regulations forbid LGBT-dedicated housing units.⁵⁵ This solution is a form of compromise, which acknowledges the differing views of such units.⁵⁶ Some LGBT inmates have had positive [*352] experiences in separate housing,⁵⁷ while in other circumstances "gay" units have been used to stigmatize LGBT incarcerated people.⁵⁸

PREA bars corrections facilities from placing LGBT inmates in isolation indefinitely for the purpose of "protecting" them.⁵⁹ The regulations provide that involuntary housing can only be used when there are "no available alternative means" to protect an inmate.⁶⁰ Segregated inmates must have access to work and education, and the use of segregation should be reassessed every 30 days.⁶¹

Some of the most ground-breaking PREA reforms are in the area of housing for transgender incarcerated people. PREA requires that corrections officials make "case-by-case" decisions about housing transgender prisoners, based on what "would ensure the inmate's health and safety, and whether the placement would present management or security problems."⁶² This is a significant change from the previous, nearly universal rule of housing prisoners according to genital status alone.⁶³ In a particularly significant change, the PREA regulations state that an incarcerated person's "own views" about their safety should be given "serious consideration" in the housing determination.⁶⁴ Housing determinations for transgender prisoners should be revisited at least twice a year.⁶⁵

⁵³ [28 C.F.R. § 115.41\(h\) \(2013\)](#).

⁵⁴ [28 C.F.R. § 115.42\(a\) \(2013\)](#).

⁵⁵ [28 C.F.R. § 115.42\(g\) \(2013\)](#).

⁵⁶ Contrast Sharon Dolovich, Two Models of the Prison: Accidental Humanity & Hypermasculinity in the L.A. County Jail, [102 J. Crim. L. & Criminology 965 \(2012\)](#) (providing a positive description of the K6G unit in the Los Angeles County Jail), and Sharon Dolovich, Strategic Segregation in the Modern Prison, [48 Am. Crim. L. Rev. 1 \(2011\)](#) (providing a positive view of the K6G unit), with Russell K. Robinson, Masculinity as Prison: Sexual Identity, Race & Incarceration, [99 Cal. L. Rev. 1309 \(2011\)](#) (criticizing the K6G unit).

⁵⁷ Nat'l Ctr. for Transgender Equal., LGBT People & the Prison Rape Elimination Act (2012), available at http://transequality.org/Resources/PREA_July2012.pdf ("Some people may prefer to be housed [in LGBT-dedicated units] because they may feel they are safer from being abused by other inmates.").

⁵⁸ See Joey L. Mogual, et al., Queer (In)Justice: The Criminalization of LGBT People in the United States 108-10 (2011) (describing the "butch wing" at Fluvanna, Virginia prison for women).

⁵⁹ [28 C.F.R. § 115.43\(a\) \(2013\)](#).

⁶⁰ *Id.*

⁶¹ [28 C.F.R. § 115.43\(b\)](#), (c) (2013).

⁶² [28 C.F.R. § 115.42\(c\) \(2013\)](#).

⁶³ See Sydney Scott, "One is Not Born, But Becomes a Woman": A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities, [15 U. Pa. J. Const. L. 1259 \(2013\)](#) (describing problems of housing transgender women in facilities designated for men).

⁶⁴ [28 C.F.R. § 115.42\(e\) \(2013\)](#).

⁶⁵ [28 C.F.R. § 115.42\(d\) \(2013\)](#).

[*353] PREA regulations regarding strip and body cavity searches also protect LGBT incarcerated people, forbidding such searches for the "sole purpose of determining the inmate's genital status," and providing that searches of trans prisoners be conducted in "the least intrusive manner possible," and in a "professional and respectful manner." ⁶⁶ Transgender and inter-sex prisoners are to be allowed to shower apart from the general population. ⁶⁷

PREA has the potential to perform important public education functions. In 2009, in *Ad Law Incarcerated*, I wrote about the effect of the definition of terms in the NPREC proposed standards, which included terms such as "gender identity," "gender non-conforming," and "transgender." ⁶⁸ We do not know how many corrections officials will be introduced to these concepts for the first time through the PREA process.

PREA might also play an "expressive function," described by Cass Sunstein as "the role of law in 'making statements' as opposed to controlling behavior directly." ⁶⁹ For example, the "professional and respectful" search rule might impress upon line officers that LGBT incarcerated people are due respect, even if the rule alone cannot dismantle the prison system that visits these searches on people in custody. ⁷⁰

PREA's requirement that corrections officials make case-by-case housing determinations for transgender prisoners may encourage more thoughtful and deliberate decisions by corrections officials. A few jurisdictions including Cook County, Illinois; the District of Columbia; the City and County of Denver; and Cumberland County, Maine, have passed policies establishing transgender housing committees. ⁷¹ Such committees [*354] are to consider a number of factors in determining a transgender or intersex inmate's housing placement. ⁷² For example, the Cumberland County, Maine policy directs the transgender housing committee to consider the incarcerated person's preference, medical plan, institutional history, criminal charges, length of stay, and any mental or physical illness that may require special housing. ⁷³ The Cumberland County policy states explicitly that the committee "shall avoid blanket housing policies," thus emphasizing the individual nature of the determination. ⁷⁴ The Denver policy instructs the transgender housing committee that it should seek the views of a member of the free-world LGBT community if it needs further guidance. ⁷⁵ The incarcerated person also has a right to be represented at

⁶⁶ [28 C.F.R. § 115.15\(e\)](#), (f) (2013).

⁶⁷ [28 C.F.R. § 115.42\(f\) \(2013\)](#).

⁶⁸ Shay, *supra* note 22 at 365-66.

⁶⁹ Cass R. Sunstein, On the Expressive Function of Law, [144 U. Pa. L. Rev. 2021, 2024 \(1996\)](#).

⁷⁰ See Jackson, *supra* note 38, at 198, 210 (describing how the prison system itself is a form of "sexual violence enacted by the state," and how prison searches and monitoring are experienced by prisoners as sexual abuse); see also Alice Ristroph, Sexual Punishments, [15 Colum. J. Gender & L. 139 \(2006\)](#) (arguing that incarceration itself is a "sexual punishment").

⁷¹ See Cook Cnty., Ill. Interagency Directive No. 64.5.43.0, Mgmt. of Inmates With Gender Identity Disorder (Mar. 7, 2011); Cumberland Cnty. Sheriff's Office Policy No. N-243A, Transgender Inmates (Dec. 2009); D.C. Dep't of Corrections Program Statement No. 4020.3C, Gender Classification & Housing (Dec. 28, 2011); Denver Sheriff Dep't Order 4005.1, Transgender & Gender-Variant Inmates (June 6, 2012). See also Adrienne Lu, For Transgender Detainees, a Jail Policy Offers Some Security, N.Y. Times (Dec. 22, 2011), http://www.nytimes.com/2011/12/23/us/for-transgender-detainees-a-jail-policy-offers-some-security.html?pagewanted=all&_r=0 (describing the implementation of the Cook County, IL policy). I would like to thank Chase Strangio of the ACLU for sharing a helpful summary of these policies, and Amy Whelan of the National Center for Lesbian Rights for sharing copies of these policies.

⁷² See Cumberland Cnty. Sheriff's Office Policy No. N-243A, Transgender Inmates (Dec. 2009); D.C. Dep't of Corrections Program Statement No. 4020.3C, Gender Classification & Housing (Dec. 28, 2011). The Denver policy instructs the Transgender Review Board to consider factors including the inmate's statement of preference form, "individual adjustment to incarceration ... and other psychological factors that may contribute to either the individual's resiliency or vulnerability." Denver Sheriff Dep't Order 4005.1, Transgender & Gender-Variant Inmates (June 6, 2012).

⁷³ Cumberland Cnty. Sheriff's Office Policy No. N-243A, Transgender Inmates (Dec. 2009)

⁷⁴ *Id.*

the Transgender Review Board housing meeting by either a representative of the LGBT community or a department volunteer "who is knowledgeable with the issues surrounding transgender and gender variant people."⁷⁶ These measures suggest to corrections officials the need to educate themselves and grapple meaningfully with issues facing transgender and gender non-conforming incarcerated people.

IV. Implementation: To Be Continued

The outlook for PREA implementation is mixed. Like so [*355] many other efforts to reform our criminal punishment systems, PREA may fail in the execution, especially given the relatively weak enforcement mechanisms.⁷⁷ Even more troubling, PREA reform efforts could boomerang and inadvertently reinforce our nation's over-reliance on incarceration.⁷⁸ Indeed, there are some concerning reports of PREA being used as a sword rather than a shield, providing a rationale for disciplining LGBT incarcerated people for asserted disciplinary infractions such as holding hands or expressing affection.⁷⁹ The ACLU warns of "policies or practices that limit 'cross-gender' expression because such expression 'invites' sexual assault,"⁸⁰ a phenomenon that predates PREA.⁸¹

Most fundamentally, PREA does not address the root problem that exposes too many people to prison sexual violence - over-incarceration.⁸² While United States incarceration rates recently began to decline slightly for the first time in four decades, they are still the world's highest. Writing shortly after PREA's passage, Robert Weisberg and David Mills argued that the "key variables" affecting the rate of prison rape were "really the sheer rates of incarceration in the United States, the density of prison housing, the number and quality of staff, and the abandonment of any meaningful attempts at rehabilitation."⁸³ Put simply, to paraphrase Todd Clear and James Austin, the most direct way to address abuse in prison is to incarcerate fewer people for shorter periods of time.⁸⁴

[*356] I plan to address the challenges of PREA implementation in a Northeastern Law Review piece in 2014. In this symposium contribution, I want to focus on PREA's promise, however elusive and indeterminate. The PREA process is an unprecedented attempt at administrative reform through corrections regulation, with a new emphasis on respect and safety for LGBT people.

Loyola Journal of Public Interest Law
Copyright (c) 2014 Loyola University New Orleans College of Law
Journal of Public Interest Law

⁷⁵ Id.

⁷⁶ Denver Sheriff Dep't Order 4005.1, Transgender & Gender-Variant Inmates (June 6, 2012).

⁷⁷ Kaiser & Stannow, *supra* note 37. See also Alex Friedman, Prison Rape Elimination Act Standards Finally in Effect, But Will They Be Effective?, Prison Legal News, Sept. 2013.

⁷⁸ Jackson, *supra* note 38, at 197, 218; see also Angela Y. Davis, Are Prisons Obsolete? 84-104 (2003) (criticizing prison reform efforts).

⁷⁹ Jackson, *supra* note 38; Telephone Interview with Rev. Jason Lydon, Black & Pink, (October 8, 2013) (discussing issues facing LGBT incarcerated people, including harassment and the issuance of disciplinary infractions for behavior perceived to be romantic or affectionate).

⁸⁰ ACLU Prison Rape Elimination Act (PREA) Toolkit, *supra* note 34, at 6.

⁸¹ Arkles, *supra* note 30, at 908-09.

⁸² Cf. Barrett, *supra* note 11 (discussing causes of burgeoning prison populations including mandatory minimum sentences, reliance on incarceration, and "truth-in-sentencing" laws, and acknowledging that PREA does not address these root causes to ease overcrowding). See also Weisberg & Mills, *supra* note 11.

⁸³ Weisberg & Mills, *supra* note 11.

⁸⁴ Todd R. Clear & James Austin, Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations, 3 Harv. L. & Pol'y Rev. 307, 307-11 (2009).

End of Document



U.S. Department of Justice
Federal Bureau of Prisons

CHANGE NOTICE

OPI: RSD/WSP
NUMBER: 5200.04 CN-1
DATE: May 11, 2018

Transgender Offender Manual

Approved: Mark S. Inch
Director, Federal Bureau of Prisons

This Change Notice (CN) implements the following change to Program Statement 5200.04, **Transgender Offender Manual**, dated January 18, 2017. The purpose of the Change Notice is to ensure that the Transgender Executive Council (TEC) considers issues related to prison management and security in determining appropriate housing of transgender inmates, including risks posed to staff, other inmates, and members of the public. The clarifications to policy will establish appropriate expectations for the inmate population concerning designations.

The changes are marked with a **highlight** and inserted into the policy. Deleted text is struck through. In addition, the branch name has been changed from Female Offender Branch to Women and Special Populations Branch.

1. PURPOSE AND SCOPE

To ensure the Bureau of Prisons (Bureau) properly identifies, tracks, and provides services to the transgender population, **consistent with maintaining security and good order in Federal prisons.**

4. STAFF TRAINING

The **Women and Special Populations Branch** will be responsible for developing training materials and current information on the management of transgender inmates. **Training will include information concerning best practices for maintaining the safety of transgender inmates, while also ensuring security and good order in Federal prisons and the safety of staff, inmates, and the public.** This information will be made available to staff on the **Women and Special Populations Branch** Sallyport page.

5. INITIAL DESIGNATIONS

The TEC will consider factors including, but not limited to, an inmate's security level, criminal and disciplinary history, current gender expression, medical and mental health needs/information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The TEC may also consider facility-specific factors, including inmate populations, staffing patterns, and physical layouts (e.g., types of showers available). ~~The TEC will recommend housing by gender identity when appropriate.~~

In deciding the facility assignment for a transgender or intersex inmate, the TEC should make the following assessments on a case-by-case basis:

- The TEC will use biological sex as the initial determination for designation;
- The TEC will consider the health and safety of the transgender inmate, exploring appropriate options available to assist with mitigating risk to the transgender offender, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, etc.;
- The TEC will consider factors specific to the transgender inmate, such as behavioral history, overall demeanor, and likely interactions with other inmates; and
- The TEC will consider whether placement would threaten the management and security of the institution and/or pose a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.).

The designation to a facility of the inmate's identified gender would be appropriate only in rare cases after consideration of all of the above factors and where there has been significant progress towards transition as demonstrated by medical and mental health history.

It will be noted in SENTRY designation notes that the TEC reviewed the inmate for appropriate institution designation.

7. HOUSING AND PROGRAMMING ASSIGNMENTS

In order for an inmate to be considered for transfer to another institution of the same sex as the inmate's current facility location, ~~including a facility housing individuals of the inmate's identified gender~~, the Warden should consult with the TEC prior to submitting a designation request to the DSCC, but this is not required.

In addition, the Warden may make a recommendation to the TEC to transfer a transgender or intersex inmate based on an inmate's identified gender.

In considering such recommendations, the TEC will apply all criteria of Section 5, above, and make the following assessments concerning the recommendation:

- The TEC will use biological sex as the initial determination for designation;
- The TEC will consider the health and safety of the transgender inmate, exploring appropriate options available to assist with mitigating risk to the transgender offender, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, re-designation to another facility of the same sex, etc.;
- The TEC will also consider factors specific to the transgender inmate, such as behavioral history, overall demeanor, program participation, and likely interactions with other inmates; and
- The TEC will consider whether placement would threaten the management and security of the institution and/or pose a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.).

The designation to a facility of the inmate's identified gender would be appropriate only in rare cases after consideration of all of the above factors and where there has been significant progress towards transition as demonstrated by medical and mental health history, as well as positive institution adjustments.

It will be noted in SENTRY designation notes that the TEC reviewed the inmate for appropriate institution designation.

9. HORMONE AND NECESSARY MEDICAL TREATMENT

Hormone or other necessary medical treatment may be provided after an individualized assessment of the requested inmate by institution medical staff. Medical staff should request consultation from Psychology Services regarding the mental health benefits of hormone or other necessary medical treatment. If appropriate for the inmate, hormone treatment will be provided in accordance with the Program Statement **Patient Care** and relevant clinical guidance. Questions concerning hormone treatment may be referred to the TCCT.



U.S. Department of Justice
Federal Bureau of Prisons

PROGRAM STATEMENT

OPI: RSD/FOB

NUMBER: 5200.04

DATE: January 18, 2017

Transgender Offender Manual

/s/

Approved: Thomas R. Kane

Acting Director, Federal Bureau of Prisons

1. PURPOSE AND SCOPE

To ensure the Bureau of Prisons (Bureau) properly identifies, tracks, and provides services to the transgender population, **consistent with maintaining security and good order in Federal prisons.**

a. Program Objectives. Expected results of this program are:

- This policy is meant to provide guidance to staff in dealing with the unique issues that arise when working with transgender inmates.
- Institutions ensure transgender inmates can access programs and services that meet their needs as appropriate, and prepare them to return to the community.
- Sufficient resources will be allocated to deliver appropriate services to transgender inmates.
- Staff will be offered training, enabling them to work effectively with transgender inmates.
- To support staff's understanding of the increased risk of suicide, mental health issues and victimization of transgender inmates.

b. Institution Supplement. None required. Should local facilities make any changes outside changes required in national policy or establish any additional local procedures to implement national policy, the local Union may invoke to negotiate procedures or appropriate arrangements.

2. DEFINITIONS

Gender – a construct used to classify a person as male, female, both, or neither. Gender encompasses aspects of social identity, psychological identity, and human behavior.

Gender identity – a person’s sense of their own gender, which is communicated to others by their gender expression.

Gender expression – includes mannerisms, clothing, hair style, and choice of activities.

Gender nonconforming – a person whose appearance or manner does not conform to traditional societal gender expectations.

Transgender – the state of one’s gender identity not matching one’s biological sex. For the purposes of this policy, a transgender inmate is one who has met with a Bureau of Prisons psychologist and signed the form indicating consent to be identified within the agency as transgender. This step allows for accommodations to be considered.

Cisgender – the state of one’s gender identity matching one’s biological sex.

Sexual orientation – the direction of one’s sexual interest towards members of the same, opposite, or both genders (e.g., heterosexual, homosexual, bisexual, asexual). Sexual orientation and gender identity are not related.

Gender Dysphoria (GD) – a mental health diagnosis currently defined by DSM-5 as, “A strong and persistent cross-gender identification. It is manifested by a stated desire to be the opposite sex and persistent discomfort with his or her biologically assigned sex.” Not all transgender inmates will have a diagnosis of GD, and a diagnosis of GD is not required for an individual to be provided services.

Intersex – a person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical biological definitions of male or female. Not all intersex people identify as transgender; unless otherwise specified, this policy does not apply to intersex people who do not identify as transgender.

Transition – measures that change one’s gender expression or body to better reflect a person’s gender identity.

3. STAFF RESPONSIBILITIES

The following Bureau components are responsible for ensuring consistent establishment of the programs, services, and resource allocations necessary for transgender offenders.

a. **Central Office**

(1) The **Women and Special Populations Branch** is the agency's primary source and point of contact on classification, management, and intervention programs and practices for transgender inmates in Bureau custody. The Branch is responsible for the following functions as they relate to transgender inmates:

- Engaging stakeholders, including serving as the primary point of contact on issues affecting transgender inmates with judges, political figures, and advocacy groups.
- Ensuring the Bureau offers appropriate services to transgender inmates.
- Preparing budgetary requests to deliver national and pilot programs or services affecting transgender inmates.
- Providing guidance and direction to Regional staff and institution leadership on transgender issues.
- Developing and implementing staff training on transgender issues.
- Building a research-based foundation for the Bureau's work with transgender inmates.
- Presenting at internal and external conferences/events regarding the agency's transgender inmates' practices.
- Developing and monitoring monthly reports on the transgender population and institutional programs.
- Issuing an annual report on the state of transgender offenders in the Bureau that will be made available to all staff and stakeholders.
- Advising agency leadership on transgender inmate needs.
- Conducting an annual survey of transgender inmates in the Bureau and sharing results with internal and external stakeholders.
- Providing national oversight of pilot programs and initiatives serving transgender offenders.

(2) The **Health Services Division** oversees all medical and psychiatric activity as it applies to transgender inmates. Guidance on the most current research-driven clinical medical and psychiatric care of transgender inmates will be provided by the Medical Director.

The Health Services Division also has oversight of a Transgender Clinical Care Team (TCCT). This team will be comprised of Physicians, Pharmacists, and Psychiatrists. Social Workers, Psychologists, and other clinical providers can also be included when appropriate. The TCCT will offer advice and guidance to health services staff on the medical treatment of transgender inmates and/or inmates with GD. Medical staff can raise issues to the TCCT through the Health Services Division.

(3) The **Psychology Services Branch** oversees all psychological mental health programs and services as they apply to transgender inmates, to include providing advice and guidance on

identification and evaluation of transgender inmates, and making recommendations for treatment needs of transgender inmates and/or inmates with GD.

(4) **Central Office Branches/Divisions** of Correctional Services, Psychology Services, Education, Correctional Programs, Reentry Affairs, Residential Reentry Management, Health Services, Health Programs, Social Work, Office of General Counsel, and Trust Fund meet annually with the **Women and Special Populations Branch** to discuss transgender population needs and evaluate current gender-responsive services. The National Union and the Central Office LGBT Special Emphasis Program Manager will be invited to attend these meetings.

(5) The **Transgender Executive Council (TEC)** will consist of staff members from the Health Services Division, the **Women and Special Populations Branch**, Psychology Services, the Correctional Programs Division, the Designation and Sentence Computation Center (DSCC), and the Office of General Counsel. The TEC will meet a minimum of quarterly to offer advice and guidance on unique measures related to treatment and management needs of transgender inmates and/or inmates with GD, including designation issues. Institution staff and DSCC staff may raise issues on specific inmates to the TEC through the **Women and Special Populations Branch**. The National PREA Coordinator is consulted as needed.

b. Regional Offices

- Provide oversight to institutions regarding services and other relevant trends managing transgender inmates.
- Assign transgender responsibilities to the Regional Female Offender/Transgender_Coordinator Collateral Duty Assignment. This individual meets quarterly with the **Women and Special Populations Branch** to discuss staffing and programming needs.

c. Institutions

The institution CEO will establish a multi-disciplinary approach to the management of transgender inmates; specifically:

- Ensure transgender inmates have access to services.
- Enter tracking information for self-identified transgender inmates by updating SENTRY and other databases (e.g., PDS), as appropriate.
- Provide appropriate reentry resources that may be specific to the population.
- Advise the Local Union of transgender inmate management issues, as appropriate.

4. STAFF TRAINING

Staff will be provided specialized training in working with unique issues when managing transgender inmates, with refresher training at annual training. Institutions housing known transgender inmates should provide additional training, if needed.

The **Women and Special Populations Branch** will be responsible for developing training materials and current information on the management of transgender inmates. **Training will include information concerning best practices for maintaining the safety of transgender inmates, while also ensuring security and good order in Federal prisons and the safety of staff, inmates, and the public.** This information will be made available to staff on the **Women and Special Populations Branch** Sallyport page.

In addition, the Prison Rape Elimination Act (PREA) regulations incorporated into the BOP Program Statement **Sexually Abusive Behavior Prevention and Intervention Program** have training requirements concerning pat searches and communication skills for transgender inmates. See 28 C.F.R. § 115.15(f) and 115.31 (a) (9). Please refer to this Program Statement regarding implementation of those training requirements.

Staff will be provided adequate time to complete these trainings during duty hours.

5. INITIAL DESIGNATIONS

The PREA regulations, incorporated into the Program Statement **Sexually Abusive Behavior Prevention and Intervention Program**, state in section 28 C.F.R. § 115.42 (c):

“In deciding whether to assign a transgender or intersex inmate to a facility for male or female inmates...the agency shall consider on a case-by-case basis whether a placement would ensure the inmate’s health and safety, and whether the placement would present management or security problems.”

Upon receipt of information from a Pre-Sentence Report, court order, U.S. Attorney’s Office, defense counsel, the offender, or other source that an individual entering BOP custody is transgender, designations staff will refer the matter to the TEC for advice and guidance on designation.

Institution staff managing pretrial or holdover offenders may also refer cases to the TEC for review. Any TEC recommendations concerning pretrial inmates will be coordinated with the appropriate United States Marshal’s Office.

The TEC will consider factors including, but not limited to, an inmate's security level, criminal and disciplinary history, current gender expression, medical and mental health needs/information, vulnerability to sexual victimization, and likelihood of perpetrating abuse. The TEC may also consider facility-specific factors, including inmate populations, staffing patterns, and physical layouts (e.g., types of showers available). ~~The TEC will recommend housing by gender identity when appropriate.~~

In deciding the facility assignment for a transgender or intersex inmate, the TEC should make the following assessments on a case-by-case basis:

- The TEC will use biological sex as the initial determination for designation;
- The TEC will consider the health and safety of the transgender inmate, exploring appropriate options available to assist with mitigating risk to the transgender offender, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, etc.;
- The TEC will consider factors specific to the transgender inmate, such as behavioral history, overall demeanor, and likely interactions with other inmates; and
- The TEC will consider whether placement would threaten the management and security of the institution and/or pose a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.).

The designation to a facility of the inmate's identified gender would be appropriate only in rare cases after consideration of all of the above factors and where there has been significant progress towards transition as demonstrated by medical and mental health history.

It will be noted in SENTRY designation notes that the TEC reviewed the inmate for appropriate institution designation.

6. INTAKE SCREENING

The PREA regulations in 28 C.F.R. part 115, Subpart A, incorporated into the Program Statement **Sexually Abusive Behavior Prevention and Intervention Program** and the Program Statement **Intake Screening**, address intake screening. Screening of transgender inmates will be conducted in accordance with these policies and all other applicable policies and procedures.

7. HOUSING AND PROGRAMMING ASSIGNMENTS

During Initial classification and Program Reviews, Unit Management staff will twice-yearly review the inmate(s) current housing unit status and programming available for transgender inmates; this review will be documented by Unit Management.

The reviews will consider on a case-by-case basis that the inmate placement does not jeopardize the inmate's health and safety and does not present management or security concerns.

In making housing unit and programming assignments, a transgender or intersex inmate's own views with respect to his/her own safety must be given serious consideration.

Transgender inmates shall be given the opportunity to shower separate from other inmates.

The agency shall not place transgender or intersex inmates in dedicated facilities, units, or wings solely on the basis of such identification or status, unless such placement is in a dedicated facility, unit, or wing established in connection with a consent decree, legal settlement, or legal judgment for the purpose of protecting such inmates.

In order for an inmate to be considered for transfer to another institution of the same sex as the inmate's current facility location, including a facility housing individuals of the inmate's identified gender, the Warden should consult with the TEC prior to submitting a designation request to the DSCC, but this is not required.

In addition, the Warden may make a recommendation to the TEC to transfer a transgender or intersex inmate based on an inmate's identified gender.

In considering such recommendations, the TEC will apply all criteria of Section 5, above, and make the following assessments concerning the recommendation:

- The TEC will use biological sex as the initial determination for designation;
- The TEC will consider the health and safety of the transgender inmate, exploring appropriate options available to assist with mitigating risk to the transgender offender, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, re-designation to another facility of the same sex, etc.;
- The TEC will also consider factors specific to the transgender inmate, such as behavioral history, overall demeanor, program participation, and likely interactions with other inmates; and
- The TEC will consider whether placement would threaten the management and security of the institution and/or pose a risk to other inmates in the institution (e.g., considering inmates with histories of trauma, privacy concerns, etc.).

The designation to a facility of the inmate's identified gender would be appropriate only in rare cases after consideration of all of the above factors and where there has been significant progress

towards transition as demonstrated by medical and mental health history, as well as positive institution adjustments.

It will be noted in SENTRY designation notes that the TEC reviewed the inmate for appropriate institution designation.

8. DOCUMENTATION AND SENTRY ASSIGNMENTS

a. **Medical and Mental Health Information.** Medical and mental health information for transgender inmates will be maintained in the current electronic recordkeeping system in accordance with the Program Statement **Health Information Management**. Medical and mental health information is considered confidential, and may only be released in accordance with appropriate laws, rules, and regulations.

b. **Initial Screening.** For initial designations, designations staff will assign Case Management Activity (CMA) SENTRY assignments if information in the PSR or other documentation indicates a likely transgender identity. The screening codes will be:

SCRN M2F – inmate should be screened for male to female.

SCRN F2M – inmate should be screened for female to male.

Any inmate arriving at the designated institution with a screening code is to be referred to the Chief Psychologist or designee for review within 14 days. If the code was assigned in error, the screening code will be removed by the psychologist. If the inmate identifies as transgender, the psychologist will replace the screening code with an identifying code, as indicated below. Holdover facilities will be exempt from this initial screening requirement, as limited available records and brevity of stay do not allow for a comprehensive screening.

Any inmate who arrives without a screening code but identifies as transgender during intake, or at any time during the incarceration period, is referred to the Chief Psychologist or designee and interviewed within 14 days of the inmate notification. Inmates in pretrial status at Bureau facilities may also receive a SENTRY code.

c. **Notification to Staff and Tracking.** After consultation with Psychology Services, and if the inmate affirms his/her transgender identity, the screening code will be updated to a permanent assignment by a psychologist:

TRN M2F – inmate is male to female transgender (transgender female).

TRN F2M – inmate is a female to male transgender (transgender male).

The inmate must request to Psychology Services staff that the CMA assignment be entered, and the inmate consents that all staff will therefore be notified that the individual is transgender. The inmate's request will be documented on BP-A1110, Case Management Activity (CMA) SENTRY Assignment Consent Form for Transgender Inmates (included as Attachment A to this policy). Psychology Services will maintain the form in the electronic mental health record and forward a copy of the form to the Unit Team. The Unit Team will maintain the form in the FOI Exempt section of the Central File.

Staff should consult the CMA assignment when interacting with the inmate; e.g., use of pronouns, searches, commissary items, etc., as indicated below.

If there are questions about the need to continue a CMA assignment, the Warden should contact the **Women and Special Populations Branch**. Should the CMA assignment change, staff members will not be disciplined for the continued provision of accommodations or use of pronouns.

9. HORMONE AND **NECESSARY** MEDICAL TREATMENT

Hormone or other **necessary** medical treatment may be provided after an individualized assessment of the requested inmate by institution medical staff. Medical staff should request consultation from Psychology Services regarding the mental health benefits of hormone or other **necessary** medical treatment. If appropriate for the inmate, hormone treatment will be provided in accordance with the Program Statement **Patient Care** and relevant clinical guidance. Questions concerning hormone treatment may be referred to the TCCT.

In the event this treatment changes the inmate's appearance to the extent a new identification card is needed, the inmate will not be charged for the identification card.

10. INSTITUTION PSYCHOLOGY SERVICES

Bureau psychologists are available to provide assessment and treatment services for transgender inmates, if appropriate. Guidance on assessment procedures will be provided by the Psychology Services Branch.

If an inmate identifies as transgender, the psychologist will provide the inmate with information regarding the range of treatment options available in the Bureau and their implications. In addition, based upon the psychologist's preliminary assessment and the inmate's expressed interest, a referral to the Clinical Director and/or Chief Psychiatrist may be generated. While the initial interview must be scheduled within 14 days, an assessment may take longer in some instances.

In addition to a referral to medical services, a transgender inmate may be offered individual psychotherapy. Individual psychotherapy goals might include: (1) helping the inmate to live more comfortably within a gender identity and deal effectively with non-gender issues; (2) emphasizing the need to set realistic life goals related to daily living, work, and relationships, including family of origin; (3) seeking to define and address issues that may have undermined a stable lifestyle, such as substance abuse and/or criminality; and (4) addressing any co-occurring mental health issues. Mood disorders, anxiety disorders, substance use disorders, and personality disorders, etc., may also be present; any effective treatment plan will fully address these symptoms.

If an institution has multiple transgender inmates, a support group facilitated by a mental health provider may also be a component of the treatment plan. Common concerns of transgender inmates, which may be addressed effectively in a group setting, include self-esteem issues and relationship issues.

Psychologists who provide mental health treatment for transgender inmates address all mental health needs, including suicide risk, if present.

Psychologists working with transgender inmates are encouraged to consult the Reentry Services Division in Central Office for additional resources.

11. PRONOUNS AND NAMES

Staff interacting with inmates who have a CMA assignment of transgender can use the authorized gender-neutral communication with inmates (e.g., by the legal last name or “Inmate” last name). Transgender inmates often prefer to be called by pronouns of their identified gender identity. Staff may choose to use these gender-specific pronouns or salutations per the inmate’s request, and will not be disciplined for doing so.

An official committed name change while in BOP custody must be done consistent with the Program Statement **Correctional Systems Manual**, Chapter 4. The name entered on the inmate’s Judgement and Commitment Order will remain the official committed name for all Bureau records (incident reports, progress reviews, sentence calculations, etc.). However, any additional names or aliases can be entered into SENTRY as appropriate.

12. PAT SEARCHES

Pat searches of transgender inmates will be conducted in accordance with the Program Statement **Searches of Housing Units, Inmates, and Inmate Work Areas**. The policy language, included here as a reference, states:

“Transgender Inmates – For purposes of pat searching, inmates will be pat-searched in accordance with the gender of the institution, or housing assignment, in which they are assigned. Transgender inmates may request an exception. The exception must be pre-authorized by the Warden, after consultation with staff from Health Services, Psychology Services, Unit Management, and Correctional Services. Exceptions must be specifically described (e.g., “pat search only by female staff”), clearly communicated to relevant staff through a memorandum, and reflected in SENTRY (or other Bureau database; e.g., posted picture file). Inmates should be provided a personal identifier (e.g., notation on commissary card, etc.) that indicates their individual exception, to be carried at all times and presented to staff prior to pat searches.”

It is recommended the inmate request the exception by submitting an Inmate Request to Staff (BP-A0148) to the Warden. The Warden will consult with the departments listed above, and the memo approving or denying the request will be generated by the Warden’s Office.

Inmates who are granted this exception under policy may have it reversed by the Warden if found to have violated institution rules concerning contraband.

In exigent circumstances, any staff member may conduct a pat search of any inmate consistent with the Program Statement **Searches of Housing Units, Inmates, and Inmate Work Areas**.

13. VISUAL SEARCHES

For purposes of a visual search, inmates will be searched in accordance with the gender of the institution, or housing assignment, to which they are assigned. The visual search shall be made in a manner designed to ensure as much privacy to the inmate as practicable. Staff should consider the physical layout of the institution, and the characteristics of an inmate with a transgender CMA assignment, to adjust conditions of the visual search as needed for the inmate’s privacy.

Transgender inmates may also request an exception to be visually searched by a staff member of the inmate’s identified gender. The exception must be pre-authorized by the Warden, after consultation with staff from Health Services, Psychology Services, Unit Management, and Correctional Services. Exceptions must be specifically described (e.g., “visual search only by female staff”), clearly communicated to relevant staff through a memorandum, and reflected in SENTRY (or other Bureau database; e.g., posted picture file). Inmates should be provided a

personal identifier (e.g., notation on commissary card, etc.) that indicates their individual exception, to be carried at all times and presented to staff prior to visual searches.

It is recommended the inmate request the exception by submitting an Inmate Request to Staff (BP-A0148) to the Warden. The Warden will consult with the departments listed above, and the memo approving or denying the request will be generated by the Warden's Office.

Inmates who are granted this exception under policy may have it reversed by the Warden if found to have violated institution rules concerning contraband.

Transgender inmates placed at an institution or in a housing unit that does not correspond with their identified gender, and who are granted an exemption as indicated above, will be searched by: bargaining unit staff of the inmate's identified gender who consent to participate in the search; management staff of the inmate's identified gender who consent to participate in the search; or available Health Services clinical staff.

Transgender inmates placed at an institution or in a housing unit of their identified gender will be searched by bargaining unit staff of the inmate's identified gender who consent to participate in the search; management staff of the inmate's identified gender; or available medical staff.

Institutions should consider using available body scanning technology in lieu of visual searches of transgender inmates.

In exigent circumstances, any staff member may conduct a visual search of any inmate consistent with the Program Statement **Searches of Housing Units, Inmates, and Inmate Work Areas**.

14. CLOTHING AND COMMISSARY ITEMS

Consistent with safety and security concerns, inmates with the CMA assignment of transgender will have the opportunity to have undergarments of their identified gender even if they are not housed with inmates of the identified gender. Institutional laundry will have available institutional undergarments that fulfill the needs of transgender inmates. Undergarments will not have metal components.

Standardized lists of Commissary items for transgender inmates are available in accordance with the Program Statement **Trust Fund/Deposit Manual**.

Additional items based on an individualized assessment of the transgender inmate may be approved by the Warden. Additional items may be provided by the institution or purchased by the inmate, as appropriate.

Inmates who purchase and/or are provided items under this section will be subject to disciplinary sanctions, including the removal of these items, if they are found to have violated institution rules relating to the possession of these items.

15. REENTRY NEEDS

In accordance with the Program Statement **Release Preparation Program**, institution staff should assist transgender inmates in addressing these issues prior to release or placement in a Residential Reentry Center/Home Confinement.

During initial classifications and Program Reviews, Unit Management will formulate a pre-release plan that will assist transgender inmates in obtaining appropriate identification, finding housing and employment, and providing community resources to reintegrate into the community.

The Reentry Affairs Coordinator may assist staff with identifying these resources. Institution and/or Regional Social Workers should be contacted concerning the continuity of medical care.

The **Women and Special Populations Branch** and/or Social Workers can be contacted to provide guidance and resources for reentry needs of transgender inmates.

16. ADMINISTRATIVE REMEDIES

Inmates may use the procedures of the Program Statement **Administrative Remedy Program** concerning any issues relating to this policy.

REFERENCES

Program Statements

P1330.18	Administrative Remedy Program (1/6/14)
P4500.11	Trust Fund/Deposit Fund Manual (4/9/15)
P5100.08	Security Designation and Custody Classification Manual (9/12/06)
P5290.15	Intake Screening (3/30/09)
P5310.12	Psychology Services Manual (03/07/95)
P5310.16	Treatment and Care of Inmates with Mental Illness (5/1/14)
P5322.13	Inmate Classification and Program Review (5/16/14)
P5324.08	Suicide Prevention (4/5/07)
P5324.12	Sexually Abusive Behavior Prevention and Intervention Program (6/4/15)
P5325.07	Release Preparation Program (12/31/07)
P5521.06	Searches of Housing Units, Inmates, and Inmate Work Areas (6/4/15)
P5800.15	Correctional Systems Manual (9/23/16)

P6031.04 Patient Care (6/3/14)
P6090.04 Health Information Management (3/2/15)

Federal Regulations

28 CFR part 115

Additional Resources For Clinicians

Diagnostic and Statistical Manual of Mental Disorders (DSM), most current version.

World Professional Association for Transgender Health (WPATH) standards.

BOP Forms

BP-A0148 Inmate Request to Staff

BP-A1110 Case Management Activity (CMA) SENTRY Assignment Consent Form for Transgender Inmates

*ACA Standards (see Program Statement, **Directives Management Manual**, sections 2.5 and 10.3)*

- American Correctional Association Standards for Adult Correctional Institutions, 4th Edition: 4-4056M, 4-4084M, 4-4084.1M, 4-4133M, 4-4180M, 4-4194M, 4-4278M, 4-4281.1M, 4-4281.2M, 4-4281.3M, 4-4281.4M, 4-4281.5M, 4-4281.6M, 4-4281.7M, 4-4281.8M, 4-4362M, 4-4371M, 4-4406M.
- American Correctional Association Performance Based Standards for Adult Local Detention Facilities, 4th Edition: 4-ALDF-2A-29, 4-ALDF-2A-32, 4-ALDF-2A-34, 4-ALDF-6B-03, 4-ALDF-2C-03, 4-ALDF-4C-22M, 4-ALDF-4C-30M, 4-ALDF-4D-22, 4-ALDF-4D-22-1, 4-ALDF-4D-22-2, 4-ALDF-4D-22-3, 4-ALDF-4D-22-4, 4-ALDF-4D-22-5, 4-ALDF-4D-22-6M, 4-ALDF-4D-22-7, 4-ALDF-4D-22-8, 4-ALDF-7B-08, 4-ALDF-7B-10, 4-ALDF-7B-10-1.
- American Correctional Association Standards for Administration of Correctional Agencies, 2nd Edition: None.
- American Correctional Association Standards for Correctional Training Academies: None.

Records Retention

Requirements and retention guidance for records and information applicable to this program are available in the Records and Information Disposition Schedule (RIDS) on Sallyport.

**Attachment A. Case Management Activity (CMA) SENTRY Assignment
Consent Form for Transgender Inmates (BP-A1110)**

I agree that Bureau of Prisons staff may enter a CMA assignment on SENTRY concerning my gender identity.

I understand that this CMA assignment will identify me as transgender to all staff members.

I understand that the purpose of the CMA assignment is to assist staff members in providing programs and taking measures as described in the Program Statement **Transgender Offender Manual**.

I understand that specific medical and mental health information will not be disclosed to all staff using the CMA assignment; specific medical and mental health information is maintained separately.

Inmate Name:

Register Number:

Signature:

Date:



COMING OUT OF CONCRETE CLOSETS

A REPORT ON BLACK & PINK'S NATIONAL LGBTQ PRISONER SURVEY

To increase the power of prisoners we need greater access to the political process. We need real! access to real people in real power who will actively hear us and help us, not just give us lip service, come sit and talk with me, help me take my dreams and present them to the people who can turn them into a reality, I am not persona non grata, hear me, don't patronize me just to keep me quiet, understand that I'm very capable of helping in this fight. -Survey respondent

Jason Lydon
with
Kamaria Carrington
Hana Low
Reed Miller
Mahsa Yazdy

Black & Pink
October 2015
www.blackandpink.org

This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.



Version 2, 10.21.2015

Cover image: "Alcatraz" by Mike Shelby / CC BY 2.0

TABLE OF CONTENTS

Executive Summary	3
Key Findings.....	3
Recommendations	6
Policing and Criminalization of LGBTQ People	6
Courts / Bail Reform / Sentencing.....	7
Prison Conditions and Decarceration.....	9
Introduction	12
A Note on Language	13
Scope And Methodology	15
Demographics	18
Age.....	18
Race	18
Gender/Sex and Sexuality	19
Children	19
Schooling	20
Housing.....	20
Military Service.....	21
Employment and Criminalized economies.....	21
Arrest and Incarceration	22
Pretrial Detention, Courts, Bail, Sentencing, and Parole	24
Pretrial Detention.....	24
Experiences with Defense Attorneys	24
Sentencing.....	25
Facilities.....	26
Parole	27
Sexuality, Gender Identity, And Sexual Activity	29
Sexuality	29
Gender Identity	30

Sexual Activity.....	31
Solitary Confinement	34
Race / Ethnicity and Solitary Confinement.....	36
Gender / Sex and Sexuality and Solitary Confinement.....	37
Prison Security Level and Solitary Confinement.....	37
Self-Identified Mental Illness and Solitary Confinement.....	38
Discrimination And Violence.....	39
Violence by Staff	39
Strip Searches	41
Violence by Other Prisoners	42
Healthcare.....	46
Fees	46
HIV / AIDS.....	46
Mental Illness.....	48
Respect	49
Relationships And Community	51
Romantic Relationships	51
Intimate Partner Abuse, Survival and Resilience.....	53
Relationships with Community Outside of Prison	55
Programs.....	56
Access to Books	56
Visions For Movement Building	58
Conclusion.....	60
Acknowledgments	60

EXECUTIVE SUMMARY

This report lifts up the voices of LGBTQ prisoners from across the United States so that they can inform, shape, and lead the movement for prisoner justice. These numbers, statistics, and stories represent the largest ever collection of information from LGBTQ prisoners. This collection of information is possible because of the time taken by 1,118 prisoners across the United States to handwrite responses to our 133-question survey, which was itself designed/drafted with prisoners themselves. Black & Pink's free world leadership extends the utmost thanks to prisoner members who took the time to help design and respond to the National LGBTQ Prisoner Survey and for sharing their deeply personal and valuable stories of harm and resilience. This report will be printed in the Black & Pink newspaper for all prisoner members to read. Along with the report, there will be space for responses and reflections that will be compiled into a supplementary report to be released in Spring/Summer of 2016.

LGBTQ people, particularly people of color and poor people, experience high levels of policing and criminalization, leading to arrest and incarceration. Once inside prison, LGBTQ people are subjected to constant violence by both prison staff and other prisoners. This report seeks to offer a tool for organizers, both inside and outside of prisons, to strengthen national campaigns and grassroots efforts to alleviate the immediate suffering of prisoners and bring an end to the prison industrial complex while centering the needs of LGBTQ prisoners.

KEY FINDINGS

Homelessness and Housing

- Nearly a fifth of respondents reported being homeless or transient prior to their incarceration, while 29% lived with family or a friend. Only 52% were living in a home of their own.

Unemployment and Criminalized Economies

- Over a third of respondents reported being unemployed prior to their incarceration, nearly 7 times the 2014 national unemployment rate in 2014.
- 39% of respondents reported that they have traded sex for survival.
- Selling drugs is also a frequent means of survival: over half of respondents have sold drugs for money. Black respondents were nearly 20% more likely to have participated in the drug trade than white respondents (67% and 48% respectively). This over-representation of Black respondents in the drug trade highlights the racism of the War on Drugs, since white people are actually *more* likely to sell drugs.

Arrest and Incarceration

- Close to two thirds (58%) of respondents' first arrest occurred when they were under the age of 18. Black and Latin@/Hispanic respondents were more likely to have their first arrest occur when they were under 18 compared to white respondents (66% versus 51%, respectively).
- For two thirds of respondents, the current sentence they are serving is not their first experience of incarceration. Frequency of incarceration varied, although Black, Latin@/Hispanic, and mixed-race respondents were more likely to have experienced multiple incarcerations than their white and Native American/American Indian counterparts.

Education

- Ninety percent of respondents have completed high school or earned a GED. Closer scrutiny, however, reveals that *only* 29% of respondents completed high school outside of prison. This means that 71% of respondents dropped out of school, were expelled from school, or never attended school in the first place.

Children

- Forty five percent of respondents report having children, although only 29% of these parents report having any kind of contact with their children.

Pretrial Detention

- Nearly three quarters of respondents were held in jail prior to their conviction. Of those held in pretrial detention, more than half were detained for a year or more.

Sentencing

- Respondents were twice serving life sentences at twice the rate of the general state and federal prison populations.
- The average time respondents have spent in prison on their current sentence was 10 years. According to research by Pew, prisoners released in 2009 served an average of 2.9 years in custody.

Prison Security Levels

- While all respondents were over-represented in higher security facilities as compared with the national prison population, white respondents were held in minimum security prisons at nearly twice the rate of Black respondents.

Parole

- Nearly a third of respondents have been granted parole on a previous sentence. Of those who have been granted parole, 65% have been returned to prison on a parole violation.

Sexual Identity and Gender Identity

- 65% of respondents identified as LGBTQ prior to their incarceration.
- 70% of respondents experienced emotional pain from hiding their sexuality during incarceration/throughout their interactions with the criminal legal system.
- 78% of transgender, nonbinary gender, and Two-Spirit respondents experienced emotional pain from hiding their gender identity during incarceration/throughout their interactions with the criminal legal system.
- Of transgender, nonbinary gender, and Two-Spirit survey respondents, only 43% have been diagnosed with Gender Identity Disorder or Gender Dysphoria. 31% reported being denied these diagnoses upon seeking them during incarceration.
- More than a third of transgender, nonbinary gender, and Two-Spirit respondents took hormones prior to their incarceration. The majority of these respondents took street-based hormones that were not prescribed by a doctor.
- 23% of transgender, nonbinary gender, and Two-Spirit respondents are currently taking hormones in prison, while an overwhelming 44% report being denied access to hormones they requested.
- Only 21% of respondents are allowed access to underwear and cosmetic needs that match their gender.
- 15% of respondents have been barred from programs offered by the prison because they identify as LGBTQ.
- Only 20% of respondents have access to LGBTQ affirming books.

Sexual Activity

- 70% of respondents have been sexually active in prison.
- Only 2% of respondents have access to condoms allowed by the prison, yet 22% have used a condom or another barrier to stop the transmission of sexually transmitted infections (STIs).
- 81% of respondents discussed safer sex with their sexual partner(s).
- Over a third of respondents have been disciplined for engaging in consensual sex, and of those, nearly two thirds have been placed in solitary confinement as punishment for consensual sexual activity.

Solitary Confinement

- 85% of respondents have been in solitary confinement at some point during their sentence; approximately half have spent 2 or more years there. Altogether, respondents have spent a total of 5,110 years in solitary confinement.
- Black, Latin@/Hispanic, mixed-race, and Native American/American Indian respondents were twice as likely to have been in solitary confinement, at the time of the survey, than white respondents.
- Respondents with a mental illness diagnosis were more likely to be in solitary confinement at the time of the survey and more likely to have ever been in solitary confinement than survey respondents without such a diagnosis.

Experiences of Violence

- Respondents were over 6 times more likely to be sexually assaulted than the general prison population.
- All survey respondents have experienced strip searches. In answer to the question regarding how many times they have been strip searched, answers ranged anywhere from 1 to 50, 250, 500, “millions,” “every day in 12 years,” and “too many to count.” One respondent wrote, “who the heck keeps track of all that?” This means that, despite the declared intentions of the Prison Rape Elimination Act (PREA), 100% of prisoners have experienced sexual violence by prison staff.
- Prisoners are over three times more likely to have committed sexual assaults on LGBTQ prisoners than prison staff. However, of those who report having been sexually assaulted by a prisoner, 76% also report that prison staff intentionally placed them in situations where they would be at high risk of sexually assault from another prisoner.
- The vast majority of respondents experienced discrimination and verbal harassment by prison staff and more than a third were physically assaulted by prison staff.

Healthcare

- Seven percent of survey respondents are HIV positive.
- Black respondents were more than 2 times more likely to be HIV positive than white respondents.
- 81% of respondents reported having to pay a fee to see a doctor. Fees ranged from \$1 per visit to \$100 per year.
- Fees prevented 43% of respondents from seeking medical care they needed.
- 67% of respondents have been diagnosed with a mental illness; of these, 48% receive no therapy.

Relationships and Community

- 68% of respondents have been in a romantic relationship with another prisoner while incarcerated.
- One third of respondents in romantic relationships experienced intimate partner abuse.
- 66% of respondents have monthly correspondence with someone outside of prison.

Prisoner Needs and Demands

- The clearest mandate from respondents was that Black & Pink should continue its current projects: the newspaper, pen pal program, resource list, and prisoner advocacy (e.g., calling prisons to advocate for individual prisoners who are being abused). Respondents reported that both the newspaper and pen pal program help them deal with the stress of being incarcerated and feel accepted in their gender and sexuality.
- Respondents need more information about their rights, legal changes, and case law. Abuse and discrimination from prison staff is a major concern.
- Respondents want their voices and stories to reach both lawmakers and the general public in order to educate them about what prison conditions are actually like for LGBTQ people.

RECOMMENDATIONS

As an abolitionist organization, Black & Pink makes the following recommendations in the spirit of what Ruth Wilson Gilmore calls “non-reformist reforms” or what are also called abolitionist reforms. While we remain committed to the abolition of prisons, we recognize that meeting the needs and ending the daily suffering of LGBTQ prisoners is also an urgent necessity. We are convinced that such reforms are not necessarily incompatible with an abolitionist politics, provided that they do not create new barriers or prisons that we will need to tear down in the future. Hence, our recommendations include policy proposals, advocacy areas, and grassroots organizing priorities that meet the immediate needs of LGBTQ prisoners and criminalized LGBTQ communities outside of prison which we believe will neither ideologically nor materially increase the power of any facet of the prison industrial complex.

The recommendations are divided into short-term, intermediate, and long-term efforts within specific advocacy areas. Each is informed by the findings of the report and/or comes directly from recommendations articulated by respondents themselves. Black & Pink wishes to emphasize that in moving forward with implementation, it is imperative that policymakers and community organizers remain vigilant against unwittingly introducing reforms that reinforce the power of the system they seek to change.

POLICING AND CRIMINALIZATION OF LGBTQ PEOPLE

Short-Term:

- **Eliminate the practice of Stop & Frisk/Search in every municipality.** Evidence shows that Stop & Frisk practices discriminate on the basis of race and also disproportionately target LGBTQ people. Ending these practices would slow the funneling of LGBTQ people of color into the courts and prison system.
- **Pass the End Racial Profiling Act (ERPA) (in its sexual orientation- and gender identity-inclusive version).** Advocates have long been trying to pass ERPA, a federal law that would prohibit racial profiling, collect data on racial profiling, provide police with re-training on racial profiling, and hold departments that continue to racially profile accountable, albeit without success. As of 2015, ERPA is now inclusive of sexual orientation and gender identity. Lambda Legal’s report, “Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security,” showed that 25% of LGBT respondents who had interactions with police experienced misconduct and harassment. Passing an inclusive ERPA will ensure new tools are available for LGBTQ people to resist profiling.
- **End “Quality of Life” policing practices.** Our findings contribute to the wealth of research that shows LGBTQ people disproportionately experience homelessness, trade sex for survival needs, struggle with addiction, and live with mental illness, all of which are all criminalized under “Quality of Life” policies. “Quality of Life” policies do nothing to help those they criminalize and instead lead to increased incarceration, rather than provision of social services and public health measures for those who need them.
- **End all stings on internet and public spaces known to be used for purchasing and selling sex.** Ongoing police surveillance of these spaces forces those who trade sex into less public environments with fewer potential clients, forcing individuals to engage in transactions they otherwise would have rejected (e.g., sex without a condom). Given that many respondents have engaged in the sex trade prior to their incarceration, it is important to allow safer practices for trading sex.

Intermediate:

- **End the criminalization of the sex trade, for both purchasers and sellers of sex.** Decriminalizing sex trades will facilitate a safer economy and allow for greater resources and support systems to be developed by and for those engaged in the sex trade. As well, decriminalizing the sex trade will work to alleviate the discrimination in housing and employment faced by many with criminal records for sex trade participation.
- **End the practice of arresting people under the age of 18.** Youth are being introduced into the criminal legal system at increasingly earlier ages. Rather than addressing youth conflict with arrests, community-based teams should be created to stop the cycle of multiple incarcerations before it begins.
- **End the War on Drugs and decriminalize drug possession.** The majority of respondents report having sold drugs at some point in their lives. However, as has been thoroughly demonstrated, the War on Drugs has failed to reduce the use of drugs or increase safety. Criminalization of drugs does not decrease the harm caused by the drug trade, but rather gives police an additional tool to profile and arrest communities of color. Harm reduction strategies can teach people how to use drugs in safer ways, which saves lives and improves quality of life much more effectively than compulsory incarceration.
- **Create addiction treatment-on-demand programs and mental health treatment programs in non-carceral settings.** Rather than criminalize addiction and mental illness, or create more prison beds in the name of “drug treatment,” well-funded community-based addiction treatment programs and outpatient mental health care facilities would create authentic opportunities for healing and healthcare that can keep individuals and communities safer.
- **Utilize saved funds from decreased policing to create affordable and accessible housing for those most affected by homelessness and incarceration.** Nearly a fifth of respondents were homeless or transient prior to their incarceration. Establishing affordable and accessible housing will reduce reliance on criminalized economies to survive. Ending homelessness will also keep individuals out of constant surveillance by police, decreasing their likelihood of arrest and incarceration.

Long-Term:

- **Abolish the police.** Police forces’ direct ancestors are the slave patrols that targeted Black people for violence, arrest, and enslavement. This institution has always created more harm than good for those society considers disposable, particularly people of color. Policing practices are inherently rooted in maintaining systemic oppression and as such the long term goal is to create a world free from the power of police.
- **Institute community-based solutions to harm and violence.** Abolishing the police will not bring an end to all forms of interpersonal harm and violence. Establishing alternative ways to address harm without punitive based systems will facilitate both healing for survivors and accountability for those who caused harm or stood by as harm occurred. These practices can be started well before the end of the police and organizations such as *Creative Interventions*, *Generation FIVE*, and *Philly Stands Up* have already begun such initiatives.

COURTS / BAIL REFORM / SENTENCING

Short-Term:

- **Train all court-appointed attorneys on LGBTQ issues re: appropriate client advocacy (e.g., using correct name and pronouns).** With effective trainings, attorneys will, ideally, be less likely to discriminate against their own LGBTQ clients. Training should be led by or undertaken in collaboration with currently or formerly court-involved LGBTQ people.

- **Train all judges on LGBTQ issues and appropriate address of defendants.** Judges are responsible for setting the tone in the courtroom, and the majority of respondents report feeling discriminated against by judges. It is important that judges are trained on appropriate modes of interaction with LGBTQ defendants to create a less hostile environment.
- **Increase financial support for public defender programs.** The enormous caseload saddling public defenders across the country indicates a significant need for these attorneys, who are unable to serve their clients effectively due to overwork. Increasing resources to public defender programs should lead to the hiring of more staff who are able to address the unique needs of all their clients, including LGBTQ defendants.
- **End the practice of incarcerating people on parole or probation for violations that are not new criminal charges.** Reincarceration for technical violations of parole or probation increases recidivism. Rather than choosing incarceration in these circumstances, parole and probation officers should be trained to effectively support individuals under their supervision to find housing, access an income, and receive other social services they need.
- **Repeal all three-strikes laws and create a process for releasing individuals serving time on a third strike.** These laws are simply placing more people in prison, producing overcrowding and creating more violent environments.

Intermediate:

- **Eliminate financial conditions for pretrial release and develop local pretrial service systems to support and assist defendants' appearance for court dates.** Nearly three quarters of survey respondents were held in jail prior to their conviction. However, multiple states across the country have instituted new pretrial services that do not require defendants to pay bail or bond in order to regain their freedom. These programs have proven effective at ensuring defendants' appearance in court without mandating incarceration beforehand.
- **End mandatory minimum sentences for all offenses.** Not only are our respondents doing long sentences, but the far majority also took plea deals. The threat of a mandatory minimum sentence pressures defendants into taking plea deals for fear of serving lengthy sentences if they are convicted at trial. Mandatory minimums also require people to spend longer time in prison without access to parole, eliminating them would expand opportunities for parole.
- **Abolish life sentences and the death penalty.** Rather than hold people accountable for harm they have caused, life sentences and the death penalty simply dispose of human beings. They inherently dehumanize people by presuming there is nothing of value left to them. More than 20% of survey respondents are serving life sentences. Taking away these sentences will require courts and society to engage in actual transformative justice processes with those who have caused harm rather than simply throw them away.

Long-Term:

- **Close the criminal court system.** The US criminal legal system is claimed by its proponents as the "best system in the world," yet the basis of the system is punishment of individual acts with little to no attention to transformation of social conditions that led to harm occurring or authentic healing for those who have experienced harm. Rather than rely on a system that is rooted in 17th Century Puritan values of punitive control, new systems are necessary that refuse to allow racial/gender/sexual identities and access to wealth to be the determinants of justice.
- **Institute community-based solutions to harm and violence.**

PRISON CONDITIONS AND DECARCERATION

Short-Term:

- **Eliminate solitary confinement.** A wealth of evidence shows the long-term detrimental effects of solitary confinement; it is considered a form of torture by the UN Special Rapporteur on Torture. Solitary confinement is also used as a tool of control over LGBTQ prisoners, especially transgender women and cisgender gay men. 85% of respondents have been held in solitary confinement at some point during their sentence.
- **End prisoner strip searches.** Our data indicates that queer prisoners are strip searched repeatedly. However, this bodily invasion is a form of sexual assault and should not be common practice among prison officials. The security benefits of strip searching do not outweigh the sexual trauma experienced by prisoners subjected to this practice.
- **Permit consensual sex between prisoners and provide access to a variety of safer sex options, including condoms and Pre-exposure Prophylaxis (PrEP).** 70% percent of respondents have engaged in consensual sex with other prisoners, but only 2% have access to condoms. Rather than disciplining prisoners for engaging in consensual sex, prisons should provide access to safer sex options to reduce the transmission of sexually transmitted infections (STIs).
- **Eliminate all fees for medical care in prison. Provide full care for people living with HIV and Hepatitis C, including the cure for Hepatitis C.** All prisoners have a right to medical care
- **Allow all prisoners access to the underwear, uniform, and canteen of their choice.** Not all prisoners who might want access to undergarments or other gendered canteen options identify as transgender, although it is essential that transgender and gender variant prisoners have access to undergarments and canteen options not provided at the prison they are assigned to. Quite simply, there is no need for any policy restricting gendered clothing or canteen options at any prison or for any prisoner. Any and all such restrictions should be eliminated.
- **Create clear policies that allow transgender prisoners easy access to gender affirming medical and mental health care, including: access to hormone replacement therapy, individual and group talk therapy, gender confirming surgeries, electrolysis, and any and all other treatments recommended by doctors and mental health clinicians.** The majority of transgender survey respondents have been denied access to requested health care. More than half are unaware of any policy that might allow transgender prisoners to access such services. The consistent denial of transgender health care is rooted in transphobia and it must end.
- **Establish the safest possible housing for LGBTQ prisoners.** Policies for housing transgender prisoners should be based on individualized assessments that presume housing is assigned according to gender identity (rather than legally assigned sex). However, in all cases, individual prisoners must also be allowed to specify their housing preference and have that preference respected, even if it seems to differ from their gender identity. LGBTQ prisoners should also have the option of being housed with other LGBTQ prisoners in their facility, although no resources should be spent on building additional bed space that would be used to incarcerate more individuals.
- **Ensure every prison has a library that all prisoners can access. Provide LGBTQ-affirming books in all prison libraries.** Access to books, especially LGBTQ-affirming books, can affirm stigmatized identities and provide a respite from prison life.
- **Permit prisoners to correspond with one another through letters and email.** Nearly one-third of respondents have no regular contact with anyone outside the prison where they are housed. Moreover, mail distribution is often conducted publicly, with prison staff calling out the names of prisoners who have received letters or packages. Prisoners whose names are never called are noticed by other prisoners and sometimes made a target for harassment or abuse, since it is presumed they do not have a network of

protection or support. Being able to correspond with other prisoners thus potentially protects prisoners, increases their relational connections with others, and reduces isolation.

- **Ensure all prisoners can make free and unrecorded calls to domestic violence, sexual assault, and drug abuse hotlines.** Nearly 40% of respondents report being sexually assaulted (either by prison staff or other prisoners) and it is essential to healing for survivors to have access to outside services.
- **End all prison/jail contracts with phone companies charging more than \$5.00 per 15-minute phone call.** The expense of phone calls creates significant barriers to communication, not only between prisoners, but also between prisoners and people on the outside.

Intermediate:

- **Institute a moratorium on all prison/jail/detention center development (including, but not limited to, state funded research on prison expansion projects, additional bed space added to existing prisons/jails/detention centers, and building new institutions).** The violence, abuse, and oppression detailed in this report show that prisons cause significant harm. There should be absolutely no expansion of the carceral system while these harms remain unaddressed.
- **Close all supermax prisons.** Survey respondents are disproportionately housed in supermax prisons, which have been decried by human rights organizations around the world for the harm caused by constant sensory deprivation.
- **Hold all prison staff accountable (including clear paths to termination) who harass or physically/sexually assault prisoners.** Expand policies that hold staff accountable who are on duty when prisoners sexually assault one another. Prison staff set the tone of the prison environment. As such they should be held accountable for the harm they perpetuate. Respondents have experienced many forms of harm by prison staff, and if there were greater accountability for those staff, the harm may decrease.
- **Establish presumptive parole guidelines that will facilitate the release of prisoners at their first parole eligibility date unless they are charged with a new criminal offense while serving their sentence.** Along with ending life sentences, the practice of presumptive parole will facilitate the quicker exit of more people from prison. Given that our respondents are serving such long sentences, the practice of presumptive parole would help decrease the amount of time they are forced to serve on their sentences.
- **End indefinite commitment for people convicted of sex offenses.** Develop effective programs that facilitate safe integration back into the community and provide sustainable housing and meaningful work opportunities. The practice of civil commitment is considered, by many advocates, to be unconstitutional. There is much evidence to show that there are adequate tools and treatment to reduce sexual harm without indefinite detention.
- **End the practice of disenfranchisement and reinstate voting rights to all prisoners during and following their incarceration.** When people are incarcerated they do not stop being affected by the political process. Rather than revoke an individual's right to vote when convicted of an offense, prisons should provide opportunities for prisoners to engage in the political process.
- **Increase financial compensation for prisoners who work during their incarceration, in accordance with state and federal minimum wage laws.** Prisoners are expected to pay for many of their own basic needs and are also often expected to work inside prison. In an effort to diminish prison labor exploitation, both private and public entities that utilize prison labor should compensate prisoner workers according to the minimum standards required by law.

Long-Term:

- **Close all prisons and jails.** Rather than respond to social problems by simply locking people up, new practices for accountability must be instituted that do not rely on incarceration or carceral practices (e.g. GPS tracking bracelets). Prisons and jails have become a fundamental tool of social control and by removing this tool we will be compelled to create new practices that can rely on transformation rather than punishment.
- **Institute community-based transformative justice practices to create healing from harm and violence and to prevent violence before it occurs.**



Art by Patrick H. F., incarcerated member

INTRODUCTION

During the latter months of 2014, Black & Pink, an open family of LGBTQ prisoners and “free world” allies, conducted a survey of our prisoner membership. Nearly 1,200 prisoners responded to our 133-question survey, producing the largest ever dataset available on the experiences of LGBTQ prisoners in the country. The intent of this survey was to get some truth out from behind prison walls about the experiences of LGBTQ prisoners in the United States. Our report aims to share that truth by elevating prisoner voices, stories, and leadership to inspire immediate collective action.

The report is divided into eight sections: (1) demographics; (2) pretrial detention, courts, bail, sentencing and parole; (3) sexuality, gender identity, and sexual activity; (4) solitary confinement; (5) discrimination and violence; (6) healthcare; (7) relationships and community; and (8) programs. Questions in each section have been analyzed in terms of group responses and also disaggregated by race, gender/sexuality, and mental illness diagnosis. Given that white supremacy, transmisogyny, and criminalization of mental illness are fundamental aspects of the prison industrial complex, it is unsurprising to find differences, disparities, or inequities represented by these identity markers in many places throughout the report.

This report is intended for many audiences. First, its findings were made possible by the prisoner members who took the time to fill out the survey and, as such, this report is very much intended for them. Second, we hope that this report can be a tool for advocates resisting the harm of the prison industrial complex, whether for LGBTQ-specific organizing efforts or to provide useful information regarding specific LGBTQ concerns to general anti-prison organizers. Third, this report is intended for policy makers and policy advocates. The information provided in these pages highlights the disproportionate violence experienced by LGBTQ prisoners and we have provided many recommendations to alleviate this suffering. As one respondent wrote, “Because I have participated in advocacy work my whole life- I have found that the best professional or experts are those who are living the struggle. So they are the best to find solutions.” Policy makers are encouraged to move forward on these recommendations, which are based on the knowledge and experiences of LGBTQ prisoners themselves. Finally, this report is intended for well-resourced LGBTQ organizations. Too often those most marginalized in LGBTQ communities are forgotten, or intentionally ignored, in LGBTQ justice campaigns. This report provides the necessary information to take the next step in prioritizing prisoner voices in larger efforts towards liberation.



Art by David F., incarcerated member

A NOTE ON LANGUAGE

For clarity purposes, please find some definitions and explanations of word and terminology choice below.

LGBTQ: This acronym stands for Lesbian, Gay, Bisexual, Transgender, and Queer/Questioning. Even though we know that sexuality and gender are much bigger than these letters, we nevertheless use this limited acronym to name include people who claim LGBTQ identities as well as many others, including but not limited to: same-gender-loving, homosexual, homophile, transsexual, transvestite, nelly, asexual, Two-Spirit, intersex, sissy, dyke. We continue to seek better words for people who identify outside of heteronormative and white supremacist categories of gender and sexuality. For the purposes of this report, however, we will use LGBTQ.

Transgender: “Generally, a term for those whose gender identity or expression is different than that typically associated with their assigned sex at birth, including transsexuals, androgynous people, cross-dressers, genderqueers, and other gender non-conforming people who identify as transgender. Some, but not all, of these individuals desire to transition gender; and some, but not all, desire medical changes to their bodies as part of this process.”¹

Two-Spirit: “The term Two-Spirit refers to another gender role believed to be common among most, if not all, first peoples of Turtle Island (North America), one that had a proper and accepted place within indigenous societies. This acceptance was rooted in the spiritual teachings that say all life is sacred and that the Creator must have a reason for making someone different. This gender role was not based in sexual activities or practices, but rather the sacredness that comes from being different. This definition is not meant to replace cultural and traditional teachings, which speak to this role. It is intended to find common ground and to help educate in a contemporary context.”²

Cisgender: “Types of gender identity where an individual's experience of their own gender matches the sex they were assigned at birth.”³

Prison Industrial Complex: The prison industrial complex is a system of control. It is the prisons, jails, and detention centers- the concrete and steel buildings that warehouse people. The prison industrial complex is also how the government and companies work together to control, punish, and torture poor communities and communities of color. This includes the police, immigration enforcement, and courts. This also includes the ways the news and movies portray “criminals.” It includes cameras used to surveil communities, and the companies making money on prison phone calls. The prison industrial complex includes the way schools are set up to fail.⁴ Also in this vein, we use the term “criminal legal system,” and the conscious choice to avoid the term “criminal justice system” is an acknowledgement of the fact that this system does not produce justice for most people in the United States, and that it has perpetuated and continues to perpetuate violence and inequality on already marginalized people, especially people of color, poor people, immigrants, and queers.⁵

Prisoner: In our survey, we asked respondents what term they preferred to refer to themselves: prisoner, inmate, incarcerated person, person who is incarcerated, or other. We also left a blank space for respondents to offer their own suggestions. The majority of respondents chose “other.” In the blank space, most respondents wrote in their name or simply, “my name.” Given that there was no general agreement on terminology from respondents, we use the word “prisoner” as an identifying term for all incarcerated individuals. We intentionally use the term “prisoner” as it connects to the political reality of incarceration and aligns with the history of the Prisoner Rights Movement, of which we consider Black & Pink to be a part. In a 2015 survey by the Marshall Project on preferred terminology, one formerly incarcerated person wrote the following: “I was once disciplined fairly harshly in a California women's prison for referring to myself as a prisoner while speaking to an officer. In our conversation,

the guard interrupted me and told me I was a female inmate, and not a prisoner. He said that referring to myself as a prisoner was against rules and furthermore subversive to the order of the facility.” Given our interest in subverting the order of the prison industrial complex, we will follow this writer’s lead and refer to our survey respondents as prisoners.

Abolition: Abolition means a world where we do not use the prison industrial complex as an “answer” to social, political, and economic problems. Abolition means that instead we develop new ways to stop harm from happening. It means responding to harm when it does happen, without simply “punishing.” It means we will try to fix the causes of harm, instead of using the failed solution of punishment to redress it. This approach is often called “harm reduction.” It means we will not use policing, courts, and prisons, which make us less safe. Abolition means creating sustainable, healthy communities with the power to create safety. Abolition is not only the end goal, but also the way we do our work to get there.⁶

Solitary Confinement: “Solitary confinement is the practice of isolating people in closed cells for 22-24 hours a day, virtually free of human contact, for periods of time ranging from days to decades... In California, long-term solitary confinement units are referred to as Security Housing Units (SHUs); in New York, the same acronym stands for Special Housing Units. In Oregon, the long-term isolation units are called Intensive Management Units (IMUs), while in Pennsylvania they are called Restricted Housing Units (RHUs). In the federal system, one type of extreme solitary confinement takes place in Communication Management Units (CMUs). Despite the variety of names, the general practice of incarceration in these units and facilities is solitary confinement.”⁷

PREA: “The Prison Rape Elimination Act (PREA) was passed in 2003 with unanimous support from both parties in Congress. The purpose of the act was to ‘provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.’”⁸

Endnotes:

1. Grant, Jaime M., Lisa Mottet, Justin Edward Tanis, Jack Harrison, Jody Herman, and Mara Keisling. *Injustice at every turn: A report of the National Transgender Discrimination Survey*. National Center for Transgender Equality, 2011.
2. Native Youth Sexual Health Network. Available at <http://www.nativeyouthsexualhealth.com/supportcircle.html>. Accessed October 11, 2015
3. International Spectrum. Available at <https://internationalspectrum.umich.edu/life/definitions> Accessed October 11, 2015
4. Critical Resistance available at <http://criticalresistance.org/about/not-so-common-language/> Accessed October 11, 2015
5. Mogul, Joey L., Andrea J. Ritchie, and Kay Whitlock. *Queer (in) justice: The criminalization of LGBT people in the United States*. Vol. 5. Beacon Press, 2011.
6. Interview with Rose Braz available at <http://dissidentvoice.org/2008/07/organizing-to-abolish-the-prison-industrial-complex/> Accessed October 11, 2015
7. Solitary Watch available at <http://solitarywatch.com/facts/faq/> Accessed October 11, 2015
8. National PREA Resource Center available at <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> Accessed October 11, 2015

SCOPE AND METHODOLOGY

In October 2013, the outside leadership of Black & Pink printed a notice in the monthly Black & Pink newspaper, which was at that time distributed to 3,700 prisoners, announcing our intention to conduct a survey of the membership. The announcement read as follows:

We are planning to do a survey of the people who receive the Black & Pink newspaper. We want to be able to tell the stories of what is happening with lesbian, gay, bisexual, transgender, Two-Spirit, same-gender loving, gender non-conforming, queer people in prisons across the United States. Black & Pink has connection to the largest number of LGBTQ prisoners of anyone, we reach over 3,500 prisoners each month. We want to hear stories about who you are and share them with all of you and also share them with the general public. Our goals of the survey are to get information about the realities of prison experiences for LGBTQ people in prison, hear stories of resistance, hear stories of hardship, and share those stories to build the power of our movement. The survey will run for a couple of months in the newspaper. We want to know what questions you would want on the survey. It will be an additional page in the newspaper, so we will not lose standard newspaper space. Individuals who fill out the survey will receive a certificate of completion and each person who fills out a survey will be entered into a contest to win a book of their choice. Feel free to include another piece of paper if you need more space for answers.

Share one or two questions you would like to see on the survey (such as, ‘Have you had romantic partners while incarcerated?’ or ‘Describe a time you asserted your rights in prison, what happened?’)

How could a survey like this be useful to you?
Who should we share a final report with?

More than 30 prisoners responded to the announcement with questions, including one person who sent an entire list of survey questions that was used as a template to design the final survey. It took about four months to receive all of the feedback from prisoner members of Black & Pink (long timespans are common and often necessary when creating a project with prisoners through the mail).

A team of outside volunteers worked together to finalize the survey questions. This team looked at survey projects and reports done by other prisoner justice organizations, including *Hearts on a Wire’s* report “This is a Prison, Glitter is Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania’s Prison System” and the *Sylvia Rivera Law Project’s* “It’s a War In Here: A Report on the Treatment of Transgender and Intersex People in New York State Men’s Prisons.” An email was also sent to all the major players in LGBTQ prisoner justice efforts inquiring about what information would be helpful to their work and what experiences they have had with similar surveys. By the summer of 2014, a list of 133 questions was agreed upon as the final survey. One exceptional volunteer, Reed Miller, came up with an extremely effective method of laying out this large survey in an accessible way. All throughout the survey, we interspersed encouragements to take breaks, one of which included an image of a cute kitten and puppy. We also flagged questions we suspected might bring up hard memories or trigger trauma. The entire survey and layout can be viewed in the appendix.

As with the original announcement, the survey was also distributed to prisoners through the monthly newspaper. Due to substantial growth in Black & Pink's distribution, the newspaper was sent to nearly 7,000 prisoners each in September and November 2014. Over 1,200 prisoners responded to the survey, constituting the largest ever collection of information from LGBTQ prisoners in the United States. The paper survey was then entered into a *Survey Monkey* tool designed by friends at Research Action Design. More than 30 different volunteers entered data from the survey, many of whom were formerly incarcerated people themselves. Some compensation was made available to people doing larger amounts of data entry. The data was then "cleaned" (duplicates removed, coding done, etc.) in partnership with the Public Science Project (PSP) at the City University of New York as well as two expert volunteers, Reed Miller and Mahsa Yazdy.

During the summer of 2015, the preliminary data was shared with two groups in order to gather community reflections on what should be more deeply considered and what questions could be asked of the data. The first gathering happened with participants at a workshop in Detroit at the annual Allied Media Conference. The second was a more intentional gathering of formerly incarcerated LGBTQ people as well as people who had entered data from the survey. This meeting was held in Boston in collaboration with PSP. These two opportunities to reflect on the data in community helped create a more clear direction for doing final analysis of the data.

The final report writing was coordinated by a team of volunteers through both in-person and internet communication. Since all of the questions in the survey were optional, the number of respondents varied by question; hence the sample size varies across this report.

This report will be printed in the November 2015 Black & Pink newspaper for all prisoner members to read. Along with the report, there will be space for responses and reflections that will be compiled into a supplementary report to be released in Spring/Summer of 2016.

Even though this is the largest collection of LGBTQ prisoner stories to date, there are still many stories left untold. In particular, while nearly half of the 2.3 million people incarcerated in the United States are held under the control of county jails, nearly all the survey respondents write from state (90%) and federal (8%) prisons. This gap can be accounted for in a number of ways. First, because people are held in county jails for far less time than they are in prisons, it is less likely they will get access to information about Black & Pink from a resource list or another prisoner. Moreover, people doing less time (such as those in county jails) often find it more feasible to be closeted about sexuality and/or gender identity than those who are serving decades in prison. Finally, of course, the Black & Pink newspaper is far from a discreet publication. Anyone receiving the Black & Pink newspaper is likely to be open about sexuality or gender identity issues because, even if they weren't, the newspaper itself would "out" them to prison staff and other prisoners.

With the above comments in mind, it is important to point out that this report is not based on a random selection of LGBTQ prisoners from across the country. This is a selection of LGBTQ prisoners who have intentionally reached out for access to resources and who are willing to put themselves at risk to receive a newspaper that is known as an LGBTQ publication. As such, this report cannot claim to be representative of LGBTQ prisoner experiences. However, this is the largest-ever survey of LGBTQ prisoners and *the only survey on a national level to be created*

in partnership with LGBTQ prisoners. The sheer number of responses amassed in this report nevertheless provides valuable insight into the experiences of LGBTQ prisoners incarcerated in the United States on the basis of information that has never existed before now. The people who took the time to fill out this survey did so at some risk to themselves and efforts to challenge the violence of mass incarceration will be strengthened because of it.



Art by WhiteEagle, incarcerated member

DEMOGRAPHICS

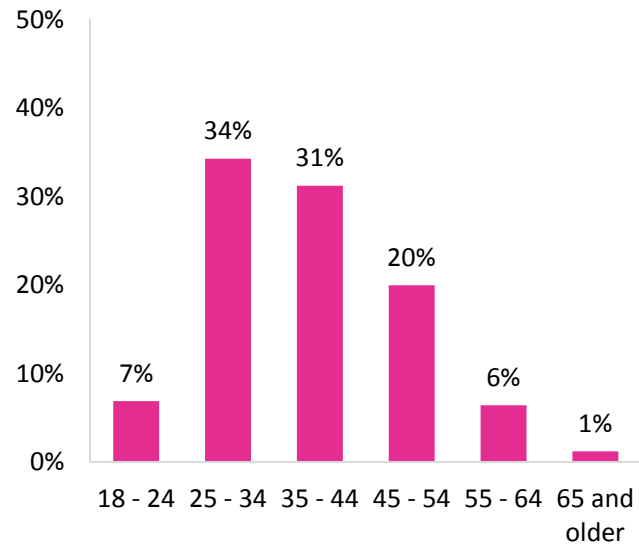
AGE

Respondents had the opportunity to write in their responses based on age. The youngest respondent was 19 and the eldest was 71. The average age of respondents was 38.

RACE

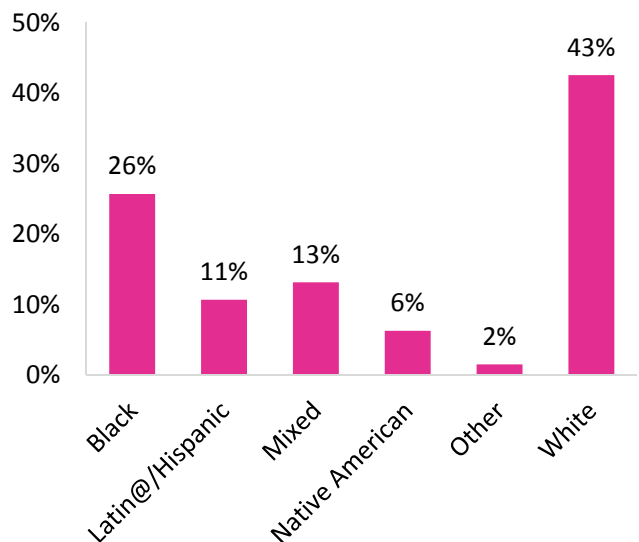
While the US Census only allows for a limited number of racial categories, we offered eleven options: Black/African American/Afro-Caribbean; Latin@/Hispanic; white (non-Hispanic); East Asian; Southeast Asian; South Asian; Middle Eastern/Arab; American Indian/Indigenous/Native American; mixed-race; Native Hawaiian or other Pacific Islander; and Inuit/Native Alaskan. We also provided space for respondents to contribute their own answer. While it was important to provide many options, for the purpose of this report, we have combined several racial categories to allow for clearer data analysis.

While the majority of respondents are people of color, white people are the largest single represented racial group, constituting 43% of respondents. According to Bureau of Justice Statistics, however, in 2014, of all those doing sentenced time in adult facilities (in both male and female assigned prisons), Black people were the largest single represented racial group at 36%, followed by white people at 34%, Hispanic people at 22%, and all other races combined at 9%. Some of the discrepancy between our survey results and the Bureau of Justice statistics regarding racial composition can be accounted for by our having included “mixed-race” as a possible racial category. However, the over-representation of white respondents in our survey raises several possible questions, including: did white prisoners feel safer filling out the survey? Is Black & Pink’s prisoner subscribership is disproportionately white? Was the survey inaccessible to People of Color? Should we have provided the survey in additional languages besides English?



Age of respondents in years.

Respondents: 1076

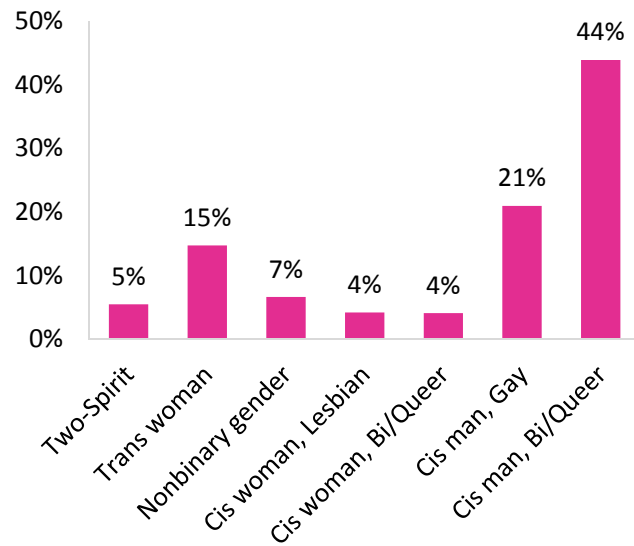


Race / ethnicity of respondents

Respondents: 1093

GENDER/SEX AND SEXUALITY

As with race, we provided multiple options to choose from for gender/sex identification (please see Appendix for complete list). Given that the far majority of prisoners in the country are cisgender men, it is unsurprising that the majority of respondents identified as cisgender men. The next largest grouping was transgender women followed by cisgender women. As the Bureau of Justice Statistics does not offer multiple options for prisoners to choose from regarding gender/sex identification in their yearly census, it is difficult to compare their data with ours. Nevertheless, according to Bureau of Justice 2014 data, 93% of people doing sentenced time in adult facilities were held in male facilities and 7% were held in female facilities.

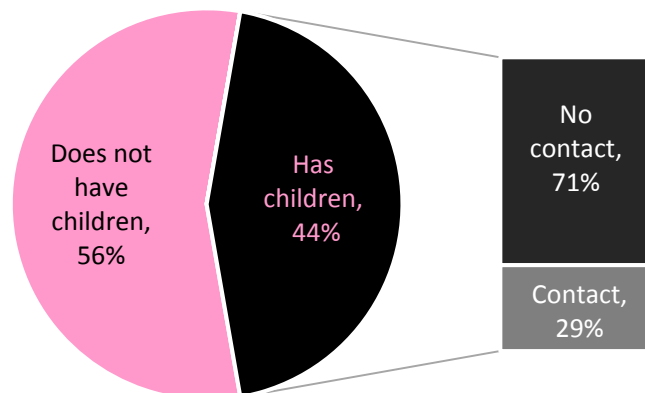


Gender / sexuality of respondents
Respondents: 950

We also provided multiple options to choose from for the category of sexuality (please see Appendix for complete list). While we found it important to offer multiple options, we have nevertheless also grouped several identities together for reporting purposes. For example, we combined gay, same-gender loving, and homosexual respondents into one identity group. We will discuss some of the complexities of prisoner sexuality and identity later in the report.¹

CHILDREN

According to a report from Pew Charitable Trust, 2.7 million children have a parent in prison.² Over half of prisoners in the US are parents of a child under the age of 18. Forty four percent of our survey respondents reported having children, although only 29% of those report having any kind of contact with their children such as phone calls or visits.

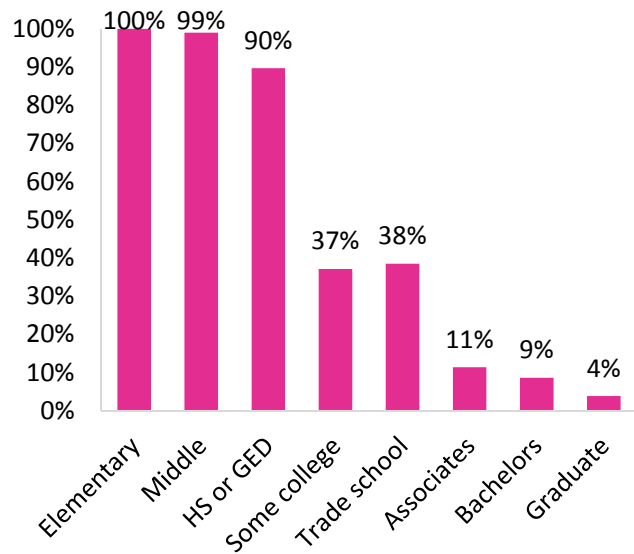


Respondents with children and whether they have contact (phone calls or visits) with them
Respondents: 1061 & 472, respectively

SCHOOLING

Surprisingly, nearly 90% of respondents had completed high school or earned a GED. Those who earned their GED primarily did so while incarcerated. Similarly, the majority of those who attended a vocational or trade school program did so while incarcerated.

While the high percentage of respondents who completed high school or earned a GED is heartening, closer examination shows that only 29% of respondents completed high school outside of prison. This means that 71% of respondents dropped out of school, were expelled from school, or never attended in the first place. A similar reality is highlighted in research on the disproportionate amounts of school discipline and dropout rates affecting LGBTQ youth, particularly youth of color.³ It is often when LGBTQ young people are pushed out of school that they become involved with the criminal legal system. This systematic practice is called the school-to-prison pipeline.



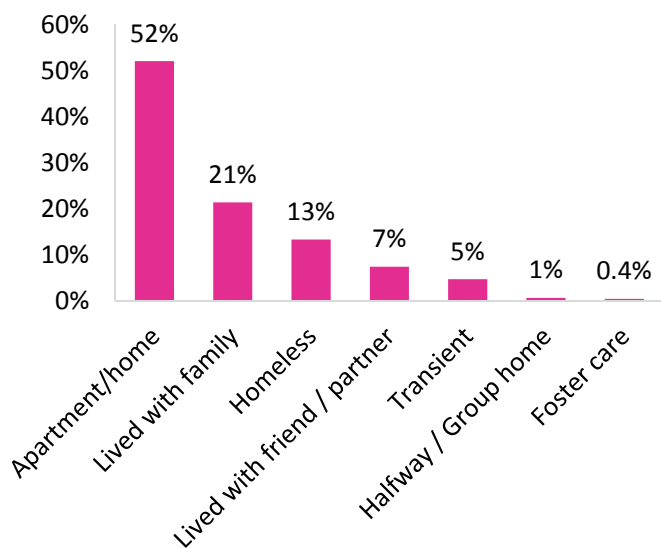
Level of schooling of respondents

Percentage is based on respondents who attended any level of schooling.

Respondents: 1084

HOUSING

According to a 2008 survey of federal and state prisoners, 9% reported being homeless in the year prior to their arrest.⁴ It is now commonly understood that LGBTQ youth are much more likely to experience homelessness than their heterosexual and cisgender peers. However, it is also true that LGBTQ adults are disproportionately homeless.⁵ Nearly a fifth of respondents reported being homeless or transient prior to their incarceration, while 29% lived with family or a friend and only 52% were living in a home of their own.



Respondents Housing situation before incarceration

Respondents: 916

MILITARY SERVICE

Despite the history of military exclusion of LGBTQ people, 11% of respondents reported having served in the armed forces.

EMPLOYMENT AND CRIMINALIZED ECONOMIES

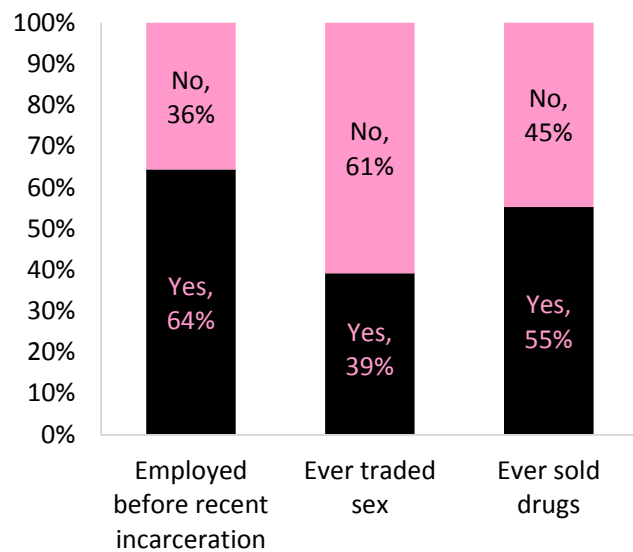
In our survey, over a third of respondents reported being unemployed prior to their incarceration; nearly 7 times the national unemployment rate in 2014. Joblessness and poverty are an often ignored aspect of LGBTQ people's lives. A recent study found that lesbian, gay, and bisexual adults are unemployed at a rate 40 percent higher than the overall average.⁶ The numbers get even worse for transgender workers: "The National Transgender Discrimination Survey' from the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that transgender adults report unemployment rates double the rates of the non-transgender population, with transgender workers of color reporting nearly four times the national average."⁷

When LGBTQ people are unable to access jobs and housing through legal means, criminalized economies become essential for survival. The criminalized economies we asked about related to trading sex for money and selling drugs.

The 2011 National Transgender Survey reported that 11% of respondents had engaged in the sex trades.⁸ According to a 2015 Urban Institute report, written in collaboration with Streetwise and Safe, LGBTQ youth who engaged in the sex trades in NYC did so in order to meet basic needs such as food and clothing.⁸ Selling drugs is also a much used means of

survival. While there is little knowledge about how many LGBTQ people sell drugs, the Center for American Progress has reported that LGBTQ people are 2 to 3 times more likely to use criminalized drugs than the general population.⁹ Further, 8% of respondents to the National Transgender Survey reported selling drugs.¹⁰

For our survey respondents, 39% reported that they traded sex for survival and over half sold drugs for money. Far too often, however, those engaged in the sex trade are left out of well-resourced LGBTQ movement efforts. Moreover, these organizations have not made resistance to the War on Drugs a priority. Given the data we have collected, it is clear that the criminalization of sex trades and the War on Drugs significantly impacts LGBTQ people and thus it is essential that those working on LGBTQ prisoner justice struggles do more to center these issues and concerns.



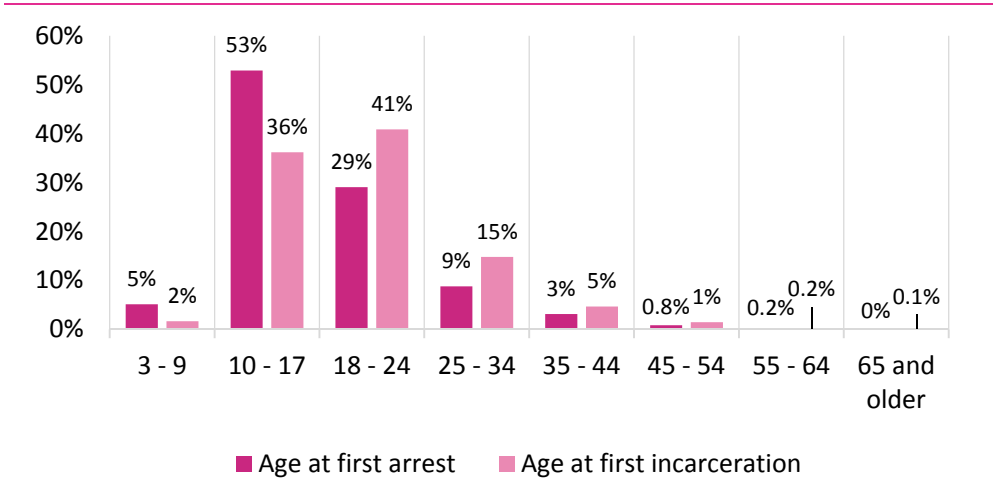
Employment and participation in criminalized economies before incarceration

Respondents: 1070, 1083, & 1097, respectively

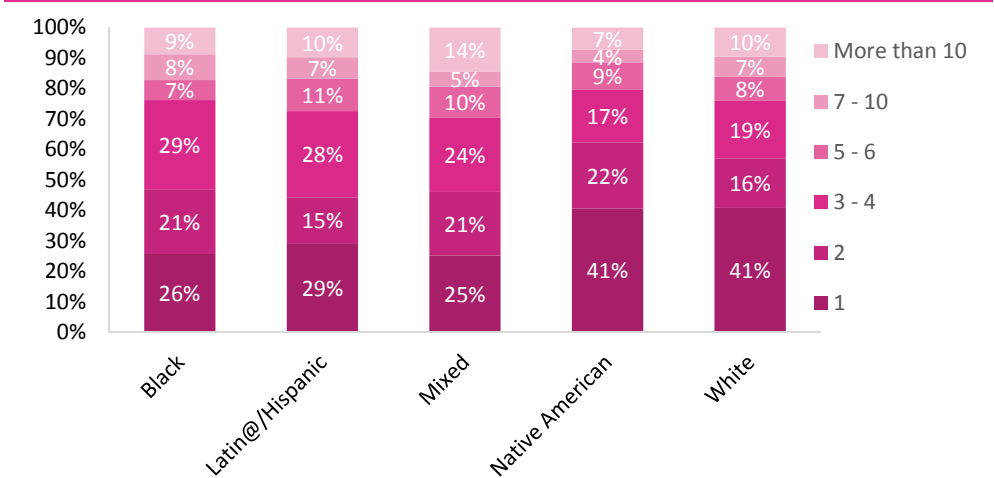
When looking at the impact of the War on Drugs, it is of vital importance to utilize a racial justice lens. In particular, Black respondents were nearly 20% more likely to have participated in the drug trade than white respondents (67% and 48% respectively). This over-representation of Black respondents (who are all writing from prison) in the drug trade highlights the racism of the War on Drugs, which leads to outrageous incarceration rates of Black people even as white people are *more* likely to sell drugs.¹¹

ARREST AND INCARCERATION

The age of first arrest and incarceration varied widely for survey respondents. The youngest arrests happened to respondents at 6 years of age; the oldest age of first arrest was 62. Black and Latin@/Hispanic respondents were most likely to have their first arrest occur when they were under the age of 18.



Reported age at first arrest and first incarceration
Respondents: 1093 & 1091, respectively



Number of times incarcerated by race / ethnicity
Respondents: 1070

According to a 2012 Center for American Progress report, “Though gay and transgender youth represent just 5 percent to 7 percent of the nation’s overall youth population, they compose 13 percent to 15 percent of those currently in the juvenile justice system.”¹² While this survey did not reach youth in the juvenile “justice” system, clearly many of the people now incarcerated in adult facilities and responding to our survey were children when they were first locked up. Thirty seven percent of respondents’ first incarceration occurred when they were under the age of 18.

For two thirds of respondents, this current sentence is not their first incarceration. Amounts of time spent incarcerated varied, though Black, Latin@/Hispanic, and mixed-race respondents were more likely to have had multiple incarcerations than their white and Native American/American Indian counterparts.

Multiple incarcerations are not surprising, as the national recidivism rate is 76.6% within five years of release from prison.¹³ In plain terms, nationally, more than three-quarters of all formerly incarcerated people return to prison.

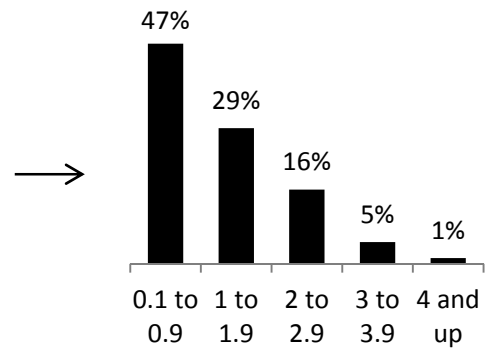
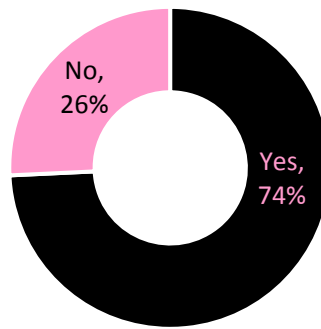
Endnotes:

1. For an in depth look into queer sexual identity and sexuality in prison - Kunzel, Regina G. *Criminal intimacy: Prison and the uneven history of modern American sexuality*. University of Chicago Press, 2008.
2. *Collateral costs: Incarceration's effect on economic mobility*. Pew Charitable Trusts, 2010.
3. Burdge, H., Licona, A. C., Hyemingway, Z. T. “LGBTQ Youth of Color: Discipline Disparities, School Push-Out, and the School-to-Prison Pipeline.” San Francisco, CA: Gay-Straight Alliance Network and Tucson, AZ: Crossroads Collaborative at the University of Arizona, 2014.
4. Greenberg, Greg A., and Robert A. Rosenheck. "Homelessness in the state and federal prison population." *Criminal Behaviour and Mental Health* 18, no. 2. 2008: 88-103.
5. 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>. Accessed October 8, 2015
6. "High Stakes: LGBT Americans Cannot Afford to Lose Unemployment Insurance" available at <https://www.americanprogress.org/issues/lgbt/news/2014/01/14/82097/high-stakes-lgbt-americans-cannot-afford-to-lose-unemployment-insurance/>. Accessed October 8, 2015
7. Grant, Jaime M., Lisa Mottet, Justin Edward Tanis, Jack Harrison, Jody Herman, and Mara Keisling. *Injustice at every turn: A report of the National Transgender Discrimination Survey*. National Center for Transgender Equality, 2011.
8. Dank, Meredith. "Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex." 2015.
9. Hunt, J., and J. Byrd. "Why the gay and transgender population experiences higher rates of substance use." *Center for American Progress*, 2012.
10. Grant, Jaime M., Lisa Mottet, Justin Edward Tanis, Jack Harrison, Jody Herman, and Mara Keisling. *Injustice at every turn: A report of the National Transgender Discrimination Survey*. National Center for Transgender Equality, 2011.
11. Ingraham, Christopher. “White people are more likely to deal drugs, but black people are more likely to get arrested for it” *Washington Post* September 30, 2014
12. Hunt, Jerome, and Aisha Moodie-Mills. "The unfair criminalization of gay and transgender youth." *Washington: Center for American Progress*, 2012.
13. Durose, Matthew R., Alexia D. Cooper, and Howard N. Snyder. "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010." *Washington, DC: Bureau of Justice Statistics*, 2014.

PRETRIAL DETENTION, COURTS, BAIL, SENTENCING, AND PAROLE

PRETRIAL DETENTION

According to the Justice Policy Institute (JPI), 60% of the US jail population has not been convicted of anything, but instead is currently awaiting trial. JPI also report that, in 2011, it cost county systems \$9 billion to keep all these people in jail awaiting their court dates.¹ While essentially all of our survey respondents were serving a sentence at the time of the survey, 74% were being held in jail pretrial because they could not afford bail they were assessed by the judge. Of those who were incarcerated pretrial, more than half were held for a year or longer.



Respondents held in jail pretrial because could not afford bail (yes/no), and length of time spent in jail prior to sentencing (years)

Respondents: 1099 & 401, respectively

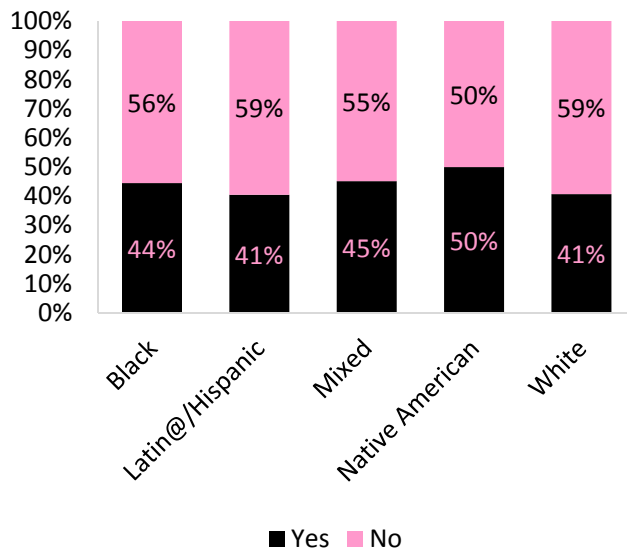
EXPERIENCES WITH DEFENSE ATTORNEYS

According to the advocacy organization *Gideon's Promise*, 80% of defendants across the country rely on court appointed attorneys.² Unfortunately, due to under-resourced public defender programs, indigent defendants plead guilty 90% of the time.³

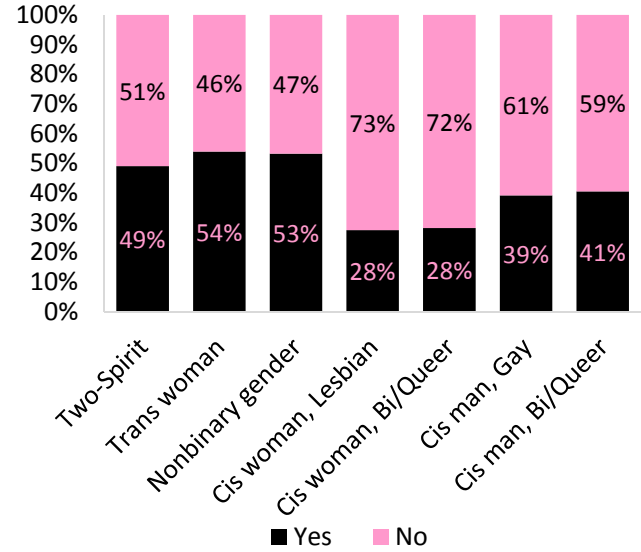
These national numbers are similarly represented by our survey respondents. Unfortunately, their challenges in court did not end at whether or not they had a private or court appointed attorney. Many respondents also experienced discrimination in the courtroom, including from their own attorney. These experiences of discrimination are increased for transgender women, nonbinary gender, and Two-Spirit defendants as well as for defendants of color.



Paper Art by Alvin E., incarcerated member



Respondents reported feeling defense attorney discrimination by race / ethnicity
 Respondents: 1043



Respondents reported feeling defense attorney discrimination by gender / sexuality
 Respondents: 947

SENTENCING

The average sentence imposed in state courts in 2006 was 4 years and 11 months; life sentences made up less than one-half of one percent (.03%) of those sentenced.⁴ According to a report by the Sentencing Project in 2012, 11% of prisoners were serving life sentences, and of those serving life, 35% had no possibility of parole.⁵ Respondents to this survey are serving life sentences at twice the rate of members of the general prison population. The average prison sentence for respondents was 17 years, excluding those serving life and capital sentences.



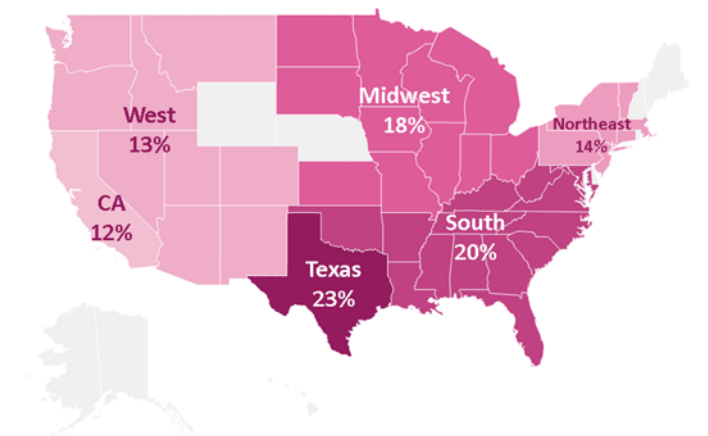
Length of current sentence (years)
 Respondents: 1080

Due to the possibility of accruing good time and getting paroled, most prisoners do not serve their entire prison sentence. According to research by Pew, prisoners

released in 2009 served an average of 2.9 years in custody.⁶ At the time of this survey, however, the average time respondents had spent in prison was 10 years.

FACILITIES

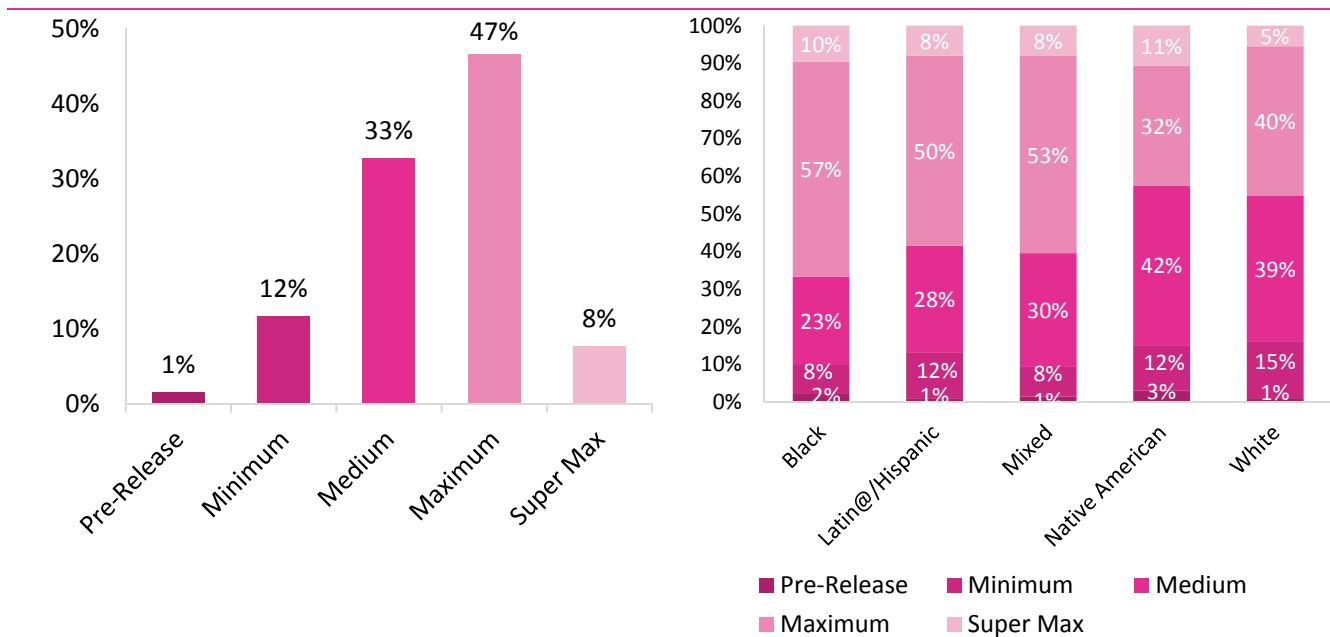
At the end of 2014, the Federal Bureau of Prisons held 13% of sentenced prisoners while state prisons held 87%. Texas, California, and Florida are the nation's leaders in number of state prisoners, accounting for 10.6%, 8.6%, and 6.5% of the prison population respectively.⁷ As is evidenced in the map to the right, survey respondents are disproportionately from Texas and California. Due to Florida limiting access to the Black & Pink newspaper, there was a lower response rate from Florida (4.5%).



Location of survey respondents
Respondents: 1084

The last national survey of prison security levels was done in 2005. At that time, the Bureau of Justice Statistics only used three categories for classification of prisons: minimum security (53% of prisons), medium security (26% of prisons), and maximum security (20% of prisons).⁸ As detailed in the graph below, our survey respondents were much more likely to be held in higher security facilities, despite the fact that these make up the smallest percentage of available prison facilities.

There is significant racial disparity in housing security levels. In particular, white respondents were more likely to be held in lower security facilities. This is especially clear in Super Max facilities, where our white respondents make up less than 10% of the prison population.

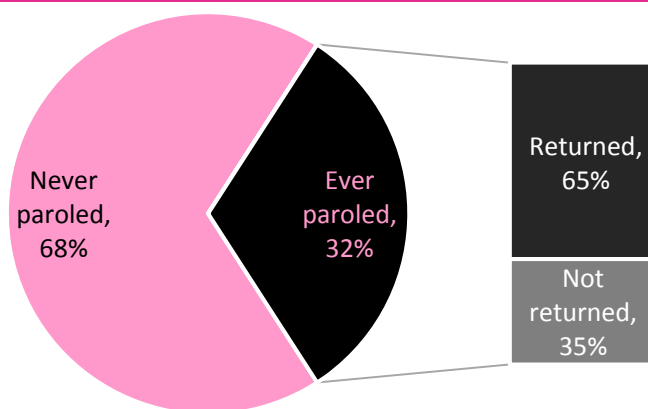


In 2005, only about 1.5% of the US prison population was housed in supermax prisons,⁹ which have come under intense scrutiny for being inhumane. Writing specifically about the Federal Supermax Prison in Florence, Colorado, Amnesty International asserts, “The US government’s callous and dehumanising practice of holding prisoners in prolonged solitary confinement in the country’s only federal super-maximum security prison amounts to cruel, inhuman or degrading treatment or punishment and is in violation of international law.”¹⁰ As of 2014, nearly every state has its own supermax prison. The fact that 8% of our respondents are held in supermax prisons is cause for immediate action.

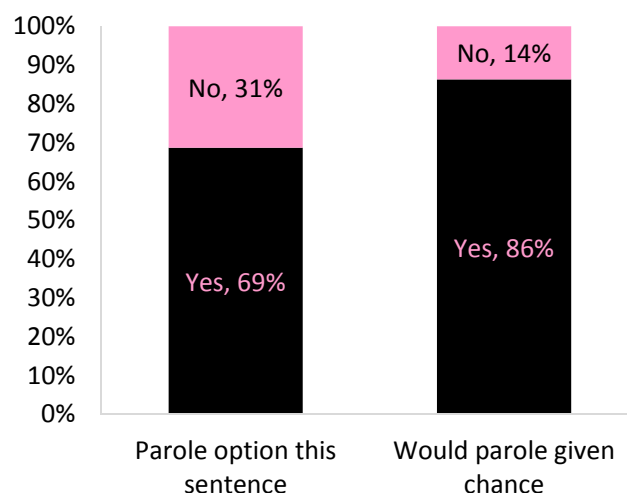
PAROLE

Federal prisoners are not entitled to parole, as long as they were sentenced after passage of the Sentencing Reform Act of 1984. At the state level, the structure of parole systems and parole eligibility varies. Sixty nine percent of respondents reported that they have the option for parole and, if granted parole, 86% would take the opportunity. Nearly a third of respondents have been granted parole on a previous sentence, although of those who have been granted parole, 65% have been returned to prison for a parole violation.

Forty two percent of respondents have been denied parole when going before the Parole Board in their state. Similarly, 41% of respondents have felt discriminated against by the parole board. Two-Spirit and nonbinary gender respondents were more likely to have felt discriminated against (57.5% and 50% respectively). One respondent wrote, “They are extremely bias and against what they say they're about. If you go before them with marked improvements they'll focus solely on the negative and what you ain't do.” Another respondent wrote, “Here in Texas, they discriminate against Blacks. This is the South, we are job security only slaves for profit, they don't pay us jack. That's why they have many prisons.” One respondent wrote about being treated unfairly by the Parole Board, “I was a child [when I got locked up], I'm not the same person. I'm a mature 31-year-old woman.”



Respondents granted parole and whether they returned to prison for a parole violation
Respondents: 1014 & 312, respectively



Whether respondents have the opportunity for parole and given the opportunity, would they take parole
Respondents: 1083 & 995, respectively

Endnotes:

1. Neal, Melissa. "Bail Fail: Why the US. Should End the Practice of Using Money for Bail. Justice Policy Institute." 2012.
2. Drinan, Cara H. "Gideon's Army and the Central Theme of Poverty." *New Eng. J. on Crim. & Civ. Confinement* 41, 2015: 37.
3. Marcus, Paul, and Mary Sue Backus. "The Right to Counsel in Criminal Cases, A National Crisis." *Hastings Law Journal* 57, no. 6, 2006: 1031.
4. Durose, Matthew R., and Patrick A. Langan. *Felony sentences in state courts, 2000*. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2003.
5. Nellis, Ashley, and J. Chung. "Life goes on: The historic rise in life sentences in America." *Washington, DC: The Sentencing Project*, 2013.
6. Pew Center on the States, and United States of America. "Time Served: The High Cost, Low Return of Longer Prison Terms." 2012.
7. Carson, E. Ann, and William J. Sabol. "Prisoners in 2014, Washington, DC: Bureau of justice statistics." Available online here: <http://bjs.ojp.usdoj.gov/index.cfm>, 2012.
8. Stephan, J. James. "Census of State and Federal Correctional Facilities, 2005" Available online: <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf>. Accessed October 9, 2015
9. Mears, Daniel P. "Evaluating the effectiveness of supermax prisons." Urban Institute Justice Policy Center, 2006.
10. Amnesty International, and United States of America. "Entombed: Isolation in the US Federal Prison System." 2014.



Art by Tony B., incarcerated member

SEXUALITY, GENDER IDENTITY, AND SEXUAL ACTIVITY

SEXUALITY

Sexual identity in prison is a highly contested topic. The term “gay for the stay” is a common phrase used in both in prison and dominant culture references to prison sexuality. As an organization, Black & Pink explicitly focuses on individuals who identify as LGBTQ. Many people in prison (and outside of prison) engage in sex acts that would be considered queer, and while we asked respondents about sex they engage in, we also asked about their experiences of LGBTQ identity. The majority of our respondents (65%) identified as LGBTQ before they were incarcerated; over a third did not. Given that the majority of respondents’ first arrest occurred when they were under the age of 18 and many have spent decades in prison already, it is not surprising that several respondents would be discovering their sexuality in prison. This is not to suggest that incarceration somehow creates (or does not create) queer sexual identity. Rather, it is to say that, just as people outside of prison develop their sexual identities over time, so too do people inside of prison.



Art by anonymous incarcerated member

Just as is true for people outside of prison, identifying with a non-heterosexual sexual identity can be emotionally draining for people inside of prison. Seventy percent of respondents experienced emotional pain from hiding their sexuality. Even though many have tried to hide their sexuality, the vast majority of respondents claimed that other prisoners (85%) and prison staff (67%) knew about their sexuality. Whether respondents had chosen to “come out” about their sexual identity or if they were being read as queer or trans in some way is unclear. What is clear, however, is that there are significant consequences to prisoners and prison staff knowing (or thinking they know) a prisoner’s sexual identity.

One respondent wrote about the impact this knowledge had on his ability to get a prison job:

My only problem as of late they discriminate and deny me job assignments simply cause I'm gay. This person is really unprofessional and outright disrespectful. It's common for an officer and inmates and other officers to call a gay inmate a faggot in front of other inmates and other officers while they laugh and make jokes. But my problem is that this administration systematically discriminates against me, by denying me job assignments simply cause they know that I am a gay inmate. In fact I was hired in the kitchen, then suddenly fired when they recognized I was gay. It is an unwritten policy and practice to discriminate and deny gay inmates job assignments.

Losing access to jobs is not the only threat faced by prisoners who are (or are perceived to be) LGBTQ. Respondents also experienced harassment and physical violence by prison staff and other prisoners who (believed they) knew

their sexual identity. Many respondents were intentionally sought out for sexual encounters for this reason and, if they chose not to consent, were sexually assaulted.

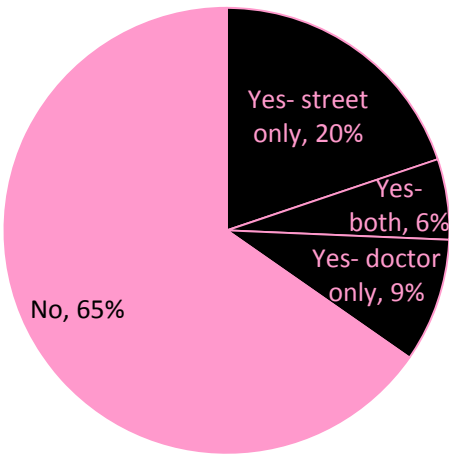
Some positive stories were also shared regarding disclosure of sexuality and gender identity. While many prisoners experience harassment or violence from other prisoners around perceived knowledge of non-normative gender or sexuality, there were also those who reported being treated respectfully, engaging in healthy friendships, and even feeling authentic support of their identity. One respondent wrote, “We embrace each other cause they’re gay also.” Sometimes being known can create a community of support in an environment that thrives on division. One respondent even suggested that being out in prison was easier than being open about her sexuality outside of prison, “cause there’s so many other lesbians and bisexuals in one place.”

GENDER IDENTITY

The negative experiences of transgender, nonbinary gender, and Two-Spirit respondents with regard to disclosure of gender identity were similar to LGB respondents regarding disclosure of sexuality, though often more severe. Seventy eight percent of transgender, nonbinary gender, and Two-Spirit respondents experienced emotional pain from hiding their gender identity. Eighty five percent reported that other prisoners knew about their gender identity. One respondent wrote that other prisoners who knew about her gender identity were “cruel and vicious, humiliating me regarding my hormones, bras, breast development, etc.”

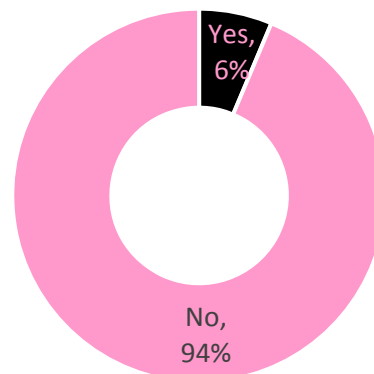
Physical violence and verbal harassment are far from the only struggles transgender, nonbinary gender, and Two-Spirit respondents have to navigate. A diagnosis of Gender Identity Disorder or Gender Dysphoria (GID/GD) is a prerequisite for accessing many life-affirming treatments and services. Of transgender, nonbinary gender, and Two-Spirit survey respondents, only 43% had been granted this diagnosis, and 31% reported being denied a diagnosis during their incarceration.

Barriers to gender affirming care are not limited to respondents’ time in prison. In the free world, accessing some basic needs (such as therapists who will provide a GID/GD diagnosis, or doctors who can prescribe hormone replacement therapy) can be incredibly difficult. While more than a third of transgender, nonbinary gender, and Two-Spirit respondents took hormones prior to their incarceration, the majority of those who did so took street-based hormones that were not prescribed by a doctor. Simply taking care of one’s medical needs in a transphobic/transmisogynistic society, it seems, is a criminal act.



Use of hormone replacement therapy to support respondent’s gender expression before incarceration
Respondents: 222

Currently, 23% of transgender, nonbinary gender, and Two-Spirit respondents are taking hormones while incarcerated, while an overwhelming 44% report being denied access to hormones they requested. The refusal of gender affirming medical care is not limited to hormone replacement therapies; 40% of respondents also report being denied access to gender confirming surgeries they sought.

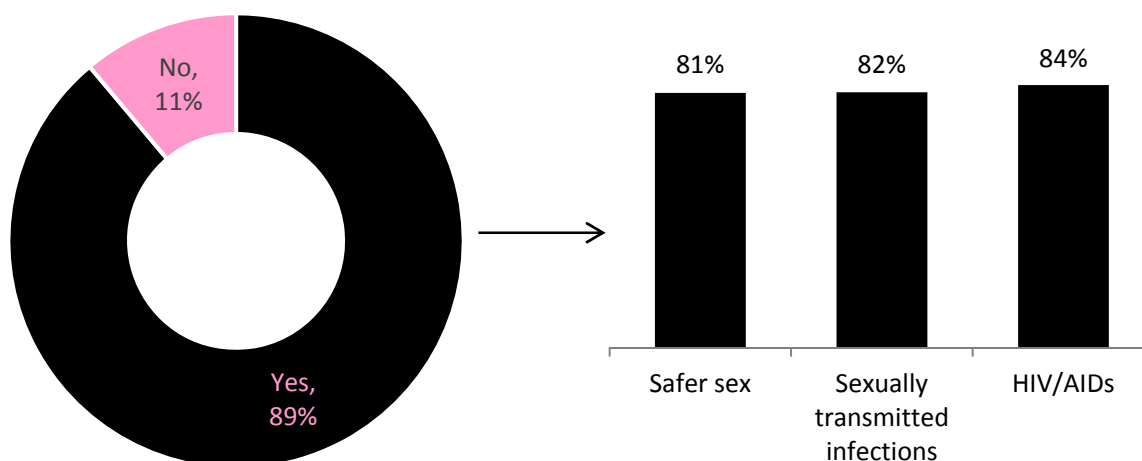


Availability of special canteen for transgender prisoners
Respondents: 221

Using clothes, makeup, or accessories to present oneself in a way that affirms one's gender identity can be unsafe in the free world. In prison, where so many basic freedoms have been taken away, it can be nearly impossible. Only 21% of respondents are allowed access to underwear and cosmetics that match their gender. A very small percentage of respondents have access to a canteen for transgender prisoners, and even if such a canteen does exist within a specific prison, it may or not be available to transgender, nonbinary gender, or Two-Spirit prisoners who lack a GID/GD diagnosis.

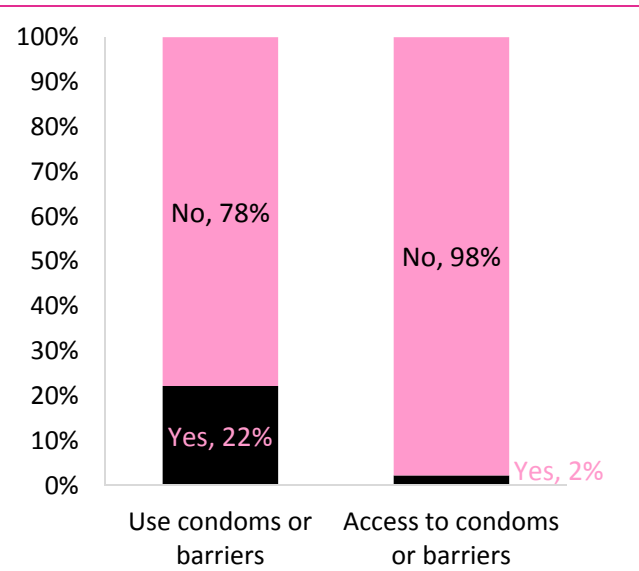
SEXUAL ACTIVITY

The vast majority (67%) of respondents are sexually active in prison, but their prison does not equip them with the tools and resources to keep themselves and their partners safe from preventable, sexually transmitted infections (STIs). While prisons fail to provide access to condoms to all but 2% of respondents, over one fifth of respondents have used a condom or other barrier for the purpose of preventing STI transmission. This discrepancy between what the prison provides and what prisoners have managed to access, highlights prisoner resilience and intentionality in taking care of themselves and their sexual partners. Additionally, the overwhelming majority of respondents discussed safer sex, STIs, and HIV/AIDS with their sexual partners.

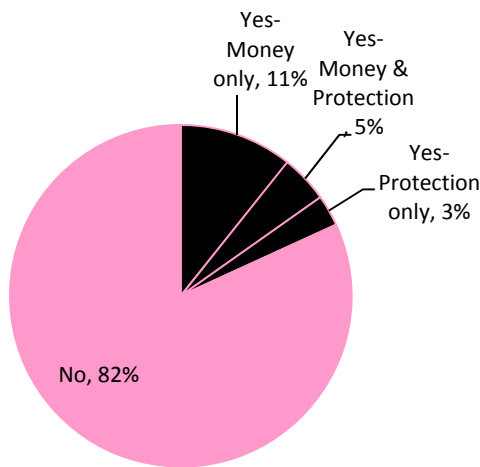


Whether respondents had conversations while in prison with their sexual partners and, if yes, topics(s) discussed
Respondents: 719 & 639, respectively

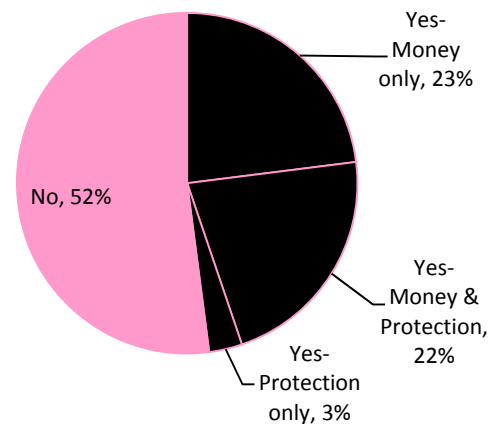
Just as is the case outside of prisons, not all sex happening within prisons (inside) is for pleasure alone. Over a quarter of respondents have traded sex with other prisoners for money or canteen/commissary during their incarceration, and 14% have traded sex with other prisoners for personal protection (what is often called “protective pairing”). Respondents who traded sex outside of prison were much more likely to trade sex inside of prison, although it is significant that many respondents who did not trade sex outside of prison did trade sex while incarcerated. The means and mechanisms for survival in prison are even more limited than those available to LGBTQ people on the outside, and trading sex is one way LGBTQ prisoners can access the things they need.



Use and access to condoms or barriers in prison
Respondents: 1006 & 1073, respectively



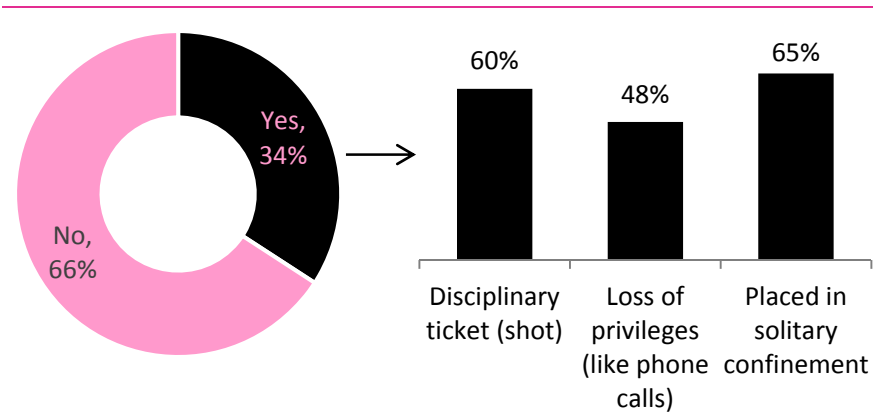
Trading sex inside for money and/or protection, Did not trade sex before incarceration
Respondents: 644



Trading sex inside for money and/or protection, Did trade sex before incarceration
Respondents: 413

While it is commonly known by prisoners, prison staff, and the general public that prisoners are engaging in consensual sexual activity, virtually all prison administrations have established rules forbidding sex between prisoners. PREA has intentionally left decision-making regarding the regulation of consensual sex between prisoners to local prisons, rather than insisting on a universal mandate. Many prison administrators have in fact utilized PREA as an opportunity to expand their rules governing sexual activity, some even going so far as to

make hand-holding a disciplinary offense. Over a third of respondents have been disciplined for engaging in consensual sex, and of those, nearly two-thirds have been placed in solitary confinement as their punishment.



Whether respondents reported disciplinary action for engaging in consensual sex and, if yes, punishment(s) received

Respondents: 758 & 259 respectively

The above findings illustrate that issues around sexuality, gender identity, and sexual activity within prisons are complex, with significant cause for concern occurring simultaneously alongside resilience and resourcefulness. As discussed in the recommendations section, there are many policy changes that can be made to immediately reduce the risk and violence faced by LGBTQ prisoners, and advocates must work to remove the barriers prison officials put in place that prevent LGBTQ prisoners from navigating their incarceration as sexual and gendered beings.



Card by Jay M., incarcerated member

SOLITARY CONFINEMENT

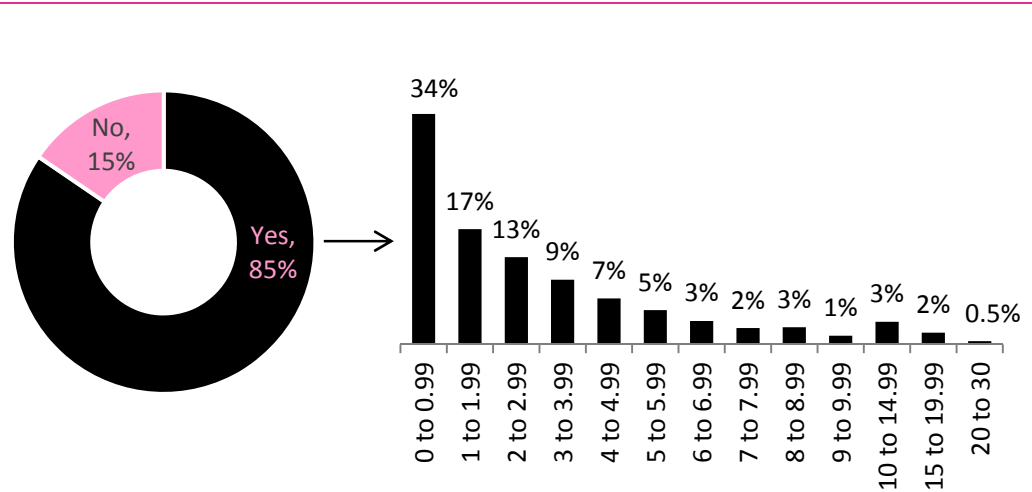
Solitary confinement is a violent tool that can cause great harm, even to people who are subjected to only a couple of days of it. Our respondents have spent years of their lives locked away in isolation. The United Nations Committee Against Torture has been very explicit on the detrimental effects of long term solitary confinement:

According to the Inter-American Court of Human Rights, “prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person’s psychic and moral integrity and the right to respect of the dignity inherent to the human person.” Because of its potentially deleterious effect on prisoners’ mental and physical health, the Committee Against Torture, the official body established pursuant to the Convention Against Torture (a treaty ratified by the United States and part of United States law), has recommended that the practice be abolished altogether.¹

As is noted in the recommendations, the practice of solitary confinement must stop immediately and long term healing efforts must be provided to all those who have been forced to deal with the trauma of solitary.

Based on the information given, all respondents taken together spent a total of 5,110 years in solitary confinement.

An overwhelming majority of respondents have been held in solitary confinement at some point during their incarceration. At the time of the survey, 248 respondents were writing out their answers from solitary cells. Based on the information given, all respondents taken together spent *a total of 5,110 years* in solitary confinement. Half of respondents have spent two years or longer there.



Reports of ever being in solitary confinement and, if yes, total amount of time ever spent in solitary confinement (years)
Respondents: 1099 & 874, respectively

It is not uncommon for prison staff to assert that they are placing prisoners into solitary confinement as a means of increasing safety. Indeed, because prison administrators often consider solitary confinement a protective measure, they do not use the term solitary confinement, but rather euphemisms such as “protective custody.”

Thus, despite the Prison Rape Elimination Act’s clear statement that isolation should only be used in circumstances when there is no other possible alternative to prevent abuse, it is nevertheless a routine practice used on LGBTQ prisoners. Fifty percent of those who have experienced solitary confinement were put there for

their own protection but against their will. Thirty eight percent of respondents report being housed in solitary confinement for their own protection and at their request. While it may be difficult to imagine a person choosing to be housed in “the prison within a prison,” prisoners are often forced to decide between the torture of sensory deprivation and constant violence from other prisoners in the general population. Those who requested solitary confinement faced life threatening positions due either to imminent violence or self-harm. See box for excerpts from survey respondents detailing why they requested solitary confinement.

Excerpts from survey respondents describing why they requested solitary confinement

- ▼ *Because the men was making me sell my body and it was the only safe place for me, the prison system won’t help...so I ran to solitary to be safe.*
- ▼ *... due to my gayness. I was totally harassed - daily by inmates and staff alike...*
- ▼ *Sexually abused by staff member...*
- ▼ *I was placed in solitary after being raped... only released after it drove me to a suicide attempt.*
- ▼ *I was raped BADLY and cuz Trans, scared of being hurt cuz of how feminine I am and I was 18 years old. So scared.*
- ▼ *Protection from gang relation inmates, pressuring for sex. Exhaustion and for protection from security due to my sexual lifestyle and openly gay pride.*
- ▼ *People did not like to live with someone who has HIV so I was put into confinement because of this.*
- ▼ *Because I'm trans I was threaten by the white gang members.I was placed involuntarily while a PREA investigation was conducted.*

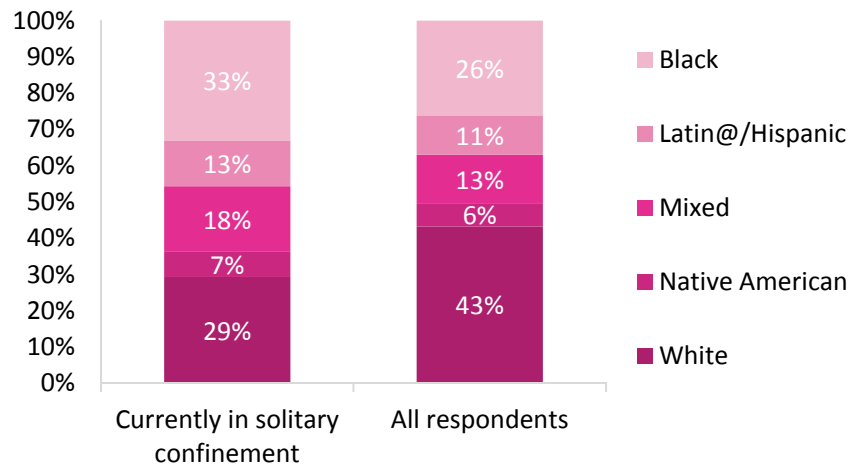
Roadmap for Change, a 2014 report addressing the criminalization of LGBTQ people and people living with AIDS, details the excessive use of solitary confinement and some of this practice’s impacts on LGBTQ prisoners:

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.²

RACE / ETHNICITY AND SOLITARY CONFINEMENT

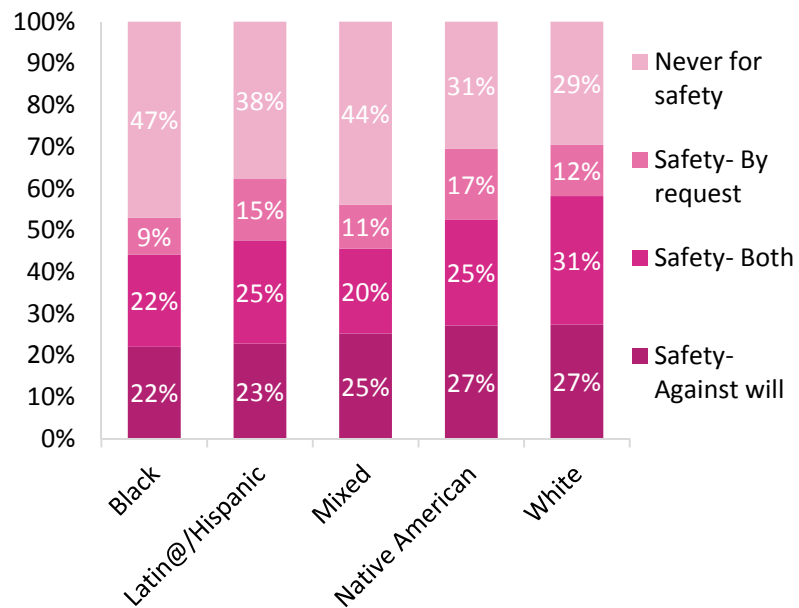
At the moment of the survey, 33% of those currently in solitary self-identify as Black, 28% as Latin@/Hispanic, 24% as mixed-race, 23% as Indigenous/American Indian, and 19% as white. People of color respondents are thus dramatically overrepresented in solitary confinement, given the absolute number of survey respondents in each racial category (see table). Overall, participants of color are more likely to currently be in solitary confinement at the moment the survey was taken. Black, Latin@/Hispanic, mixed-race, and Native American/American Indian respondents are twice as likely to have been in solitary confinement at the time of the survey than white respondents.

As already noted, there are times when prisoners ask to be placed in solitary confinement and other times when prison staff decide to place prisoners in solitary confinement under the guise of protection but against the prisoner's will. All respondents, regardless of race, are more likely to have been placed in solitary confinement for their own safety against their will. However, white respondents were disproportionately likely to have been in solitary confinement for



Those currently in solitary confinement compared to all respondents, by race / ethnicity

Respondents: 232 & 1076, respectively



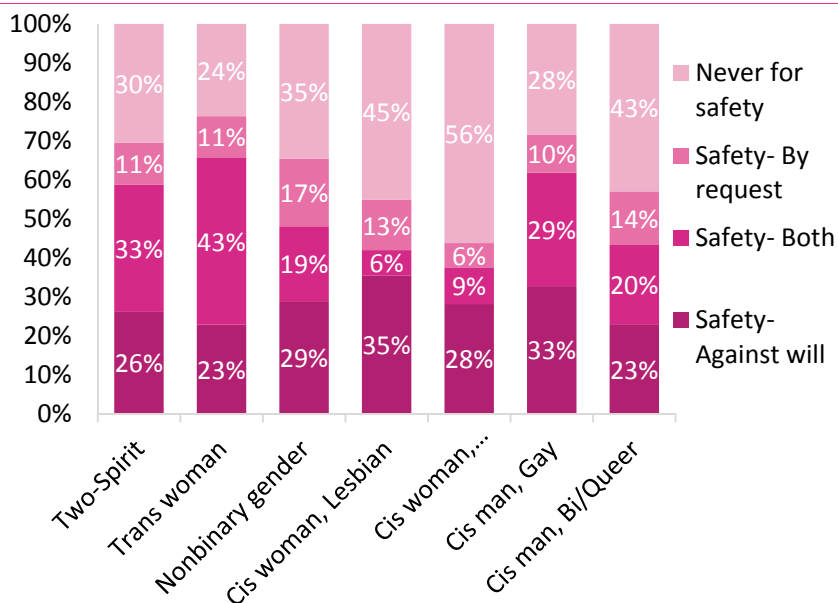
Respondents placed in solitary confinement for safety by their own request and/or for safety against their will, by race / ethnicity

Respondents: 236, 101, 123, 59, & 373, respectively

“safety” both by their own request and against their will. It seems that, even in prison, white life is more valuable or worthy of protection. However, this racialized and disingenuous claim of “protection” cannot obscure the fact that that solitary confinement violates the human rights of anyone subject to it.

GENDER / SEX AND SEXUALITY AND SOLITARY CONFINEMENT

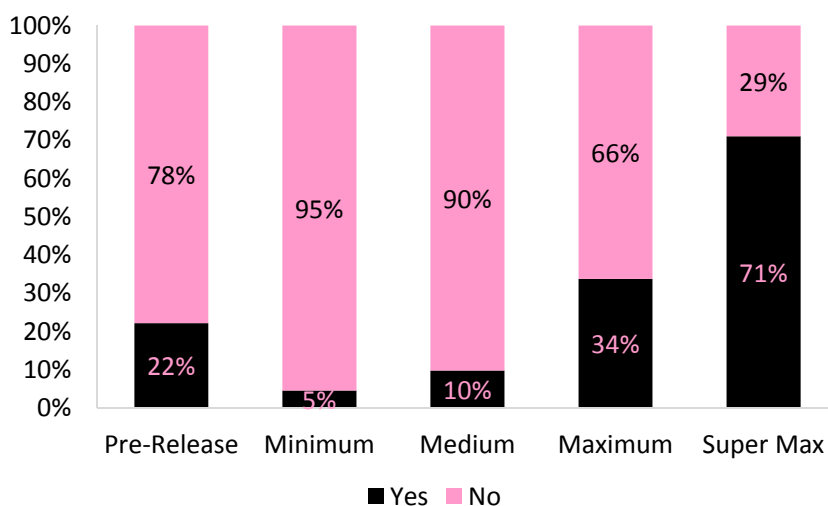
All respondents who experienced solitary confinement, whether by request or involuntarily, were placed in solitary confinement against their will at higher rates than by request. Further, trans women, Two-Spirit people, and cisgender gay men are put into solitary confinement against their will at the highest rates. While prison staff may claim they are placing LGBTQ prisoners in solitary confinement for their own safety, it is often being done so as an attempt to decrease sexual activity amongst prisoners or to control what they see as disruption of the social order of the prison by LGBTQ prisoners.



Respondents placed in solitary confinement for safety by their own request and/or for safety against their will, by gender / sexuality
Respondents: 46, 114, 52, 31, 32, 165, & 349, respectively

PRISON SECURITY LEVEL AND SOLITARY CONFINEMENT

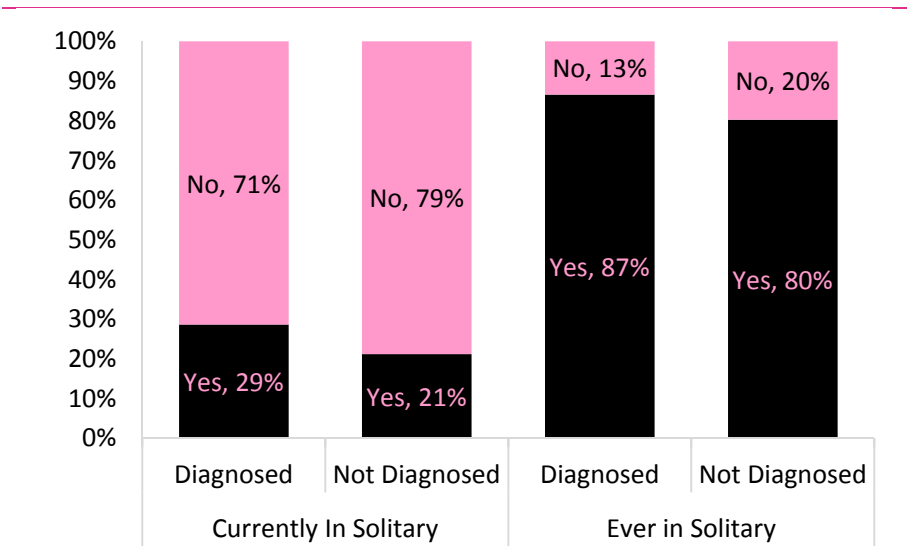
The chart shows that, apart from pre-release prisons, the usage of solitary confinement by prison authorities increases with the security level of the facility. Thus solitary confinement is used most in supermax prisons, which are already an extreme form of confinement by design.



Respondents placed in solitary confinement for safety by their own request and/or for safety against their will, by gender / sexuality
Respondents: 46, 114, 52, 31, 32, 165, & 349, respectively

SELF-IDENTIFIED MENTAL ILLNESS AND SOLITARY CONFINEMENT

Prisons are not designed to address the needs of people living with mental illness; rather, they often exacerbate it and/or its underlying issues. Prison staff often respond to prisoners suffering from mental illness with excessive discipline and, in many cases, rely on solitary confinement as a means of control of these prisoners. The graph below show that respondents with a mental illness diagnosis were more likely to be in solitary confinement at the time of the survey and are more likely to have ever been in solitary confinement during their incarceration.



Currently in solitary confinement as well as has ever been in solitary by diagnosed with mental illness
Respondents: 614, 283, 723, & 354, respectively



The Cell
*Sitting in this 6 by 9 cell,
no it's not pleasant, but feel like hell.
Looking at life, wondering how I fell.
Thinking back, and wishing only if I made bail.
Sitting in this small cell,
feeling down and out. Don't want to talk,
or to be bothered, smelling myself, damn I smell.
This overwhelming experience is no small tell,
If you take a look in my eyes, I'm not living well.
It feel like these walls are closing in,
My ears hurt, arguing is a common trend.
In the belly of the beast, not looking or seeking a friend,
but when I get out for my life, I will make amend.
But until then, I be sitting in this cell.*

Art and poem by Kevin P., incarcerated member

Endnotes:

1. Lobel, Jules. "Prolonged solitary confinement and the Constitution." *University of Pennsylvania Journal of Constitutional Law* 11.115, 2008: 2009-19.
2. Hanssens, Catherine, et al. "Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV." 2014.

DISCRIMINATION AND VIOLENCE

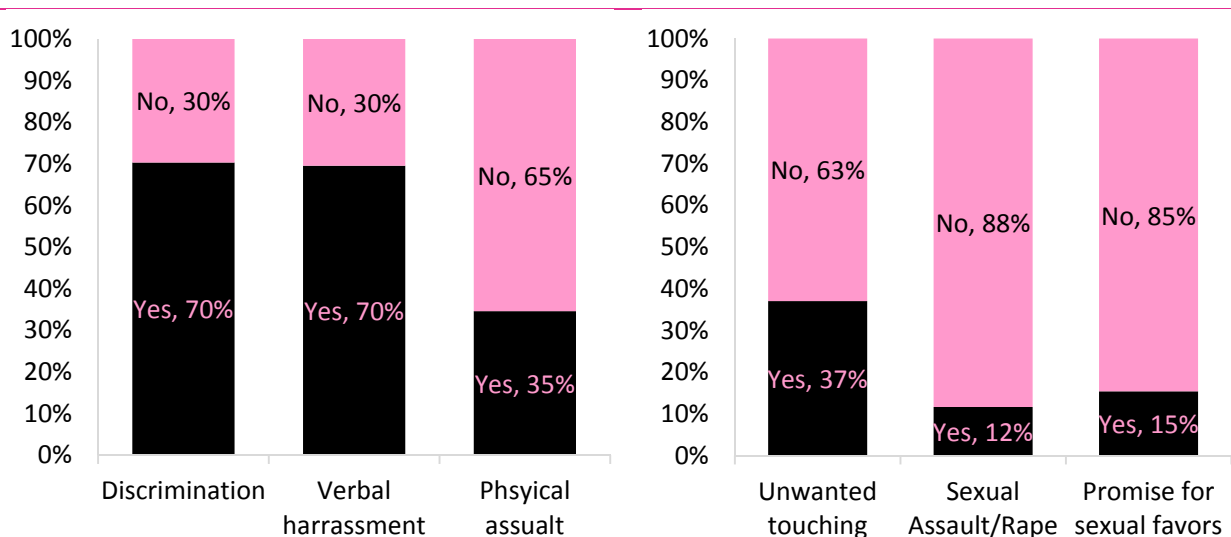
Discrimination, harassment, harm, and violence are the lived realities of LGBTQ prisoners. In the closing paragraph of their chapter on prisons, the authors of *Queer (In)Justice: The Criminalization of LGBT People in the United States* assert that

the violence and punishment visited on LGBT prisoners “are not anomalies,” and they cannot be eradicated through reform. They are deeply embedded in the fabric of the prison system, and perpetuated through queer criminalizing archetypes. Not only have prisons failed to deter crime and produce safety, they are sites where the safety, dignity, and integrity of all prisoners, including LGBT prisoners, are eviscerated.¹

The responses that follow only confirm these observations.

VIOLENCE BY STAFF

The vast majority of respondents experienced discrimination and verbal harassment by prison staff people and more than a third were physically assaulted. Nearly half of Native American/American Indian respondents experienced physical assaults by prison staff.



Whether respondents experienced discrimination and violence by prison staff

Respondents: 1092, 1090, & 1084 respectively

Whether respondents experienced sexual violence by prison staff

Respondents: 1090, 1090, & 1077 respectively

Respondents also reported incidences of sexual assault by a prison staff and experiences of unwanted touching by prison staff. We intentionally left the question about unwanted touching vague given that not all people who experience sexual violence by prison staff consider it an assault and that there is much unwanted touching by prison staff that respondents may want to disclose. Also, not all sexual assaults are aggressively violent, even if

they involve violations of consent or exploit the power inequity inherently at work in the relationship between prison staff and prisoner. So, for example, sometimes prison staff promise things, like cigarettes, food, drugs, or leniency, in exchange for sex.

Of the respondents who experienced sexual assault or unwanted touching by prison staff, 197 provided details. The following are excerpts of their stories. While these may be difficult to read, it is important that they not be hidden:

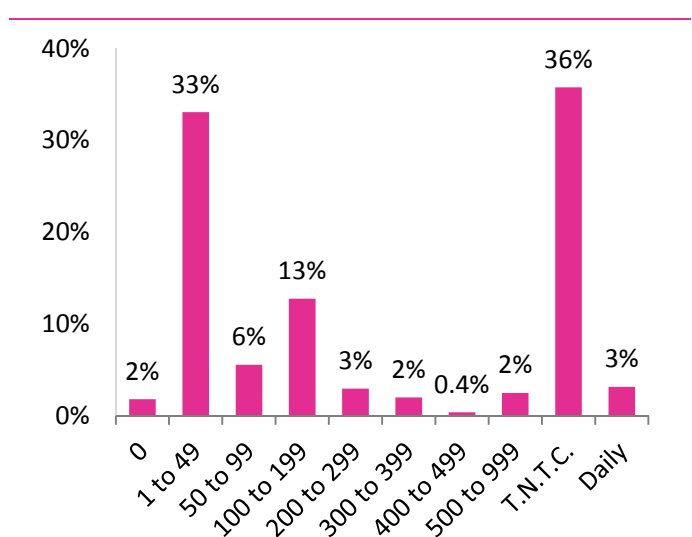
- ▼ *I was raped by a jail guard in Sedgwick County, KS and am currently in a lawsuit against that county. I feel horrible every time I think about it and wonder what I could ever have done to avoid it. Please do pray for me. Thank you.*
- ▼ *A female CO kept patting me down and stripping me. I asked her why. She said because I can. She would call other staff to strip me and she would watch and then comment on my body parts. I also had a mental health doctor touch me and try to assault me saying "who will they believe, me or you?" And this is still a problem but I am in mental health unit for suicide attempt and can't go anywhere.*
- ▼ *Nearly every time I am pat searched the male officers either cup my breasts or extensively rub my nipples of which is not allowed at female facilities.*
- ▼ *It only happened once but A C/O made A comment on the size of my penis saying It's true what they say About Black people.*
- ▼ *I had a Sergeant touch my legs and groin area when he was patting me down & I was wearing shorts, so he had NO reason to caress my legs from top to bottom. I told him he doesn't need to touch me in this way, he replied I'll touch you in any way I want to. When I spoke to a Lieutenant, he stated I would be placed in segregation if I raised a PREA issue over this.*
- ▼ *I was raped in 2007 by another prisoner, and placed on self-harm observation status because I was feeling suicidal. The guard assigned to observe me entered my cell after turning the security camera off and coerced me to perform oral sex on him. He promised to protect me, and gave me food and tobacco products.*
- ▼ *For a few months in 2006 there was a practice at MCT-Norfolk of pat-searching prisoners leaving the Health Services Unit if they received an injection. After male guards grabbed my breasts, I stopped taking the Lupron injections to avoid this.*
- ▼ *Every prisoner experiences unwanted touching or sexual assault by prison staff whether they want to admit it or not. I don't like being forcefully touched by anyone or stripped search every day! I feel violated by having another individual seeing my naked body and touching me without my consent but there's virtually nothing I can do to prevent it from happening.*

- ▼ *When these officers knows you are LGBTQ, they purposely began to harrass us. They'll subject us to a strip-search & make us bend over & open our butts until they can see our anus or they'll pat search us and they'll either rub their filthy hands on our butts, nuts, or jack our pants in the crack of our butts.*
- ▼ *in 2003 at USOW they showed a video on the new pat searching clothed searches by male officers. They used the outside of their palms to run down between our breasts and also in an upward motion moving up our thighs and pressing into our vaginas.*

Not only are these sexually violent experiences, but they make clear the ways that sexual violence is informed by and functions as a tool of racism, sexism, and transmisogyny. In addition to the harm of the assault itself, sexual violence also results in prisoners not getting the health care they need, being afraid to go to programs, and can lead to self-harm or suicidal feelings.

STRIP SEARCHES

Advocates, policy makers, and politicians alike have advocated that sexual violence by prison staff, and prisoners, is an egregious and preventable aspect of incarceration. Political will and coalition-based organizing led to the passage of the Prison Rape Elimination Act in 2003. Much attention has been paid to PREA and the mandates that have followed its passage. This attention has caused advocates to respond to some of the specific types of sexual violence that happens in prisons across the country. However, rather than classify the act of strip-searching a prisoner as a form of sexual harm, PREA offers appropriate ways to strip search prisoners. Some of these regulations, such as the practice of transgender women prisoners being entitled to strip searches by female prison staff, have been celebrated by advocacy organizations. However, the systemic practice of strip searching prisoners has become presumed as an inevitable aspect of incarceration. Jesse Lee Jackson reflects on this reality in an article dealing with the effects of PREA:



Approximate number of times strip searched during incarceration

T.N.T.C. = too numerous to count

Respondents: 1043 T.N.T.C. = too numerous to count

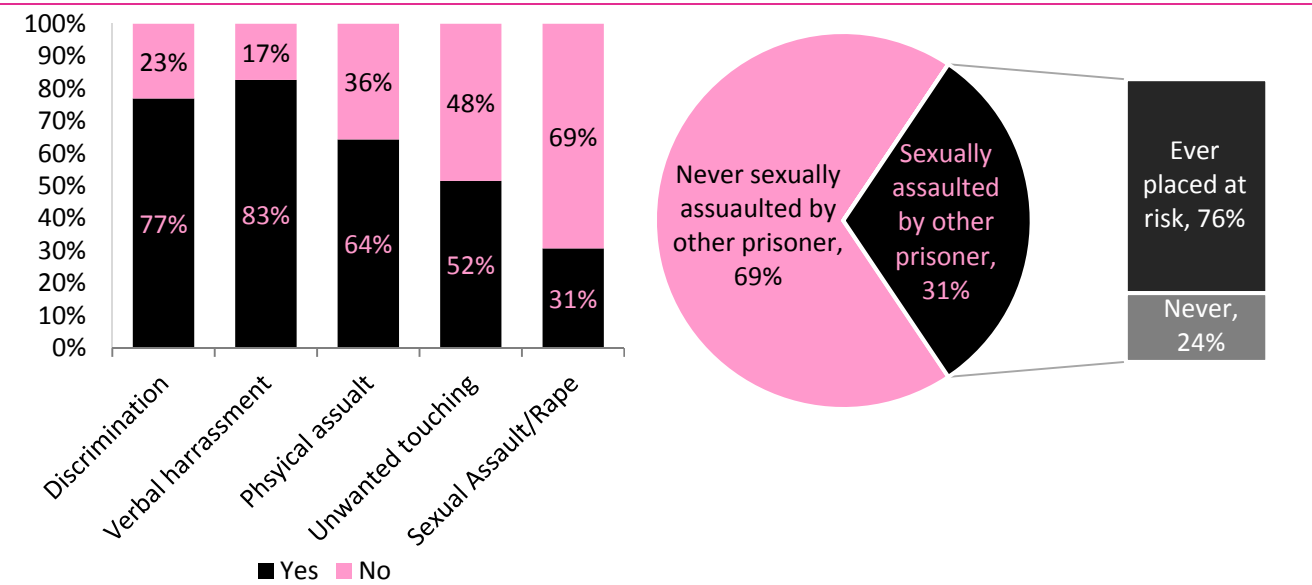
In the [National Prison Rape Elimination Commission] report, practices that could be considered institutional sexual abuse, such as body cavity searches and pat-downs, are affirmed as necessary for security. The conflict between monitoring practices and opposition to sexual violence is most clear in this instance: security procedures demand what would in other contexts be considered sexual abuse. But because it happens in the context of state monitoring, it is disclaimed as sexual violence.²

While not all individuals who are strip searched experience trauma from the event, the constant invasion of a prisoner’s body can be devastating. Strip searches are rarely a one-time event. Respondents ranged in their answers to how many times they have been strip searched from 1 to 50, 250, 500, “millions”, “every day in 12 years”, “too many to count”. One person even questioned, “who the heck keeps track of all that?” The truth about prisons is that they are inherently sexually violent places and 100% of prisoners have experienced sexual violence by prison staff.

VIOLENCE BY OTHER PRISONERS

Prison staff are not the only ones who are violent and discriminatory towards LGBTQ prisoners. Other prisoners also commit verbal harassment, physical attacks, and sexual violence. In fact, prisoners are responsible for more physical violence and verbal harassment than prison staff. However, prison staff are responsible for the culture that allows prisoners to harm one another.

The responsibility of prison staff for violence between prisoners is evidenced by survey responses. Prisoners are more than three times more likely to sexually assault LGBTQ prisoners than prison staff. However, of those who report ever having been sexually assaulted by a prisoner, 76% report that prison staff had intentionally placed them in situations where they would be at high risk of being sexually assaulted by another prisoner. Certainly prisoners are responsible for sexually assaulting another prisoner, but prison staff must also be held accountable for creating the environment for that possibility.



Whether respondents experienced discrimination, physical or sexual violence by other prisoners
Respondents: 1092, 1095, 1090, 1089, 1081

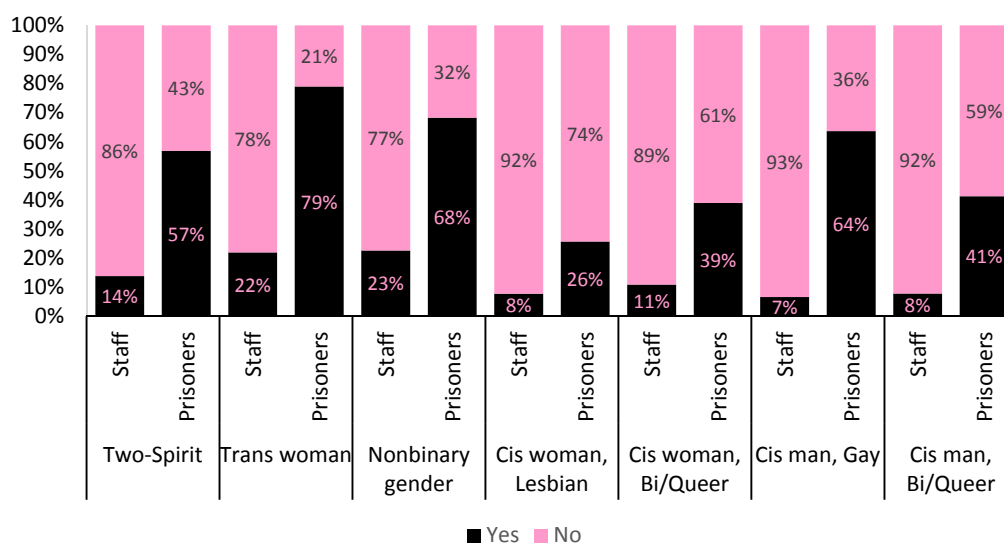
Whether respondents who experienced sexual violence or rape by other prisoners have ever or never been intentionally placed at risk by prison staff
Respondents: 1081 & 325, respectively

More than 130 prisoners shared stories of being sexually assaulted by other prisoners. These are a few excerpts:

- ▼ *Have had cellmates who have forced me to perform oral sex on them in exchange for not beating me or turning me over to their friends or enemies. Have also been guilted into receiving anal sex when I didn't want to.*
- ▼ *I have been raped at nearly every level 5 camp in MO. PREA is a joke.*
- ▼ *I've been sexually assaulted about 5 times in 25 years. it's to the point now that i just go on and sell my body for these gang members because the prison staff won't put me in safekeeping around other homosexuals. I sell my body sometimes to make my pimp happy so I don't get beat up.*
- ▼ *When other prisoners find out I'm gay they start trying to touch me on my ass or showing their penises. A couple of times I got involved sexually because of a promise to help me with money. They demanded sex almost daily whether I wanted it or not.*
- ▼ *Three times officers allowed an inmate to cut and rape me. Three times officers set me up to get raped by another inmate. While on lines inmates cop feels of my breasts and butt unwantedly.*
- ▼ *I was raped, I was in bed when another inmate came into my cell and held me down and stuck his penis in me. I told only my close friend because I did not want to get locked down.*
- ▼ *At Brush Mountain, an inmate raped me and when I reported the rape, I was ignored by CO saying "Faggots can't get raped."*
- ▼ *First 1997 Allred unit I was beaten and raped by five men. I tried to hang myself to deal with it. I have medical records proving this assault happened-statements from DRs, but they still won't put me in safekeeping.*
- ▼ *I've been in cells with dudes who tried to rape me but I fought back. And they'll touch me while I'm sleep. I ended up joining a gang, because prison staff wouldn't put me around my own kind. But that wasn't for me, so I quit. When I first came to prison, I was just turning 18 years of age. I really didn't know what to expect, so I basically stayed to myself and observed my surroundings at the same time. After being incarcerated for only 3 months I was placed on close custody with other aggressive prisoners. One day I was standing in the commissary & a guy began to masturbate. I got upset because it made me think of the 2 men that molested me when I was 5, but I was scared also, like I was when I was 5. So I didn't stop him. Anyways, I had a cellmate, who actually tried to rape me. He started jacking me off first, and then who wanted to have sex with me, but I refused and we got into a fight cause he felt like I owed him something. Sometimes, while I'm asleep he'll touch my private parts, so I informed the guards and they moved me. I'm not gonna lie man, it's hard being gay in prison. I mean you suffer discrimination from the guards and prisoners and it's not fair at all. I tried numerous times*

to get placed on safe-keeping, but each time I was denied. My only reasons for joining a gang is because I was looking for 2 things: #1 Acceptance and #2 protections. But, the gang members had a problem with me expressing my sexuality, when I tried to quit, I was threatened and jumped on. Eventually, I quit, but when I end up on units where gang members know me I have to leave, because my life be in danger. So, now I just hide my sexuality by being single & remaining affiliated in a gang. Actually, I have no other choice--other than going to safe-keeping, but I'll only be denied. so, I have to do what I have to do to survive. With no help from the outside, what else can I possibly do. What would you do if you were in my shoes. I just wish people will accept people for who they are instead of who they want them to be. Just because I identify with the LGBTQ community, doesn't mean I'm strange. If that's the case--then the whole world is strange, right? Well, that's my story. If what I've said helps someone, to God be the Glory.

According to our data, LGBTQ respondents are over 6 times more likely to be sexually assaulted (0.52 assault odds) than the general prison population (0.08 assault odds).³ This is higher than the number cited by the Bureau of Justice Statistics, which in 2015 found that 11% of transgender prisoners had been sexually assaulted by prison staff and 24% by other prisoners in the last twelve months (they do not evaluate the data based on sexual orientation).⁴ Given that our survey respondents were asked if they had ever been sexually assaulted during their sentence (in other words, during a period of time not limited to twelve months), it makes sense that we would find a higher percentage of transgender women prisoners experiencing sexual violence, though these numbers are deeply unsettling.



Whether respondents experienced sexual assault/rape by prison staff or by other prisoners, by gender/sexuality

Respondents: 51, 137, 62, 39, 36, 198, & 410, respectively

Violence, harm, harassment, and sexual assault are pervasive in prisons across the United States. Reform efforts, such as PREA, are failing to meet the immediate needs of prisoners, especially LGBTQ prisoners. It is the responsibility of advocates to support and nurture the leadership of prisoners that are most targeted for harm,

especially transgender women, nonbinary gender prisoners, and cisgender gay men. Physical, emotional, and sexual violence are essential tool of prisoner control and as long as prisons continue to function, these tools will remain at the disposal of those maintaining power.

Endnotes:

1. Mogul, Joey L., Andrea J. Ritchie, and Kay Whitlock. *Queer (in) justice: The criminalization of LGBT people in the United States*. Vol. 5. Beacon Press, 2011.
2. Jackson, Jessi Lee. "Sexual Necropolitics and Prison Rape Elimination." *Signs* 39.1, 2013: 197-220.
3. Beck, Allen J., and Candace Johnson. *Sexual victimization reported by former state prisoners, 2008*. US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2012.
4. Beck, Allen J. *PREA Data Collection Activities, 2015*. US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2015.

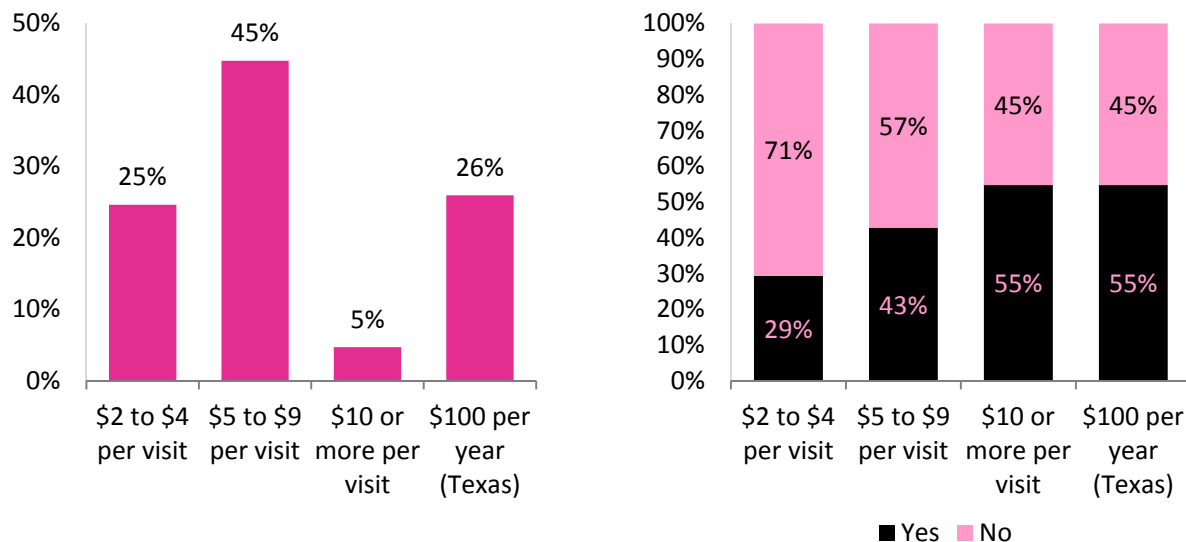


Art by Patrick H. F., incarcerated member

HEALTHCARE

FEES

Although prisons and jails are required to provide medical care for the prisoners in their facilities, it does not need to be free. A vast majority (83%) of respondents reported needing to pay a fee to see a doctor. Fees ranged from \$2 per visit to Texas state prisons' annual fee of \$100. These fees have prevented 43% of respondents from seeking medical care when they needed it. Additionally, more than half of respondents were denied some medical care they requested.



Range of medical care fees, if required

Respondents: 918

Whether the fee has ever prevented the respondents from accessing care, by fee range

Respondents: 1081 & 325, respectively

For people on the outside of prison, many of whom who spend thousands of dollars on healthcare per year, these fees may seem affordable, but for prisoners they can be devastating. Surviving on sub-minimum wage jobs, prisoners may be faced with the vexing choice of buying toiletries, seeking care, or keeping in touch with loved ones on the outside. Fees cause many people to forgo doctor visits in order to avoid incurring greater financial burdens on themselves or on their families, who are already suffering financially from the loss of their incarcerated family member's income. An article in the *National Prison Project Journal* noted, "Often prisoners will do without hygiene items or medical treatment rather than have their families deposit funds that will be immediately confiscated to satisfy prison charges."¹

HIV / AIDS

Respondents were knowledgeable about HIV/AIDS in general and their own HIV/AIDS status. Ninety three percent had been tested for HIV, and 75% had received education about HIV in prison. Seven percent of respondents are HIV-positive which, while much higher than the prevalence in the US population (0.04%) and the prevalence in the general state and federal prison population (1.3%)², it is significantly lower than the prevalence recorded by

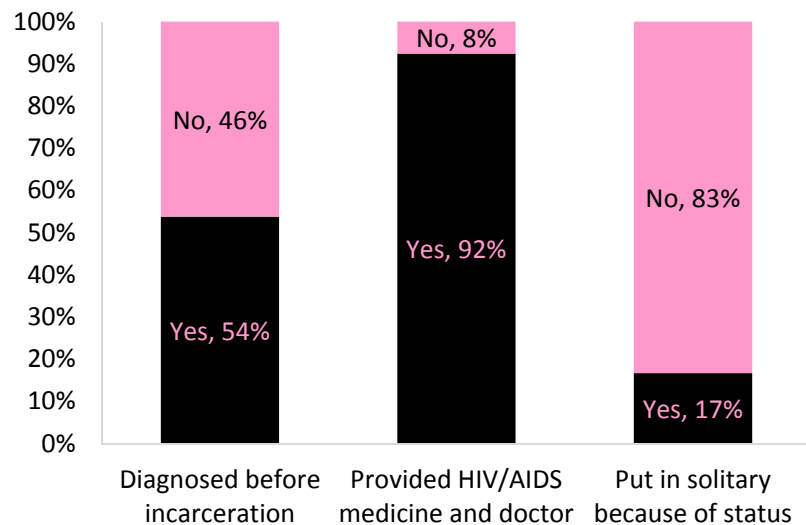
the Center for Disease Control among men who have sex with men (20%).³ It would seem that our respondents are under representative of HIV-positive LGBTQ prisoners. It is unclear if respondents may not know their HIV status, may have chosen not to disclose, are not able to be sexually active due to isolation from other prisoners, or if Black & Pink does not effectively reach HIV-positive prisoners.

Slightly over half (54%) of respondents who are HIV-positive received their diagnosis prior to their incarceration. While it is promising that the far majority of HIV-positive prisoners are receiving access to medical staff and treatment for manage their care, this does not necessarily lead to equitable treatment within the prison or a broad acceptance of community education about HIV/AIDS. One respondent came into the prison system with knowledge and experience of effective safer sex education gained from the outside, but staff attempted to quash any discussion of it amongst prisoners:

I have had staff members try to order me not to discuss the certain topics about AIDS/HIV with other inmates, outside of class as a peer educator, and specifically... to gay or homosexuals... cause I was not allowed to go speak to them in that manner...

A key struggle of living with HIV is dealing with the constant stigmatization of one's status as positive. HIV stigma is pervasive outside of prison, so it is unsurprising that HIV-positive respondents similarly experience harassment on the inside because of their status. Treatment of HIV-positive prisoners by prison staff ranges from indiscretion about respondents' HIV status to downright manipulative and abusive behavior. These are some of respondents' stories:

- ▼ *I believe that many, not all, of my institutional issues may have arose because of my HIV status in part - regarding harassful misconducts of state officials. One CO told a guy I was dating of my status and my ex-spouse told me of the officers actions; this was all while we were dating.*
- ▼ *I was diagnosed this yr and it has been hell! People treat me like I'm radioactive both staff and inmates, I have been begging since being diagnosed for mental health care ie counseling and HIV case mang. but have yet to receive any! It has made me depressed, suicidal and devastated!!!*
- ▼ *Living with HIV is a stigma in itself. But all too often the medical staff will deliberately put EVERYONE that is HIV+ or one call-out + give the same spill to each of us. So if one was + is not confident enough to disclose his status if just became evident. Because the staff totally refuses to use discretion. Therefore the Correction Officers will more than often be very disrespectful + yell, "Hey Mary another*

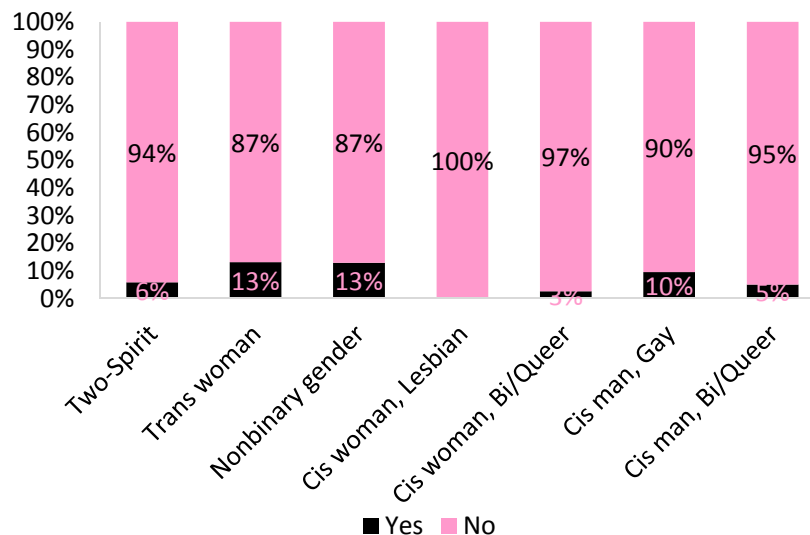


Experiences of respondents diagnosed with HIV/AIDS

Respondents: 80, 79, & 78, respectively

one of your HIV patients are here.” or “Hey Bob, Dead Man walkin.”

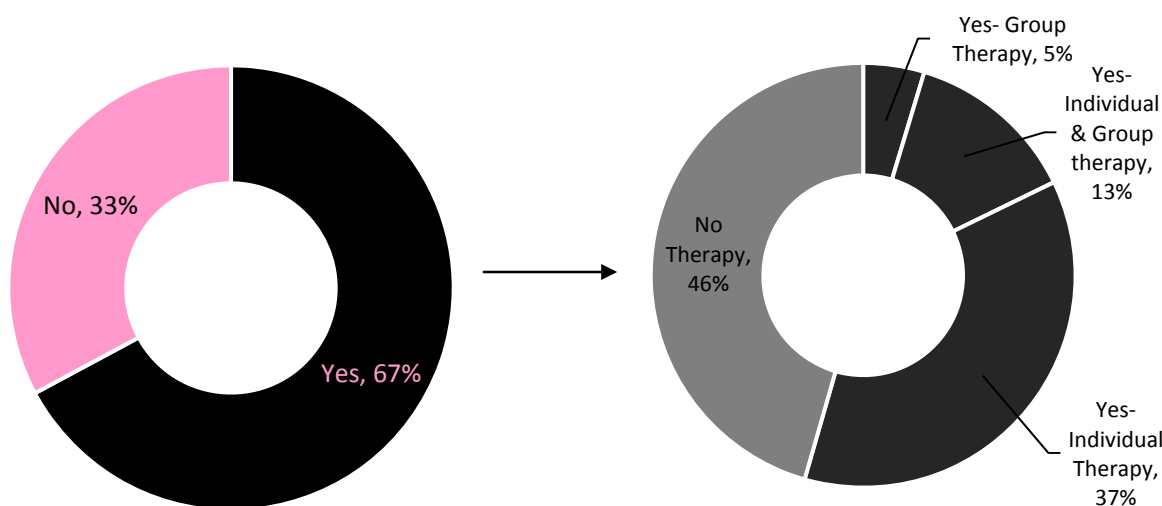
HIV does not affect all prisoners equally, just as it does not affect all people outside of prison equally. In particular, the greatest inequities in HIV status are across race. Black respondents are more likely to be HIV-positive than white respondents. Inequities are also noticeable between respondents based on gender and sexuality, with transgender women and nonbinary gender respondents having the highest prevalence of HIV (13%), followed by gay cisgender men (10%).



Whether respondents have HIV/AIDS diagnosis, by gender/sex
 Respondents: 51, 137, 62, 39, 38, 199, & 414, respectively

MENTAL ILLNESS

According to a 2005 special report of the Bureau of Justice Statistics, 56% of state prisoners and 45% of federal prisoners have a mental illness.⁴ Our respondents reported a significantly higher rate of mental illness, with more than two-thirds having a mental illness diagnosis. Of those respondents living with mental illness, nearly half receive no therapy, and those who do are not always getting adequate mental health care.



Whether respondents have been diagnosed with a mental illness
 Respondents: 1081

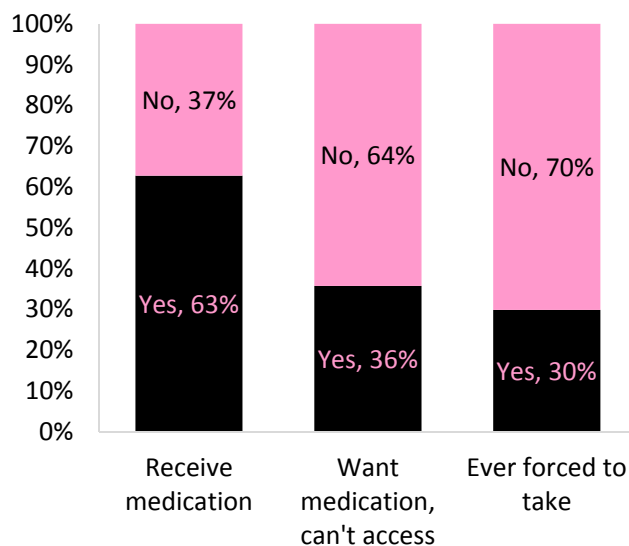
Whether and what kinds of therapy those with mental illness diagnoses participate in
 Respondents: 709

The pharmacological aspect of mental health care is not necessarily any better. There are respondents who want medication to treat their mental illness, but are unable to get it; meanwhile, there are respondents who are being forced to take medications they do not wish to take.

There is a crisis in prison healthcare generally, ranging from primary care to gender affirming treatment, from HIV/AIDS care to mental health treatment. The lack of adequate healthcare continues to demonstrate the institutional culture of viewing prisoners as disposable. Alongside larger efforts, immediate and effective care should be provided to all prisoners.

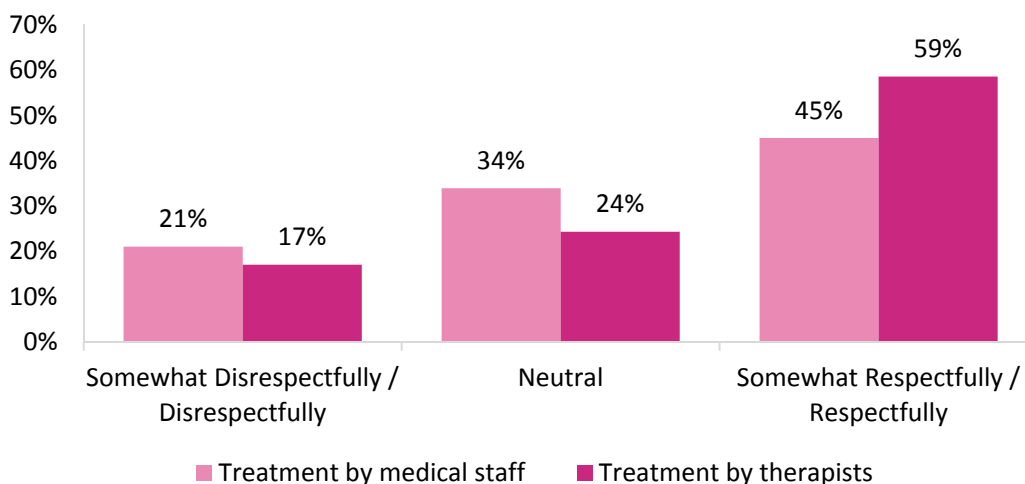
RESPECT

Even when respondents did get access to medical care, they were not necessarily provided adequate services that met their needs. A fifth of respondents (21%) reported that medical staff treated them disrespectfully or somewhat disrespectfully. While it is often suggested that medical staff will be a safe alternative for prisoners to reach out to, in reality the general medical care in prison for respondents leaves much to be desired. Similarly, nearly a fifth of respondents report being treated disrespectfully or somewhat disrespectfully by their therapist(s).



Medication experiences of those with diagnosed mental illnesses

Respondents: 717, 644, & 700 respectively



Treatment by medical staff and therapists

Respondents: 1055 & 563, respectively

Endnotes

1. Eisen, Lauren-Brooke. "Charging Inmates Perpetuates Mass Incarceration." Brennan Center for Justice at New York University School of Law, 2015.
2. Mayer, Kenneth H., et al. "Human immunodeficiency virus in correctional facilities: a review." *Clinical Infectious Diseases* 35.3, 2002: 305-312.
3. Wejnert C, Le B, Rose CE, Oster AM, Smith AJ, et al. "HIV Infection and Awareness among Men Who Have Sex with Men—20 Cities, United States, 2008 and 2011. Centers for Disease Control and Prevention, 2013.
4. James, Doris J., and Lauren E. Glaze. *Mental health problems of prison and jail inmates*. Washington, DC: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2006.



Art by Shaylanna L., incarcerated member

RELATIONSHIPS AND COMMUNITY

ROMANTIC RELATIONSHIPS

A large majority of respondents have developed significant romantic relationships while in prison. As *Queer (In)Justice* notes,

Despite rules banning sex and notwithstanding the reality of endemic physical and sexual violence, many incarcerated men and women engage in consensual, loving, sexual relationships and friendships as a form of resistance to the isolation and violent dehumanization of prisons, as a tool of survival within them, to affirm their humanity, or simply as an exercise of basic human desire.¹

However, LGBTQ prisoners are distinctly targeted for their relationships in ways that heterosexual prisoners are not; for example, by hyper-surveilling and/or prohibiting forms of contact that are often sanctioned or promoted for heterosexual prisoners. Indeed, respondents' experiences attest to a culture of policing and punishing queer relationships in prisons. This is a distinctly LGBTQ prisoner fear and experience.

Respondents shared some of the successes and challenges of maintaining romantic relationships in prison. Navigating these relationships can be incredibly difficult, particularly given that these relationships are forbidden by prison regulations. Below are some of the responses to how respondents, to the best of their abilities, resiliently participate in creating loving relationships with one another while in prison.



Envelope Art by Shaylanna L., an incarcerated member

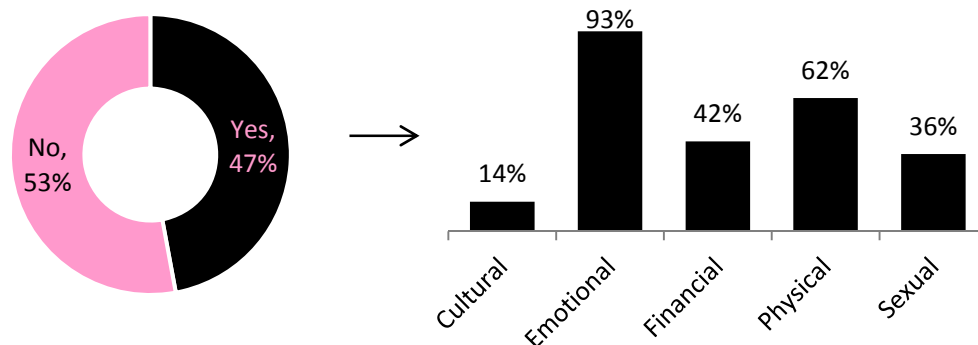
- ▼ *By staying out of trouble or gettin into trouble to manipulate transfer to same prison [as my partner]*
- ▼ *Me and my husband went to church service and passed letters through people who liked us to one another. I was on close custody my husband medium, and we met every Sunday, Thursday and Tuesday at church. Not caring what others think.*
- ▼ *It's nice to not be alone in here, but we have to be very secretive. Now with P.R.E.A. staff use it against Homosexuals. If they think we're together, they separate us permanently.*
- ▼ *The relationship worked cause I thought real love exist(s) in prison. She taught me to love again, even though she got released and went on with her life I needed that. The challenge was staying and not getting moved.*
- ▼ *It was rough cause of where we are but our families were involved with us so that made it strong . we go home together 2015.*
- ▼ *Talking to each other through cracks in the door in solitary.*
- ▼ *You just make it work it's hard cause you can always be split up, but for the most part. Just enjoy the time you have & always be careful. it's good to have someone who you know has your back.*
- ▼ *I'm trying to make one work now.*
- ▼ *We are both transgender women, imprisoned in different states. We fell in love by mail, and have stayed in love as committed partners since 2006. The power of love and the suspension of disbelief allows us to stay strong. I miss her everyday, yet she always with me.*
- ▼ *Always try to be discreet and low-key about it. however, it is hard to have a healthy relationship when everything around you is designed to prevent it from happening.*
- ▼ *We sat down and made lists of our expectations, boundaries and needs, then went over them together, made compromises if needed, then both signed and had copies. We went to positive classes together, learned communication skills. The hard part is the CO's who try to keep couples separated and punish us for even eating together.*
- ▼ *I only hang out with other LGBT or LGBT friendly people so that helps. The biggest challenge is not being able to hold hands or kiss the person I love because of rules.*
- ▼ *To know the routines of the prison and C/O's. Just be cautious when doing something and keep it private.*

- ▼ *I was too scared of people finding out because of the verbal and physical assaults that would have followed.*
- ▼ *Keep it unknown to officers to prevent them to make it hard. Texas legislation made it a misdemeanor to have a consensual sexual relationship on a TX prison.*

Secrecy was cited by many as both critical to maintaining romantic relationships and, at the same time, a significant obstacle to maintaining romantic relationships. The outing of relationships—whether by staff or other prisoners—was routinely reported as a threat to being able to maintain relational connections. Moreover, being found out has material consequences. As noted earlier, 24% of survey participants reported being punished for engaging in consensual sexual activity, ranging from receiving a “shot” (disciplinary ticket) to loss of privileges (e.g., phone calls) or even solitary confinement.

INTIMATE PARTNER ABUSE, SURVIVAL AND RESILIENCE

While romantic relationships can be beautiful and affirming for prisoners, they can also be harmful and abusive, just as they can be for people outside of prison. A third of respondents experienced some combination of emotional, physical, sexual, cultural and/or financial abuse in one or more romantic partnerships in prison. That percentage is higher than the statistic often cited that 1 in 4 LGBTQ people experience intimate partner violence nationwide.²



Whether respondent has ever been in an abusive relationship in prison and, if yes, what kind(s) of abuse were present
Respondents: 726 & 342, respectively

Eighty-two percent of respondents did not know of any institutional resources that could help them if they were attempting to leave an abusive relationship. The 18% of respondents who had some idea about available institutional resources mostly referred to PREA. Everyone who claimed knowledge of resources attested that most were untrustworthy and did not attempt to use them, or did little to nothing to intervene or protect themselves from intimate partner abuse.

Respondents who offered their own solutions to ending abusive relationships mostly did so without direct institutional support. A few respondents were able to enlist the support of friends or fight back on their own. One respondent wrote, “I ended my emotionally abusive relationship by sending him a note. I had the support of several friends close to me. I was worried when he moved back to the unit, but everything worked out.”

However, not all prisoners have access to friends who will defend them. Most respondents found that the only viable resolution they had access to was distancing themselves from their partner by moving to a different housing unit or another facility altogether. One of the most common ways of distancing oneself from an abusive partner was to seek solitary confinement. However, a request to be held in solitary confinement to get away from another prisoner is not always granted. One respondent wrote, “I had to cut my wrist to get away because the officers wouldn't help. It was the only way.” Self-harm can be one way that prisoners get themselves out of abusive relationships, or other particularly dangerous situations, although doing so often forces them into mental health units that have their own detrimental consequences.

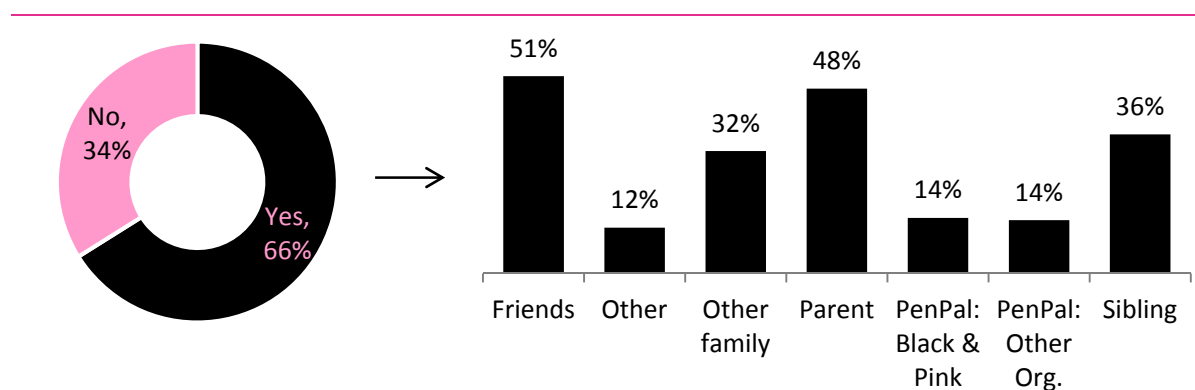
Below are stories LGBTQ prisoners shared about leaving abusive relationships in prison. In some cases, prisoners used homophobic policies and practices to either end or physically remove themselves from an abusive situation. In other cases, prisoners tried going through institutionally offered resources and were met with punishment for trying to access them. In all cases, there were no institutional support structures in place to deal directly with abuse crises or the trauma inflicted by abuse.

- ▼ *I always run to solitary confinement...it's the only place i feel safe since i don't have any outside help to get placed on safekeeping.*
- ▼ *Made sure we got caught having sex so we'd go to the hole.*
- ▼ *I got stronger I refused to be her doormat. I kept myself away from her until I knew I could stand up for myself to her.*
- ▼ *Placed in solitary, and told family via letters*
- ▼ *One instance the person was shipped to another unit. The second, I finally got strong enough with encouragement and support from friends to walk away from the relationship.*
- ▼ *Cell mate threatened me. I reported the situation to the guard per PREA and published policy. I was punished by 18 days in the hole solitary confinement in disciplinary segregation unit.*
- ▼ *I transferred to another institution without telling my cellmate/abuser.*
- ▼ *Verbally broke it off, then had myself moved to the other side of the yard so as to ensure lack of contact, surround myself with those I felt safe with.*

- ▼ *Asked for help from prison staff. It only took them 18 months to listen, and then another 6 months to take action.*
- ▼ *Sometimes I set boundaries. Sometimes I move housing.*
- ▼ *By getting transferred or messing up and getting institutional charges/tickets so I'd go to segregation.*
- ▼ *I called my mom and she called the prison.*

RELATIONSHIPS WITH COMMUNITY OUTSIDE OF PRISON

Maintaining relationships with community outside of prison can be vital to LGBTQ prisoners' well-being.³ As some of the stories above revealed, connection, support, and visibility are resources that can support survival and resistance to inhumane prison practices. The charts below show that two thirds of respondents receive mail at least once a month from a range of community members, family members, and pen pals. Given that many LGBTQ people struggle with family rejection, it is not surprising that friends are such an important connection to the outside.

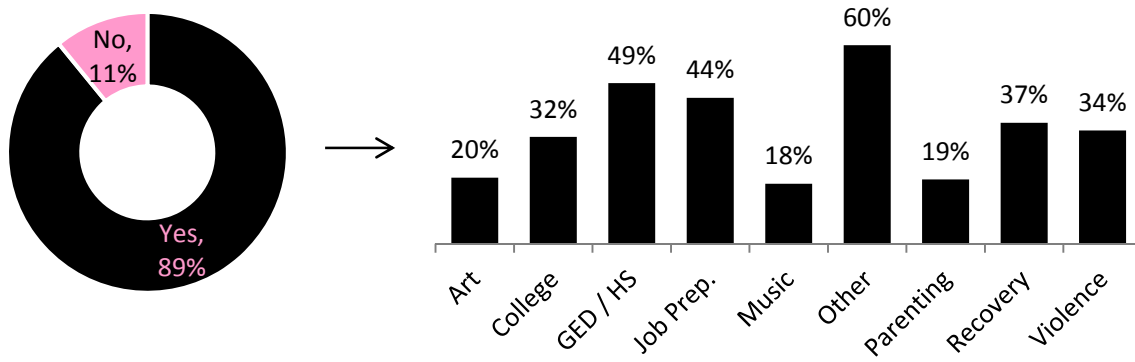


Whether the respondent receives regular mail from anyone, and if yes, which kind(s) of people
Respondents: 1097 & 716, respectively

Fewer than half of respondents receive newspapers and magazines aside from the Black & Pink newspaper. Although the mail is monitored, controlled, and censored by prison, the newsletter remains a critical resource for information to move between prison walls and the free world.

PROGRAMS

Most respondents (89%) reported having participated in a range of programs offered by the prison. The charts below show the variety of programming in which LGBTQ prisoners participate:



Whether the respondent ever took part in prison program(s), and if yes, which kind(s)
Respondents: 1084 & 966, respectively

However, 15% of respondents had been excluded from a program because of being LGBTQ. This can mean denying LGBTQ prisoners access to skills building, opportunities to accrue “good time credits” towards the possibility of parole, religious participation, or simply a break from the monotony of prison life.

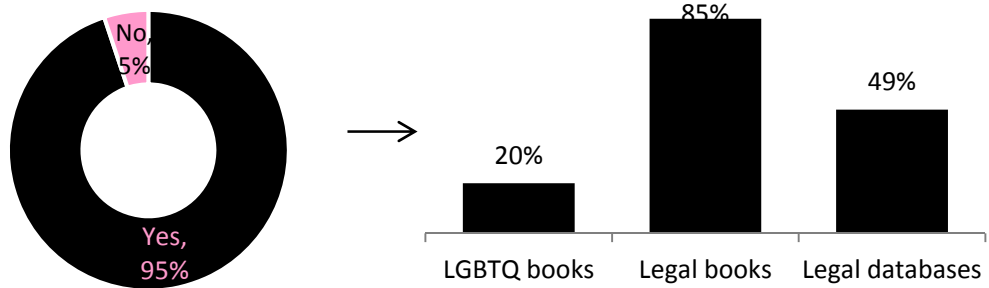
Not only are LGBTQ prisoners excluded from prison programming, but prison programming also excludes LGBTQ content. *Queer (In)Justice* illustrates an example of this practice from a facility in Michigan:

Efforts to eradicate all forms of activity and expression related to homosexuality can extend to the refusal to allow religious services for LGBT people. In 1984, Metropolitan Community Church, an LGBT-focused ministry, was denied entry into a Michigan facility to provide religious services. Conversely, religious programs that promote heterosexuality and submission to “traditional’ gender roles are welcome and promoted through incentives such as provision of more comfortable housing options in exchange for participation.⁴

ACCESS TO BOOKS

Ninety five percent of respondents have access to books provided by the institution. Of those, the vast majority have access to legal books, although only a fifth have access to books with LGBTQ content.

LGBTQ-affirming programming and books need to be made available in prisons. In order to be effective, these programs and books should be brought in to the prison via contracts with outside organizations, as outside organizations are much more likely to be trusted by LGBTQ prisoners than prison staff. Utilizing outside organizations for these services will strengthen trust by LGBTQ prisoners and ideally facilitate opportunities for deeper connections between LGBTQ prisoners and people on the outside.



Whether respondent is provided books by the institution they are in and, if yes, what kind(s) of books

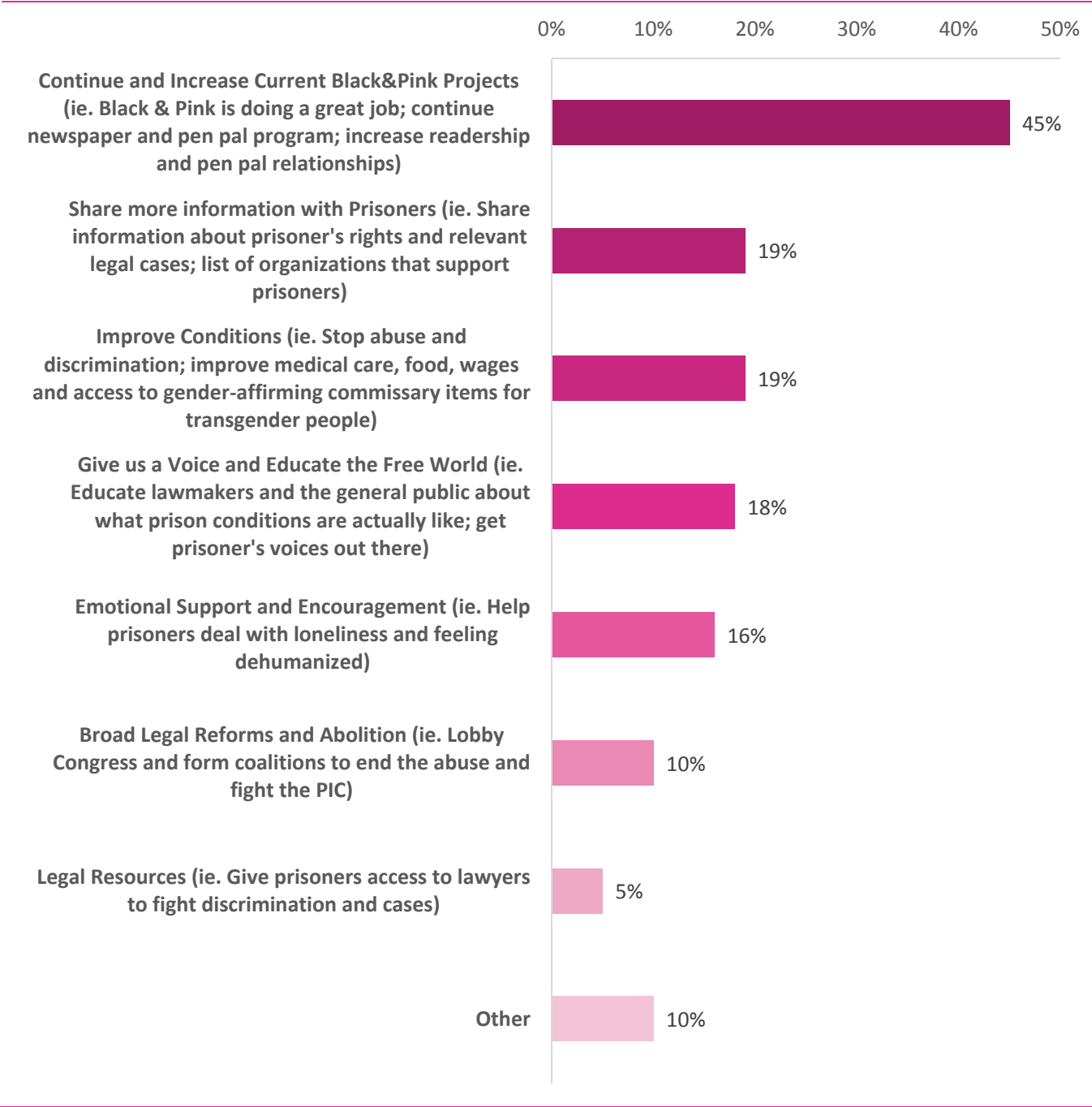
Respondents: 1079 & 1024, respectively



Art by Mikee, incarcerated member

VISIONS FOR MOVEMENT BUILDING

Respondents offered clear strategies for building the power of LGBTQ prisoners. Ninety percent of the responses fell into seven categories, listed below with representative examples:



The clearest mandate from respondents was that Black & Pink should continue its current projects: the newspaper and pen pal program, which help prisoners deal with the stress of being incarcerated and feel accepted in their

gender and sexuality, and the provision of resource lists as well as prisoner advocacy (i.e., calling prisons to advocate for individual prisoners who are being abused). Additionally, respondents requested more information on their rights, legal changes, and case law. As shown throughout this report, abuse and discrimination from prison staff members is a major concern. Respondents want their voices and stories to reach lawmakers and the general public to educate them about what prison conditions are actually like for LGBTQ prisoners.

Here is a selection of representative answers to the question: “How can the Black and Pink family increase the power of prisoners?”

- ▼ *The most important way to empower prisoners is by giving them a voice and a "soap box" to communicate from. Inability to communicate is the one most effective way prisons control and oppress us prisoners. Further to bring accountability to the staff abusers, and to stop retaliation from reporting. If we don't report a wrong or abuse for fear of being attacked we never will be strong. Finally we need to continue building our ranks in prison and out. Power In Numbers!*
- ▼ *By giving more of the honest truth to the world at large! Tell people the real truth, prisons don't deter crime, programs and mentoring do!*
- ▼ *Create a means of Holding Staff accountable for any and all wrongdoing. Help prisoners acquire more say so in How, Where, and With Whom they are housed.*
- ▼ *Increase the power of prisoners by letting us be placed with the one's we love and to help lower the commissary prices because it's hard living in prison with no help from the outside world and living on cheap state pay knowing that you can't eat a meal or snack at night all because of the government issues.*
- ▼ *1. Working to decrease the rate of recidivism; 2. Advocate restoration and use of voting rights by ex-offenders; 3. Educate prisoners about their rights and how to exercise said rights; 4. Centralize the flow of information and advocacy so that the prisoners in different systems can be on the same page in our struggle. 5. Inspire and enlighten those in the dark places. Light as many candles as we can!*
- ▼ *Maybe list addresses to pro bono attorneys. Help with getting our criminal truth version out to the free world. Addresses to counseling or self help groups to correspond with through mail maybe someone to help us with grievances that are never answered or held so that time elapses. You all are awesome already. You give us so much strength.*
- ▼ *We/I would like to see what can be done about all the violence/stigma that is being committed against all our transsexual, queers & lesbian, sisters across NYs who are incarcerated, held in solitary or put in protective custody against their will, and being denied not only certain medications by denied shots/pills for our beloved sisters who are transitioning to being what they want to be. A full woman*

CONCLUSION

It is the responsibility of those with power to listen to the voices of those affected by it. These pages offer necessary tools for those willing to work in solidarity with LGBTQ prisoners. It is the hope of the authors, and all members of Black & Pink, that the collective movement for liberation is strengthened by the addition of these stories, data, and information contained in this report. LGBTQ prisoners, disproportionately transgender women, nonbinary gender prisoners, cisgender gay men, and people of color, are experiencing horrific violence, harm, and inequities of all sorts. However, even while surviving all of this, LGBTQ prisoners also offer clear leadership to those willing to follow. This is an invitation for you to strengthen the work you are already doing with criminalized LGBTQ people and LGBTQ prisoners or get involved for the first time. There is much work to do and a movement to grow, join us!

ACKNOWLEDGMENTS

This report has been made possible because of so many people's hours of work. First and foremost, thanks goes to the prisoner members of Black & Pink, who took the time and risk to fill out this groundbreaking survey. Many thanks to the following people for entering survey data: Akane, Alice, Andrew, Andy, Ben, Courtney, Derwin, Desiree, DJ, Eddie, Eli, Elizabeth, Emily, Emma, Franklin, Gabriel, Gilbert, Greg, Jackie, Jaymie, Johannes, Julia, Kamaria, Katie, KC, Keelyn, Kenny, Mitali, Olivia, Peter, Reina, RK, Ruthie, Rye, Tyler, Victoria, Zoe. Thank you to Jackie Wang for highlighting the harms caused by solitary confinement as evidenced in our findings and for co-facilitating the Allied Media Conference workshop. Much gratitude to Chris Schweidler from the RAD Collective for creating survey tools, sharing data information, connecting collaborators, and in general having great wisdom. Thanks to Shaya French for coding data on building prisoner power. Thank you to Heike Schotten for the excellent editing of the report. We want to appreciate the image we used on the cover of this report, it is a photo taken of Alcatraz prison by Mike Shelby. Big thanks to Urvashi Vaid for opportunities to present the preliminary data and connecting possible donors and researchers.

Funding for this project was made possible by the Van Amerigen Foundation, the Hutchins Center for African and African American Research at Harvard University, Horizon's Foundation, Michael Field, and Alix Ritchie. However, truly none of this work would have been possible without the blood, sweat, and tears of our elders and ancestors in the prisoners' rights and penal abolitionist movement. To them also, we give our thanks.



The member survey begins by asking a bit about you. **PLEASE ONLY FILL OUT THIS IMPORTANT SURVEY ONE TIME.**

1. Your age: _____ years old

2. Your race/ethnicity:

▼ 2a. Black/African American/Afro-Caribbean

▼ 2b. Latin@/Hispanic

▼ 2c. White (non-hispanic)

▼ 2d. East Asian

▼ 2e. Southeast Asian

▼ 2f. South Asian

▼ 2g. Middle Eastern/Arab

▼ 2h. American Indian/Indigenous/First Nations/Native American

▼ 2i. Mixed Race

▼ 2j. Native Hawaiian or other Pacific Islander

▼ 2k. Inuit/Native Alaskan

▼ 2l. Other: _____

3. What languages do you speak? _____

4. Your gender/sex (below are some examples)

▼ 4a. Trans woman (assigned Male when born, now a Woman)

▼ 4b. Trans man (assigned Female when born, now a Man)

▼ 4c. Woman, or Cisgender Woman (assigned Female when born, now a Woman)

▼ 4d. Man, or Cisgender Man (assigned Male when born, now a Man)

▼ 4e. Genderqueer / Gender fluid

▼ 4f. Two Spirit (this identity only applies to people who identify as Indigenous / Native American / American Indian)

▼ 4g. Intersex

▼ 4h. Any other description of your gender? _____

5. Your sexuality

▼ 5a. Lesbian

▼ 5b. Gay

▼ 5c. Homosexual

▼ 5d. Bisexual

▼ 5e. Queer

▼ 5f. Same-Gender Loving

▼ 5g. Two Spirit (this identity only applies to people who identify as Indigenous / Native American / American Indian)

▼ 5h. Asexual

▼ 5i. Any other description of your sexuality? _____

6. Do you have a disability? _____ Yes, _____ No

6a. What kind of disability (please list all)? _____

7. Do you have children? _____ Yes, _____ No

7a. If yes, do you ever get visits or phone calls from them? _____ Yes, _____ No

8. Did you complete this kind of school? Mark X for "Inside" an institution like prison or juvenile detention, or "Outside" in the free world?

▼ 8a. Elementary School: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8b. Middle School: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8c. High School: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8d. GED: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8e. Some college credit, no degree: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8f. Trade/technical/vocational training: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8g. 2 year college (Associate degree): _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8h. 4 year college (Bachelor's degree): _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

▼ 8i. Graduate degree: _____ "inside" an institution like prison or juvenile detention, _____ "outside" in the free world

9. Have you ever served in any branch of the armed forces of the United States? _____ Yes, _____ No

9a. If yes, which branch? _____

10. What was your housing situation before you were incarcerated most recently? _____

11. Were you employed before you were incarcerated most recently? _____ Yes, _____ No

12. Have you ever traded sex for money, housing, food, drugs, protection or services when not incarcerated? _____ Yes, _____ No

13. Have you ever sold drugs for money? _____ Yes, _____ No

14. Have you ever stolen money or anything else you needed? _____ Yes, _____ No

15. How much money did you make in a year before you were incarcerated most recently? \$ _____

16. Growing up, about how much money did the people who raised you make each year? \$ _____

17. How old were you when you were first arrested? _____ years old

18. How old were you when you were first incarcerated? _____ years old

19. How many times have you been incarcerated? _____ times

Pre-Trial and Court Questions (based on your current sentence)

20. Were you held in jail prior to your conviction because you could not afford bail? _____ Yes, _____ No

20a. If yes, how long were you held in jail prior to your sentencing? _____ years _____ months _____ days

21. Were you denied bail prior to your conviction? _____ Yes, _____ No

21a. If yes, how long were you held in jail prior to your sentencing? _____ years _____ months _____ days

22. Did you have a private attorney? _____ Yes, _____ No

23. Did you have an attorney appointed for you? _____ Yes, _____ No

24. Did your attorney know about your gender/sexual identity? _____ Yes, _____ No

25. Did you feel discriminated against by your attorney? _____ Yes, _____ No

26. Did you feel discriminated against by the prosecution? _____ Yes, _____ No

27. Did you feel discriminated against by the judge? _____ Yes, _____ No

28. Did you take a plea agreement? _____ Yes, _____ No

28a. If yes, what were some of the reasons that you took the plea agreement? _____

29. Did you have a jury trial? _____ Yes, _____ No

29a. If yes, did you feel discriminated against by the jury? _____ Yes, _____ No

30. What were you convicted of (remember this is anonymous, and we will not judge you based on your conviction)? _____

Instructions for survey (second printing of same survey)

- Please mark **one** or **more** ▼ which make sense for you.
- Please put an X for " X Yes, _____ No" type questions
- Please put **one** or **more** X for questions like:
" X Emotional, _____ Physical, X Sexual"
- Please fill in the blank for other types like:
" 35 years old" or "\$ 10,000 "
- Please write in answers to more detailed questions. You can use more paper if you are putting the survey in an envelope, please just write the question number ☺



Cute
break!

They say
"Hi!"

Incarceration Questions (based on your current sentence)

31. How long is your current sentence?

▽ 31a. Release after (Example: 10 years 6 months): _____ years _____ months

▽ 31b. Life sentence

▽ 31c. Life without parole

▽ 31d. Death Sentence

32. How long have you done on this sentence? (Example: 3 years 4 months) _____ years _____ months

33. What type of facility are you currently housed in? _____ Federal, _____ State, _____ County, _____ Hospital

34. What level facility are you currently housed in? _____ Pre-Release, _____ Minimum, _____ Medium, _____ Maximum, _____ Super Max

35. Which state are you incarcerated in now? _____

36. Have you ever been in solitary confinement? _____ Yes, _____ No

Please only answer questions 37-41 if you have ever been in solitary confinement. Otherwise, skip to question 42. Thank you!

37. Are you currently in solitary confinement? _____ Yes, _____ No

38. How many times have you been in solitary confinement? _____ times

39. Added together, what is the total amount of time you have spent in solitary confinement? _____ years _____ months _____ days

40. Have you ever been placed in solitary confinement for your own safety, or as a protective measure by the prison, *against your will*? _____ Yes, _____ No

41. Have you ever been placed in solitary confinement for your own safety *by your own request*? _____ Yes, _____ No

41a. If yes, what were some of the reasons? _____

Parole Questions

42. Do you have the option for parole with your current sentence? _____ Yes, _____ No

42a. Given the opportunity, would you go on parole? _____ Yes, _____ No

42b. If yes, when do you go up for your next parole hearing? _____

43. Have you ever been granted parole during a previous sentence? _____ Yes, _____ No

44. Have you ever been denied parole? _____ Yes, _____ No

45. How do you feel the parole board treated you? _____

45a. Do you believe you were discriminated against by the parole board? _____ Yes, _____ No

46. Have you ever been returned to prison for a parole violation? _____ Yes, _____ No

This is a great time to take a break, stretch your fingers, and rest. The next bunch of questions start asking about your identity and experiences with harm.

Sexuality

47. Did you identify as LGBTQ before your incarceration? _____ Yes, _____ No

48. Have you felt emotional pain from hiding your sexuality? _____ Yes, _____ No

49. Do any other prisoners know what your sexuality is? _____ Yes, _____ No

49a. If yes, how did they respond? (It is okay if different people had different reactions) _____

50. Do prison staff know about your sexuality? _____ Yes, _____ No

50a. If yes, how did they respond? (It is okay if different people had different reactions) _____

51. If you have been sexually active in prison, have you had conversations while in prison with your sexual partners about:

_____ Safer sex, _____ Sexually transmitted infections, _____ HIV/AIDs, _____ None of these topics, _____ I have not been sexually active in prison

52. Have you ever been disciplined for consensual sexual activity? _____ Yes, _____ No

52a. If yes, which then occurred?: _____ Disciplinary ticket (shot), _____ Loss of privileges (like phone calls), _____ Placed in solitary confinement, _____ Other: _____

53. Have you ever used condoms or other barriers to help stop the transmission of Sexually Transmitted Infections while in prison? _____ Yes, _____ No

54. Does your prison offer access to condoms or other safer sex items? _____ Yes, _____ No

55. Have you ever traded sex with other prisoners for money/canteen/commissary during your incarceration? _____ Yes, _____ No

56. Have you ever traded sex with other prisoners for personal protection? _____ Yes, _____ No

Questions 57-69 are about Gender Identity.

Please answer only if you identify as transgender, gender non-conforming, genderqueer, two spirit, or another gender that is not cisman or ciswoman

Gender Identity

57. Have you felt emotional pain from hiding your gender identity? _____ Yes, _____ No

58. Do any other prisoners know what your gender identity is? _____ Yes, _____ No

58a. If yes, how did they respond? (It is okay if different people had different reactions) _____

59. Do prison staff know about your sexuality? _____ Yes, _____ No

59a. If yes, how did they respond? (It is okay if different people had different reactions) _____

60. Do you have a diagnosis of Gender Identity Disorder or Gender Dysphoria? _____ Yes, _____ No

61. Have you ever been denied a diagnosis of Gender Identity Disorder or Gender Dysphoria? _____ Yes, _____ No

62. Before you were incarcerated, did you take hormone replacement therapy to support your gender expression?

_____ Yes prescribed by a doctor, _____ Yes from the street, _____ No

63. Do you take prescribed hormone replacement therapy to support your gender expression now? _____ Yes, _____ No

64. Have you ever been denied hormone replacement therapy you requested? _____ Yes, _____ No

65. Have you been given access to gender confirming (AKA sex reassignment) surgeries? _____ Yes, _____ No

66. Have you been denied access to gender confirming (AKA sex reassignment) surgery you requested? _____ Yes, _____ No

67. Do you know your prison's policy about medical services for transgender prisoners? _____ Yes, _____ No

67a. If yes, what is your understanding of the policy? _____

68. Are you permitted access to underwear and cosmetic needs that match your gender? _____ Yes, _____ No

69. Is there a special canteen available for transgender prisoners? _____ Yes, _____ No

69a. If yes, does one have to have a medical diagnosis to access products in this canteen? _____ Yes, _____ No

Sometimes even reading questions about violence can bring up things inside your mind. These thoughts can make you sad, angry, feel like you are back in the situation when harm happened. Remember to take breaks if you need them. Remember that you are not alone. One of the reasons we ask these questions is to show that violence against LGBTQ prisoners is far too common. Know that you are cared for and not forgotten.

Discrimination, harassment, physical and sexual violence by prison staff

70. Have you experienced discrimination by prison staff? _____ Yes, _____ No

71. Have you experienced name calling or verbal harassment by a prison staff person? _____ Yes, _____ No

72. Have you ever been physically assaulted (hit, punched, kicked, beaten, etc) by a prison staff person? _____ Yes, _____ No

73. Approximately how many times have you been strip searched during your incarceration? _____ times

74. Have you ever been subjected to a cavity search (inserting fingers inside anus and/or vagina)? _____ Yes, _____ No

75. Have you ever had unwanted touching by a prison staff person? _____ Yes, _____ No

76. Have you ever been sexually assaulted or raped by a prison staff person? _____ Yes, _____ No



77. Would you be willing to share any details of your experience(s) of unwanted touching or sexual assault by a prison staff person? ____ Yes, ____ No
If yes, please describe (feel free to use another page if you are sending this in an envelope): _____

78. Have you ever been promised anything in exchange for sexual favors from prison staff? ____ Yes, ____ No

79. Have prison staff ever intentionally placed you where you would be at high risk of being sexually assaulted by another prisoner? ____ Yes, ____ No

Discrimination, harassment, physical and sexual violence by another prisoner

80. Have you experienced discrimination by another prisoner? ____ Yes, ____ No

81. Have you experienced name calling or verbal harassment by another prisoner? ____ Yes, ____ No

82. Have you ever been physically assaulted (hit, punched, kicked, beaten, etc) by another prisoner? ____ Yes, ____ No

83. Have you ever had unwanted touching by another prisoner? ____ Yes, ____ No

84. Have you ever been sexually assaulted or raped by another prisoner? ____ Yes, ____ No

85. Would you be willing to share any details of your experience(s) of unwanted touching or sexual assault by another prisoner? ____ Yes, ____ No

If yes, please describe (feel free to use another page if you are sending this in an envelope): _____

Relationships

86. Have you ever been in a romantic relationship while in prison? ____ Yes, ____ No

87. Have you ever been in love with another prisoner? ____ Yes, ____ No

88. How did you make the relationship work? What were some of the successes? What were some of the challenges? _____

89. Are you now or have you ever been in an abusive relationship while in prison? ____ Yes, ____ No

89a. If yes, what kinds of abuse were present in your relationship? Abuse occurs when there is control by one person over another person:

____ Emotional, ____ Physical, ____ Sexual, ____ Financial, ____ Cultural

90. If you have gotten out of an abusive relationship while in prison, in the past, how did you do so? _____

91. Do you know of resources available for prisoners who are in abusive relationships during their incarceration? ____ Yes, ____ No

91a. If yes, what are they? _____

This is a great time to take another break. Stretch your body, stretch your fingers. Take a rest.

Drug Use

92. Have you ever struggled with drug/alcohol addiction? ____ Yes, ____ No

93. Which drugs or alcohol have you used? _____

94. Have you used while incarcerated? ____ Yes, ____ No

95. Are there drug treatment programs available to you? ____ Yes, ____ No

Prison Programs

96. Have you ever taken part in a program offered by the prison? ____ Yes, ____ No

96a. If yes, which programs have you taken part in? ____ Parenting, ____ Recovery, ____ Violence Prevention, ____ Music, ____ Art, ____ Job Training, ____ GED/High School Diploma, ____ College Classes, ____ Other programs

97. Have you ever been denied access to a program because of being LGBTQ? ____ Yes, ____ No

98. Does the institution you're in provide access to any books? ____ Yes, ____ No

98a. If yes, can you access these kinds of books? ____ Legal books, ____ Computer databases about legal information, ____ LGBTQ books

99. What types of books do you read (either from the institution or mailed to you)? _____

Healthcare

100. How many times per year do you see a doctor?

101. Do you have to pay a fee to see a doctor? ____ Yes, ____ No

101a. If yes, how much are the fees you have to pay to see a doctor? \$ _____

101b. If yes, has the fee ever prevented you from accessing medical care? ____ Yes, ____ No

102. Does the medical staff know that you are LGBTQ? ____ Yes, ____ No

103. Have you ever been denied medical care you requested? ____ Yes, ____ No

104. How does the medical staff treat you?

____ Respectfully, ____ Somewhat respectfully, ____ Neutral, ____ Somewhat disrespectfully, ____ Disrespectfully

HIV/AIDS

105. Have you ever been tested for HIV/AIDS? ____ Yes, ____ No

106. Have you ever received education about HIV/AIDS in prison? ____ Yes, ____ No

107. Have you been diagnosed with HIV/AIDS? ____ Yes, ____ No

108. Were you diagnosed before your incarceration? ____ Yes, ____ No

109. If you are living with HIV/AIDS, are you provided with medication and doctor's visits for HIV/AIDS? ____ Yes, ____ No

110. Have you ever been put in solitary confinement because of your HIV/AIDS status? ____ Yes, ____ No

111. If you are living with HIV/AIDS, can you share some about your experience with harassment, stigma, support, or other interactions with prisoners and prison staff? Please share as much or as little as you would like _____

Hepatitis C

112. Have you been diagnosed with Hepatitis C? ____ Yes, ____ No

113. Were you diagnosed before your incarceration? ____ Yes, ____ No

114. Are you provided appropriate care for Hepatitis C (medication)? ____ Yes, ____ No

Mental Illness

115. Have you been diagnosed with any mental illness? ____ Yes, ____ No

115a. If yes, do you receive any therapy? ____ Individual therapy, ____ Group therapy, ____ No, I do not receive therapy

116. How do your therapist(s) treat you?

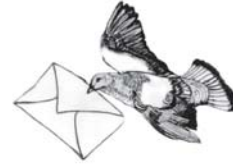
____ Respectfully, ____ Somewhat respectfully, ____ Neutral, ____ Somewhat disrespectfully, ____ Disrespectfully

Note: this space is left blank so that your name, on the reverse side, can be removed from the survey and your answers will remain anonymous

117. Do you receive any medication to treat mental illness? ____ Yes, ____ No
 118. Do you want medication to treat mental illness, but are not able to access it? ____ Yes, ____ No
 119. Have you ever been forced to take medication that you didn't want to take for mental illness? ____ Yes, ____ No

Mail: Letters, Penpals, and the Newspaper

120. Do you receive regular mail (at least once per month) from anyone? ____ Yes, ____ No
 120a. If yes, please mark who sends you regular mail: ____ Parent, ____ Sibling / Sister / Brother, ____ Other family member, ____ Friend, ____ Black and Pink penpal, ____ Penpal from another organization (which one? _____), Other: _____
 121. How many pen pals do you have from Black and Pink? ____ pen pals
 121a. If you have penpal(s), how would you rate your overall experience with your penpal(s)? ____ Great, ____ Okay, ____ Bad
 122. How long have you been writing with your Black and Pink pen pal(s)? _____
 123. How often do you get a letter from your penpal(s)? _____
 124. What kinds of experiences have you had with your Black and Pink penpal(s)?
 ▽ 124a. I get emotional support from our pen pal friendship
 ▽ 124b. We write each other sexy letters/erotica
 ▽ 124c. They stopped writing
 ▽ 124d. I wanted romance and they didn't
 ▽ 124e. They sent me money or gifts
 ▽ 124f. We write about social justice/activism
 ▽ 124g. They help with personal advocacy needs
 ▽ 124h. Other thoughts about your penpal: _____



125. When did you get your first issue of the Black and Pink newspaper? ____ month ____ year
 126. Have you ever had the Black and Pink newspaper refused by the mail room? ____ Yes, ____ No
 126a. If yes, what reasons did they give _____
 127. Do you receive any other publications (newspapers and magazines etc)? ____ Yes, ____ No
 127a. If yes, which ones? _____

Politics

128. What are your political beliefs? Feel to list several. (Example: revolutionary, moderate, conservative, anarchist, patriot, progressive etc): _____
 129. Which terms do you prefer people to refer to you as: ____ Prisoner, ____ Inmate, ____ Incarcerated person, ____ Person who is incarcerated, Other: _____

Movement Building & Visions for Change! (Feel free to use another page if you are sending this in an envelope, please list the question number)

130. How can the Black and Pink family increase the power of prisoners?

Step 1 for folding Business Reply Mail: Fold back along this line below

131. What is your vision of a world without prisons?

132. What are two immediate changes you feel are most important for people to work towards as we build the movement for abolition (for example: ending solitary confinement, abolishing life without parole, eliminating mandatory minimums, etc)

- 1) _____
 2) _____

133. What do you feel should be Black and Pink's three priorities?

- 1) _____
 2) _____
 3) _____



You are finished!!!! Thank you for taking this survey! Your information is very valuable. Your experiences need to be honored. We are stronger because of your voice. Thank you!

To share the Black & Pink family's appreciation, after you send in the survey you will receive a Certificate, a resource guide, and be entered in a raffle for \$25 canteen (with 25 winners)! Each person will only be entered into the raffle one time.

Step 2 for folding Business Reply Mail: Fold back along this line

Please SEND IN YOUR SURVEY! DEADLINE DECEMBER 15!

If you are able to afford the stamp to mail this to us, we would really appreciate your help in saving costs! We pay for each Business Reply.

Please put the survey in an envelope and send it to:

Black and Pink –SURVEY, 614 Columbia Rd. Dorchester MA 02125

However, if you are not able to afford the postage, please feel free to use this Business Reply Mail and send in the survey at no cost to you. Return address is optional, do if needed. Fold this sheet of newspaper so that the entire BUSINESS REPLY MAIL rectangle above is on the front, and this text is on the back:

- Step 1)** Fold the paper back at the crease in the middle along the bottom of the BUSINESS REPLY MAIL rectangle. **Step 2)** Fold the paper in on this line to the left. **Step 3)** Fold the paper in at the line at the top of this rectangle. **Step 4)** Use something to tape or staple it together. **Step 5)** Mail it! No stamp!

Please tell us your name and DOC# to receive your certificate! We will remove your name from this survey immediately so your answers are anonymous.

NAME: _____ # _____

Step 3

LA WEEKLY



STEAMPUNKS AND
SUPERHEROES: REVIEWS
OF JOSS WHEDON'S *THE
NEVERS*, NETFLIX'S
SHADOW AND BONE AND
MORE

APRIL 30, 2021

DODGER STADIUM TO
CLOSE ITS VACCINATION
SITE AT END OF MAY

APRIL 30, 2021

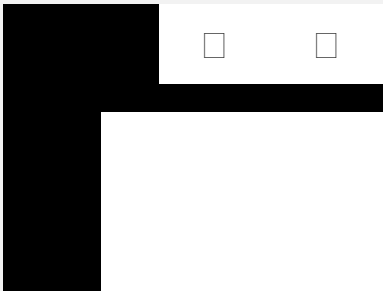
THE TIME HAS COME FOR
CANNABIS EQUITY

APRIL 30, 2021

FROM KANYE TO MELVINS
— THE NEW LA WEEKLY
PLAYLIST IS LIVE

APRIL 30, 2021

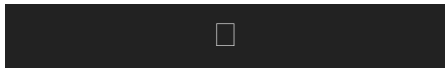
RELATED ARTICLES



IN THE GAY WING OF L.A. MEN'S CENTRAL JAIL, IT'S NOT
SHANKS AND MUGGINGS BUT HAND-SEWN GOWNS AND
TEARS



ANI UCAR NOVEMBER 18, 2014



With rouged lips, long hair and a strut that would give Naomi Campbell pause, Dave Williams, 47, works the 75-foot runway that stretches between crowded rows of green chipped-paint bunk beds at the L.A. County Sheriff’s Men’s Central Jail.

Williams, a transgender inmate known on the inside as Yah Yah, glides past a hooting and hollering crowd of her fellow gay and transgender inmates, perched atop their beds for a prime view. She’s flaunting a white cotton halter-top baby-doll dress and matching white Cinderella gloves, hand-crafted for her by one of the trans women inside this infamously tough downtown L.A. jail.

Laughing onlookers chant, “Work it, Yah Yah!” “Perform honey!” “Better work that runway!”

Catwalking on the balls of her feet as another inmate improvises syncopated beats by banging on a metal bed frame using a plastic spoon



**AIR FILTRATION EXPERT
ADVISE FOR THE UPCOMING
SEASON**

MAY 2, 2021

**LA WEEKLY
FAVORITES**

**YARIN GLAM IS KEEPING IT
REAL**

**BEYOND THE TACO – AT
COOK’S TORTAS IN
MONTEREY PARK, TELERA
IS KING**

**SUNDANCE AT HOME:
AMERICA’S LARGEST INDIE
FILM FESTIVAL GOES
VIRTUAL**

**A NEW FILM PRESENTS M.C
ESCHER IN HIS OWN
WORDS**

and a plastic 7-Up bottle, Yah Yah is in her element. Her infectious energy lights up the locked, windowless room filled with roughly 140 inmates. Two other inmates, both with long dark hair and wearing form-fitting minidresses, jostle to be the next to parade down the aisle. They twitch their hips and seem to be having the time of their lives as scores of men and transgender women whoop and shout out unprintable encouragements.

The impromptu fashion show broke out the moment after inmates spotted *L.A. Weekly's* video camera. Shortly before, Yah Yah, one of four inmates approved by the Sheriff's Department to speak to, and be videotaped by, the newspaper, had been explaining, "You're allowed to be with whomever you want to, talk to whomever you want and do whatever you want to, basically, as long as you do it in a respectable way."

]

The logo for LA Weekly, featuring the letters "LA" in a large, bold, black font, followed by the word "WEEKLY" in a smaller, bold, black font.

The scene seems all but impossible inside this tough, urban jail, one of the largest in the world, outfitted with 1,000 security cameras and employing some 500 Sheriff's deputies as jailers, where hardened inmates sometimes manage to murder other inmates. And this year, seven of the county's own jailers were convicted as part of an ongoing federal investigation into obstruction of justice and use of excessive force against inmates.

MCJ, as many dub it, is a cauldron of racial tension where violence is easily stirred by a fluctuating daily population of 3,900 to 4,700 inmates packed in close quarters. But among the roughly 400 people housed in

“K6G,” the gay wing of Men’s Central Jail, there’s little outward expression of racial prejudice or gang rivalry. Inmates in these three open-plan dorms don’t worry much about the gang politics and violence among the “general population.”

Duncan Roy, [a gay British film producer who was held in K6G for 89 days without bail in 2012, under ex–Sheriff Lee Baca’s controversial interpretation of “immigration holds,”](#) recalls, “In other parts of the jail, you try and smuggle in drugs and cigarettes. That didn’t happen in our wing.

“If you were going to smuggle something in, it would be dresses and bras.”

The gay wing at Men’s Central Jail is an exceptionally rare, if not unique, subculture, the only environment of its kind in a major U.S. city. Nothing like it exists in America’s 21 largest urban jails, all contacted by the *Weekly*, where officials described in far more modest terms their own steps to deal with and house gay inmates. San Francisco has a transgender housing area, but gay inmates live among the general population. In New York’s Rikers Island, whose similar gay wing was shuttered in 2005, a jail spokesman laughed out loud, saying that whoever decides which men get placed in L.A. County’s gay jail wing “must have really good gay-dar.”

A spokesman for the Fort Worth jail system quipped that L.A.’s inmate population is so big, officials probably could create a wing for “left-handed Frisbee players from Albania. But we smaller jails don’t have enough size to create special groups.” The closest thing to a gay wing in another big, urban jail system, though it isn’t close at all, is at the Old Wayne County Jail in Detroit, which offers a small number of locked cells to gay and transgender inmates.

MCJ’s gay wing was set up in response to a 1985 ACLU lawsuit, which aimed to protect homosexual inmates from a higher threat of physical violence than heterosexuals faced. But something unexpected has happened. The inmates are safer now, yes. But they’ve surprised everyone, perhaps even themselves, by setting up a small and flourishing society behind bars. Once released, some re-offend in order to be with an inmate they love. There are hatreds and occasionally even severe violence, but there is also friendship, community, love — and, especially, harmless rule-bending to dress up like models or decorate their bunks, often via devious means.

LA WEEKLY

Another inmate of the gay wing at Men's Central Jail struts her stuff.;

Credit: Photo by Ani Ucar

Filing down a plastic razor blade, say, to create a sewing needle, not a shank. “Smuggling” a rumored male seamstress from another bloc to handle custom work on a dress. And neatness counts among some of these men, who repurpose newspapers into long-handled brooms.

“For some people, this is their home because a lot of their families have disowned them and shunned them, so we’re their family,” explains Yah Yah, a crack cocaine addict first jailed decades ago, at age 22. “A lot of people’s walks in here have been hard walks.”

Yah Yah says she has served roughly 20 years, in total, on charges ranging from petty theft to drug possession to commercial burglary. She’s become something of a den mother for the revolving community of gay and transgender inmates. “I call [them] my kids,” she says with a proud smile. “I try to give them the love that they aren’t receiving from their families.”

Today, some straight inmates vie to get placed in MCJ’s gay wing, in part because it’s a safer harbor for ex-gangbangers afraid of being confronted by violent enemies, jailers say. The Sheriff’s Department even uses a “classification officer” to weed out impostors, through a series of controversial test questions about gay culture.

Deputy Sheriff Javier Machado, a classification officer, relies on a series

of go-to questions, such as asking purportedly gay inmates to name a local gay bar they frequent. If an incoming inmate manages to correctly name a gay bar in L.A., Machado immediately asks tougher follow-up questions, such as, “What’s the cover charge?”

According to the gay inmates, another reason some straight men try to get into K6G is that they want to hook up with often-pretty transgender detainees.

But a major reason, almost certainly, is that the gay wing is a far less dangerous, more humane place to be. Unlike the angry, racially polarized culture of Men’s Central Jail, in K6G many of the inmates help one another face their days, and sometimes their years, together.

Yah Yah is her dorm’s elected House Mouth, a position of influence. She’s much more often called the House Mouse — a term of endearment in K6G but an insult inside prisons and the military, often denoting a person of extreme submission or someone who colludes with their superiors. David Arrieta, one gay inmate given permission to speak to the *Weekly* and be videotaped inside the gay wing, explains, “Being a House Mouse in [the heterosexual side of Men’s Central Jail], you are considered a rat, whereas in K6G you are considered a fairy.”

[Duncan Roy, the producer](#), says the House Mouse in the gay wing is a “very powerful position [because] it is the liaison between the deputies and the dorms. Depending on how good your House Mouse was” at speaking up for the rest of the inmates, he recalls of his time inside, “really determined the quality of life you had in the dorms.”

The K6G wing’s three bunk bed–jammed “dorms” each house 128 to 140 men on any given day. In her Dorm No. 9200, Yah Yah has used her position to encourage a relatively nonthreatening, even warm atmosphere. When the *Weekly* entered No. 9200 in the presence of a deputy and inmates realized a female guest was present, the first comment to rise from the chatter was, “Oh, I love her shoes.”

LA WEEKLY

A trans women shows off prison garb re-sewn as shabby chic.; Credit:

Photo by Ani Ucar

Later, on a highly secured rooftop yard used for recreation time, inmates began hurling flirtatious and boisterous commentary in the direction of the *Weekly's* video camera and microphone. "Trannies unite!" called out one transgender resident. Before deputies could react, one inmate pulled down his "baby blues" — official jail pants — low on his thighs and preened his bottom before the video camera.

Why? Nothing lascivious. Just to show off his fancy cotton underwear — formerly a jail-regulation T-shirt that had been carefully cut apart, refashioned and hand-knotted down the sides to create a peek-a-boo look.

Roy likens the dorm culture to an episode of *Project Runway* in which "they would just cut everything up" and transform it. When inmates are first assigned to a gay dorm, they are immediately stripped of their general-population, dark blue jail uniforms and given the powder-blue uniforms that signify they are gay or transgender. As Roy notes, "For the first time in my life, I was identifiably gay."

According to one lieutenant, the gay inmates continually tweak their bleak environment. A row of poles embedded in a rooftop exercise yard, where inmates are allowed to spend a minimum of three hours a week, has become a popular outlet for pole-dancing. "They were entertaining themselves," Lt. Sergio Murillo says with a grin.

The show doesn't end on the jail's roof. Every Friday, the gay dorms put on self-organized events such as "Family Night," in which they present fashion shows, and engage in "dorm dating" (a form of speed dating). In one of the three gay dorms, inmates compete in Mr. Gay Dorm 9100, named after their room number.

"The community comes alive, they look after one another," Roy says. "It's not just about violence. They're inventive."

That's surely an understatement. In the gay wing, soap becomes strangely effective hair product, and foil is carefully scavenged from the inside of cereal boxes to be fashioned into shiny silver buttons. Jail-issue bedsheets are fashioned — actually transformed — into fetching wedding gowns and tuxedos.

Weddings are fairly common in K6G's culture, and even the deputies have borne witness to full ceremonies in which inmates invent fabulous, hand-stitched dresses and suits.

[

The logo for LA Weekly, featuring the letters "LA" in a large, bold, black font, followed by the word "WEEKLY" in a smaller, bold, black font.

A mobile in the gay wing made of cereal boxes and magazine pages;

Credit: Photo by Ani Ucar

"People do find love in the loneliest of places," says Dino Baglioni, 48, a K6G inmate in Room 9100, who was allowed to speak to the *Weekly*.

"Coming in here was such a shock, but what I realize is that the people that are in these jails are not all bad people," says Baglioni, who found

himself in jail for the first time at age 45 for drug-related offenses. “They come in from all lifestyles, and we come in from all education levels, and talent — amazing talent.”

Technically, inmates are destroying county property when they repurpose their jailhouse blues, jail razors and official T-shirts. To them, however, it’s an outlet for their untapped and restless creative energy. And there’s only so much reprimanding that makes sense when inmates are essentially engaged in harmless activities.

To sew dresses and suits without a needle, which is a banned potential weapon, some inmates break apart their plastic shavers, extract the jail-commissioned shaver blade, file down the blade on the concrete floors into the shape of a needle, then bend the end of it to hold thread in place. Thread is ripped from the seams of their generally hated, light blue, oversized scrubs. Staples taken from the spines of magazines make the best needles for hand-stitching.

“Somebody had heard there was a guy on another wing with a needle,” Roy recalls, “and so he was, by hook or by crook, imported into the dorm and was set to work stitching for these women, who would give him these exotic projects to make up.”

Like any business, payment of some form was required. In this case, the imported craftsman was paid handsomely with food and whatever else the dorm could pull together, Roy says.

It might almost appear, to an outsider, as if MCJ’s gay and transsexual inmates are gently mocking society’s expectations of how criminals are supposed to act when confined behind bars for long periods of time. In fact, the [Los Angeles County Sheriff’s Department’s history has been one of extreme violence behind bars — on the part of both the jailed and the jailers](#).

For years, gay prison inmates have been singled out for mistreatment and persecution. Alexander Lara, writing in the Southern California Interdisciplinary Law Journal, reported that a 2007 study of California inmates showed 5 percent of straight men were victims of sexual assault including rape, while “an astonishing” 67 percent of gay, bisexual and transgender inmates were.

But the problems began decades earlier. A 1985 settlement of a key lawsuit, *Robertson v. Block*, brought by ACLU attorney John Hagar on

behalf of gay and transgender inmates, set forth procedures and conditions for their safety and security. These conditions led to MCJ's establishment of the gay and transgender dorms.

Early on, two jail deputies committed themselves to the reforms, according to UCLA law professor Sharon Dolovich, who has extensively studied the gay wing at MCJ. "The jail got incredibly lucky with the two deputies who wound up running the unit, Bart Lanni and Senior Deputy Randy Bell," Dolovich says. "They were extremely dedicated over the course of several decades to making this program successful and ensuring the well-being of everyone in the unit. Because they treated everyone with respect, people in the unit trusted them, and as a result Bell and Lanni heard about it when things were going wrong in the unit. ... Inmates were able to report things such as 'Hey, there is a predator in here,' or 'There is a deputy on the floor using homophobic language,' or 'Someone threatened me.'?"

In the general population of MCJ, just as in the California state prison system, convicted street-gang bosses known as shot callers order stabbings, drug transfers and secret messaging among the inmates — an illegal system that long flourished under ex-Sheriff Baca and remains in place in MCJ's general-population areas today.

Not so in the gay wing. "In K6G it's different, they don't run those politics," Machado explains. "When we say 'running politics,' [it means] you're going to do as the shot caller says you're going to do."

In K6G, instead of men cowering before a feared Mexican Mafia or Crips shot caller, the system operates largely as a democracy. In each dorm, the inmates vote for their "House Mouse," the post to which Yah Yah was elected, in contests that attract a higher voter turnout than a Los Angeles municipal election.

LA WEEKLY

Inmate Dino Baglioni says, "We make the best of it."; Credit: Photo by Ani Ucar

The House Mouse explains that dorm's needs — such as a toilet-paper shortage — to the jailers, and communicates from the jailers to the gay population. A House Mouse in another gay dorm, Rubin, explains that his role is to ensure that inmates follow deputies' rules, such as quietly lying down on their beds, facing the aisleway and fully dressed in their blues, "out of respect" when the deputies bring in their meals.

"It was [initially] 'House Mouth' because we are the voice between deputies and inmates, but over the years they started making fun and it became House Mouse because supposedly we 'tell' and we work for the deputies and we became a rat," Rubin says. "It's all in good humor."

Dolovich says another factor is that, unlike in the huge general population at MCJ, "There are officers who know everyone [in K6G] as individuals, and because people in the unit trust those officers to look out for their interests, they are willing to reach out to the officers when issues arise."

Few inmates in the gay wing are accused of committing violent crimes. According to Machado, during the month of August, about 2 percent were in for murder and 4 percent for assault with a deadly weapon. Drug charges account for roughly 31 percent of the incarcerations, while burglary, robbery and other theft accounts for about 32 percent — crimes often linked to drug abuse. Another 8 percent are inside for probation or parole violations. He says none were in the gay wing purely due to prostitution — which today results in a citation and release in the field —

though many are prostitutes.

Such contrasts between the gay wing and far more violent general population help explain why, at least in part, quite a few straight arrestees and convicts try to talk their way inside K6G. Among other things, inmates in the gay wing are escorted everywhere they go, including to the medical clinic or court. Machado believes straight men, fearful of gang reprisal in the unpredictable general population, are seeking added security when they try to talk their way into the gay wing.

Roy doesn't buy that. During his time inside, he says, he found that only two kinds of guys tried to get onto the gay wing — boyfriends who got released from K6G and were purposely re-arrested to be reunited with their partners, and “trans chasers,” or straight inmates who want to sleep with and be served by transsexual women.

Says Roy, “If you're going to spend the next three years in MCJ, what better position would you be in than to have a great-looking woman to look after you all the time?”

Not everyone is happy with the system used by the Sheriff's Department to weed out straight men. For example, among the questions asked by classification officer Machado and another deputy are: What is the meaning of “size queen” and what does it mean to be “thirsty”? Some straight guys get caught out for giving rote answers — to the wrong questions. That tips off deputies that someone prepped them.

Machado says, “A lot of the inmates get coached by other inmates who are trying to get into the K6G population dorms. ... [Our approach] is like asking a baseball fan, ‘You know what's a double play?’ If you're involved in baseball, you automatically know. It's the same way in the gay community.”

[

LA WEEKLY

Credit: Photo by Ani Ucar

There are plenty of critics of that approach, however. Andrew Extein, executive director of the Center for Sexual Justice in Washington, D.C., says the Sheriff's Department screening system is "an attempt to understand the gay community, but it's oversimplified. ... The screening process is not correct — but I also don't know a better alternative off the top of my head."

Extein suggests, for example, that the jailers' questions are based upon stereotypical views of gay and transgender life, and fail to acknowledge that some GBT men heading behind bars are not party-oriented or culturally up to date, and they simply don't know the right answers.

Extein says, "I could see [them] not passing [the test] or not knowing what's going on." Yet even he admits, "It seems very progressive, for an institution that is very violent."

While K6G's environment is in stark contrast to that of the general population, at the end of the day it's still jail.

Sure, the inmates of K6G may appear to be relatively comfortable, but talk with a few of them and they will reassure you that their lives are still hell.

"A jail is a jail — it's a violent, and desperate, and cold and miserable place," says Roy, who minced no words in claiming that Sheriff's deputies openly mistreated inmates while he served his time in the gay wing.

"Where there is that terrible cruelty inflicted on everyone, people find ways of dealing with it."

Despite the very low levels of racial tension, there's still violence among K6G inmates. Much of it stems from the relationships established between inmates behind bars. "There was a lot of jealousy," Roy explains.

Another contributing factor to aggression in the gay wing, Roy says, may be that many of the trans women are taking hormones to grow or enlarge their breasts or reduce their facial hair or muscles, or they have been denied hormones that they were prescribed prior to incarceration and are experiencing withdrawal symptoms.

The fashion shows, the weddings, the family nights — all are a means of coping with dark pasts or deep-rooted problems. "There's a lot of reasons we've turned to drugs in our lives — there's a lot of pain, a lot of masking," says Baglioni, whose dorm hosts the Mr. Gay Dorm 9100 contest on Friday nights.

Baglioni came of age at a time when many gay men still stayed in the closet. "Being homosexual and finding acceptance in our society is challenging, and there's still a lot of struggling ahead of us, and as a result we hide or mask a lot of our pain in drug use," he says.

The idea of masking one's true self through the use of drugs was echoed by many inmates who spoke to the Weekly.

"Incarceration is a challenge because it is not really equipped to deal with the addiction problem," Baglioni says.

David Arrieta, who has spent 17 of his 44 years behind bars, says he's finally past the drugs and vows, "I'm not coming back — I'm done."

Arrieta credits the Sheriff's Department's Education Based Incarceration (EBI) program, a fairly well-regarded internal system of coursework and modest leadership opportunities for inmates. The program was dramatically expanded in 2006 as a way to battle internal jail violence and high recidivism rates among freed inmates who re-offended and returned to jail.

"They never had these opportunities that they have now, so EBI is excellent," Arrieta says. He cites the courses that helped him the most — "New Directions is one of them ... and Harm Reduction, which teaches you about STIs and HIV testing." Another inmate commented, "The first book I ever read was here."

LA WEEKLY

Lt. Sgt. Sergio Murillo chuckles and says, "They were entertaining themselves by ... pole dancing."; Credit: Photo by Ani Ucar

About 150 of the approximately 400 gay-wing inmates have committed to bettering themselves, and they attend these predawn classes that begin at 5 a.m. That makes coffee one of the prized possessions inside. Steven Weiss, a recently released K6G inmate, says Elaine Towner, overseer of the EBI program for the gay wing, "has hawk eyes and sees all." Attendees can earn high school diplomas, attend Narcotics or Alcoholics Anonymous and take classes or workshops that reward them with certificates in such areas as substance-abuse education and anger management.

"One is always looking for hope in the jail, hope that things will change, hope for people's early release. People are always living in hope that things are going to be different — that things will change," Roy says.

But some, such as Yah Yah, have found purpose behind bars — purpose that they don't find on the outside. She earned EBI-issued certification to counsel inmates in drug and alcohol abuse and teaches a "Character Matters" course in the gay dorm. She tells her students: "You're not a dummy. You know what's keeping you locked up. It's up to you to make the choice."

She sometimes worries about focusing too much on helping others and never fully healing herself. She cries as she says, "I don't know if I'm going to make it sometimes. I think about that a lot." She admits she struggles to take the same advice she gives others, saying she is addicted

not merely to drugs but to the lifestyle. “Every time I get out, my head says, ‘Well, how long you going to be out this time before you get arrested all over again?’

“I can come to jail — not smoke a cigarette, not smoke anything and be OK,” Yah Yah says. “But when I’m out there, I immediately go straight to it. And I don’t get it.”

Through her tears, Yah Yah admits, “It’s like I learned in Narcotics Anonymous: Until Yah Yah gets into enough pain, nothing’s going to change — and apparently I am not in enough pain.”

Her dream for the future involves Los Angeles County Men’s Central Jail.

“I just want to be happy, that’s all I want,” the House Mouse says. “I don’t want to come to jail. I would love to walk in this place in a pair of high heels and a dress and regular clothes and facilitate some class and say, ‘I used to be where you were, and God brought me out, and I made it and I know you can make it.’ That’s what I would like to do.”

(Editor’s note: Yah Yah and David Arrieta are now out of jail.)

See also: [Top 12 LGBT Movies You Need To See](#)


Share this:



SEARCH LA WEEKLY



laweekly

LAWeekly Instagram: Featuring the culture of LA since 1978 

LGBT People in Prison: Management Strategies, Human Rights Violations, and Political Mobilization **FREE**

Jason A. Brown, Department of Criminology, Law and Society, University of California, Irvine
and Valerie Jenness, Department of Criminology, Law and Society, University of California,
Irvine

<https://doi.org/10.1093/acrefore/9780190264079.013.647>

Published online: 30 June 2020

Summary

In the 21st century, an unprecedented rise in the visibility of and social acceptance for lesbian, gay, bisexual, and transgender (LGBT) people has been accompanied by exponential growth in scholarship on LGBT people generally and their experiences in diverse communities and institutional contexts in the United States and around the globe. A growing body of literature draws on first-person accounts, qualitative analyses, and statistical assessments to understand how and why LGBT people end up in prisons and other types of lock-up facilities, as well as how they experience being imprisoned and the collateral consequences of those experiences.

Scholarship in this body of work focuses on (a) the range of abuses inflicted on LGBT prisoners by other prisoners and state officials alike, including mistreatment now widely recognized as human rights violations; (b) the variety of ways LGBT people are managed by prison officials, in the first instance whether their housing arrangements in prison are integrationist, segregationist, and/or some combination of both, including the temporary and permanent isolation of LGBT prisoners; and (c) the range of types of political mobilization that expose the status quo as unacceptable, define, and document the treatment of LGBT people behind bars as human rights violations, demand change, and advocate new policies and practices related to the carceral state's treatment of LGBT people in the United States and across the globe.

The study of LGBT people in prisons and other detention facilities is compatible with larger calls for the inclusion of sexual orientation, gender identity, and gender expression in criminology and criminal justice research by advancing theoretical and empirical understandings of LGBT populations as they interact with the criminal justice system, and by incorporating this knowledge into broader criminological conversations.

Keywords: corrections, prisons, sexuality, gender, LGBT, international criminology, gay, lesbian, bisexual, transgender, queer, prisoners

The Landmark Case of Dee Farmer

In 1989, Dee Farmer, a transgender woman, was repeatedly beaten, raped, and got infected with HIV when she was imprisoned in a prison for men in Terre Haute, Indiana, in the United States (*Farmer v. Brennan*, 1994). After reporting the assault, Farmer filed a complaint against the prison for exposing her to an elevated risk of violence as a transgender woman with “feminine characteristics” in the men’s general population (*Farmer v. Brennan*, 1994). Decided in the U.S. Supreme Court, the case set the country’s precedent that “deliberate indifference” to a substantial risk of sexual assault or other harm violates U.S. constitutional law against cruel and unusual punishment when prisons do not provide reasonable protection against these harms (*Farmer v. Brennan*, 1994, p. 828). According to the Court, “a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious and disregards that risk by failing to take reasonable measures to abate it” (*Farmer v. Brennan*, 1994, p. 837). This decision marked the first time the U.S. Supreme Court directly ruled on prison rape: it was telling the case involved an African-American transgender woman in a prison for men (Jenness, Sexton, & Sumner, 2019).

The *Farmer* case was decided in an historical moment in which discussions of gender nonconforming people behind bars were increasingly visible in journalistic, academic, and legal writings. Donaldson (2001) vividly described prisoners’ distinctions among “jockers, punks, queens, booty-bandits, Daddies, and Men and identified a group of “queens” as “effeminate homosexuals.” According to Donaldson (2001, p. 6),

In jails, many are street transvestites charged with prostitution. They seek and are assigned the role of females and are referred to exclusively with feminine pronouns and terms. They have “pussies,” not “assholes,” and wear “blouses,” not shirts. They are always sexually passive and are unlikely to make up more than 1 or 2 percent of prison populations. They are highly desirable as sexual partners because of their willingness to adopt “feminine” traits, and they are highly visible, but the queens remain submissive to the “Men” and, in accordance with prevailing sexism, may not hold positions of overt power in the prisoner social structure. They are often scapegoated, involved in prostitution, and viewed with contempt by the Men and by the staff. As a result, they are frequently assigned to the most undesirable jobs, kept under closest surveillance by guards, and harassed by homophobic keepers and kept alike.

This account, which was originally published in 1993, is part of a litany of portrayals—however accurate or not—that shocked the conscience; stimulated academic, policy, and public discussion; raised concerns about the vulnerability of gender nonconforming prisoners; and underscored the need for systematic research on the plight of gay, bisexual, and transgender people in jails, prisons, and other types of lock-up facilities.

The Proliferation of Research on Violence Against LGBT Prisoners in the United States and Beyond

Following the publication of Donaldson's now classic work, a growing body of research makes it clear that gender nonconforming prisoners, especially gay and bisexual men and transgender women, are exceptionally vulnerable to violence. Documentation of sexual assault in U.S. correctional settings by outside researchers began as early as 1966 with interviews of 3,304 male Philadelphia jail inmates and 500 staff members. Davis (1968) discovered that 4.7% of those detained reported being sexual assaulted while in custody, but posited that this number was merely the "tip of the iceberg," in light of reporting issues associated with stigma and disclosure of sexual assault. Prevalence studies continued in the 1970s, when scholars investigated who is more likely to be sexually victimized: Wooden and Parker (1982, p. 18) found that 52% of their sample of 200 California prisoners were pressured into sex and 14% were sexually assaulted; among the latter group, 41% of the gay men, 2% of the bisexual men, and only 9% heterosexual men reported being sexually assaulted. Qualitative research by Chonco (1989) and Smith and Batiuk (1989) described men who are incarcerated who display feminine qualities as being among those typically targeted for rape. Through the lens of sexual assault influencing prisoner behavior, Smith and Batiuk (1989, p. 37) theorized that more than the occurrence of sexual assault, it is this "fear of victimization which ultimately shapes and colors inmate interaction." These and other studies of sex and sexual and gender minorities in prison raised larger questions about gay, bisexual, and transgender prisoners' human rights. (Historically, researchers have encountered resistance to data collection on violence against LGBT people in prisons. Sexual assault has been historically underreported by prison authorities; as a result, new reports revealing its pervasiveness have generated crises in prison policy.)

In the 2010s, for example, Meyer et al. (2017, p. 237) analyzed the data derived from the National Inmate Survey administered by the U.S. Bureau of Justice Statistic and found a consistent pattern in the United States: "Among men, sexual minorities (both gay or bisexual men and MSM [men who have sex with men]) had a much higher risk than did straight men of being sexually victimized by staff and other inmates in both jail and prison. . . . Among women, the patterns were similar, with sexual minority women showing a greater risk of sexual assault." These and other statistics reveal that sexual minorities—"non-heterosexuals," to use the vernacular of the U.S. Bureau of Justice Statistics—are both overrepresented among incarcerated populations and at exceptionally high risk of sexual assault while in the custody of the state (CAP-MAP, 2016). As the National Center for Transgender Equality (NCTE, 2012) observed: "Sexual abuse is rampant in prison and detention facilities today, and lesbian, gay, bisexual, transgender and gender nonconforming people are among those most at risk."

Transgender prisoners are particularly vulnerable. A path-breaking report, "'It's War in Here': A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons," draws on interviews with prisoners in New York to conclude that: "Verbal harassment, physical abuse, and sexual assault and coercion create an exceptionally dangerous climate for transgender, gender nonconforming, and intersex people in prison" (Sylvia Rivera Law Project, 2007, p. 26). Glaysa, a transgender woman imprisoned in a maximum security men's prison in upstate New York, reported:

I have faced violence where I have been beaten and raped because of my being a transgender with female breasts and feminine (*sic*). I have been burned out of a cell block & dorm because I wouldn't give an inmate sex. I have been slapped, punched, and even threatened because of my being a transgender that told another inmate "No" when they told me they wanted sex from me or my commissary buy. I have been harassed verbally and have had others grab my female breasts and ass because they knew I was transgender and figured they can get away with such actions—which they do most of the time due to the fact no one cares what happens to us transgenders inside. I've been subjected to all kinds of verbal harassment from "look at that inmate scumbag transgender" all the way to threats and sexual harassment physically as well as verbally.

(Sylvia Rivera Law Project, 2007, p. 25)

Eight years later, another advocacy group, Black & Pink, released a report that draws on data from a survey of 1,118 prisoners across the United States to reveal an increasingly uncontested fact: compared to other prisoners, "a higher percentage of transgender women prisoners experience sexual violence" (Lydon, Carrington, Low, Miller, & Yazdy, 2015, p. 44).

The findings on sexual victimization from the Bureau of Justice Statistics' Inmate Survey for 2011–2012 were so stark with regard to transgender prisoners that supplemental tables were published as an addendum to the initial report (Beck, 2014). These data reveal that approximately one-third of transgender prisoners reported sexual victimization by another prisoner within the past year—a figure that dwarfs the 4% general prevalence rate for incarcerated populations. Likewise, research in California reveals that transgender women in prisons for men are exceptionally vulnerable to unwanted sex. Sexual assault was 13 times more prevalent among transgender women in prisons for men than among a random sample of prisoners (Jenness, 2010; Jenness, Maxson, Matsuda, & Sumner, 2007; Jenness, Sexton, & Sumner, 2019). Jenness et al. (2007) claimed that 59% of transgender prisoners reported being sexually assaulted while incarcerated, while slightly more than 4% of 322 randomly selected prisoners in 6 California state prisons for men reported being sexually assaulted. Jenness, Sexton, and Sumner (2011, 2019) corroborated these findings and found that the prevalence rate for sexual assault of transgender prisoners was 58.5% during their incarceration history in California correctional facilities.

Disproportionate violence, sexual or otherwise, against gender nonconforming prisoners is a global phenomenon that is increasingly rendered visible by and within public discourse (Gear, 2007). In South Africa, for example, Gear (2007) found that homophobia has contributed to a conflation of rape behind bars with consensual sex between members of the same sex, leading to public hysteria about gay sex in prisons. Also, male prisoners who are perceived to be effeminate are identified as gay and viewed as "easy" targets for sexual exploitation by other prisoners and prison staff (Gear & Ngubeni, 2002, p. 56; see also Gear, 2007). The author further contextualizes the erasure of prison rape within a legal system that does not censure same-sex rape, but has historically criminalized homosexuality. As scholars and activists in Asia, Europe, Latin America, and other parts of the world have emphasized, the experience and impact of violence against gender nonconforming prisoners takes shape in the context of prison management policies and practices worldwide.

Context Matters: Integration, Segregation, and Isolation in Prison

The kinds of victimization reported by LGBT prisoners and documented in a growing number of official and unofficial reports occur in diverse institutional contexts, including jails, prisons, and immigration facilities, and is shaped by various facility management strategies.

Whether LGBT prisoners are integrated, segregated, or isolated while locked up shapes their experiences in prison, including their vulnerability to violence. Taking housing assignments as a proxy for the type of social and organizational ecology in which prisoners endure “the pains of imprisonment” (Sykes, 1958, who also sees that the pains of imprisonment are born of the deprivation of liberty, the deprivation of goods and services of choice, the imposition of a rule-bound regime, and other universal characteristics of carceral environments), one of the most pressing concerns for prison administrators and LGBT advocates alike is best stated as a question: Where should LGBT prisoners be housed while locked up? This question has inspired human rights inquiries and become the impetus for policy reforms aimed at keeping LGBT people safe(r) behind bars.

Integration

Historically, and most often in the modern era, LGBT people are housed in prisons for men and women in ways that align with the sex they were assigned at birth and, to a greater or lesser degree, qualify as integrated into these populations (Brown & McDuffie, 2009). Based on an inventory and assessment of the policies, practices, and judicial decisions related to housing assignments for transgender people locked up in jails, prisons, and other detention facilities, Sumner and Jenness (2014, p. 242) conclude, “this ‘genitalia-based’ approach to classification and attendant housing assignments is so deeply ingrained that it is not usually documented in prison operational policies in general and transgender-related correctional policies specifically.” However, this taken-for-granted state of affairs has been contested. As a result, some jails, prisons, and immigration detention facilities are, at least at the level of policy, embracing a “gender identity” based approach to classification and attendant housing decisions.

As a result, they can—and do—interact with non-LGBT prisoners in ways that challenge their safety and well-being. They do so in the context of a stratification order that situates them at or near the bottom of the prison hierarchy and as objects of derision, often expressed through language, sex, and violence. In Australia, a transgender woman in prison is regarded as “a woman, a convenience, a cat, a poof, a thing, [and] an idiot” who is forced into a role of sexual subordination to other prisoners (Wilson et al., 2017, p. 388). As one prisoner in New South Wales reported, “They see you’re a ‘trannie’ and as far as they’re concerned, it’s their right” (Wilson et al., 2017, p. 388). Donaldson’s early work on U.S. prisons popularized the concept that gay, bisexual, transgender, and other gender nonconforming prisoners are coerced into subordinate positions within prison hierarchies. “The very bottom of the structure” is reserved for prisoners forced to comply with their positioning “usually through rape or convincing threat of rape,” causing sexual and gender minorities to navigate integrated prisons under a fear of violence (Donaldson, 2001, p. 119).

Gay male prisoners who are seen as “women” and transgender women prisoners report entering into protective partnerships, often with the hope that such arrangements involve the promise of protection from other—presumably more threatening—prisoners (Gear & Ngubeni, 2002; Oparah, 2012). A nuanced understanding of “protective pairing” —an institutionally derived coercive practice that involves “willingly” engaging in sexual exchanges with an inmate in an effort to avoid being harmed by other inmates” (Oparah, 2012) —reveals the presence of a range of types of unwanted sexual activity and recognizes that consent in prison is a problematic concept (Jones & Pratt, 2008; see also Jenness et al., 2019).

A White transgender woman who had been doing time “off and on since the late 1980s” and who reported considerable mental health problems both inside and outside prison explained that she does her time this way:

Have you heard of protective pairing? It’s preferable. I wouldn’t stay in a relationship to avoid that [sexual assault] happening. It’s more of a benefit. I don’t feel like I need a partner to be safe. Safety is just a side-benefit, ya know. I prefer to be in a relationship. It makes my time easier. It’s way better than being alone. The majority of the time I’ve been locked up, I’ve found a relationship to keep me safe. People will stay away from you if they respect your partner.

(Jenness et al., 2019, p. 622)

As Jenness et al. (2019) explain, this and other types of relationships with (presumably) heterosexual men often results in violence, sexual, and otherwise.

Feminist analyses emphasize that sexual violence against gay men and transgender women in prison is used to enforce patriarchal hierarchies and heterosexism, especially in integrated carceral settings. In her work on the history of modern American sexuality in the context of prisons, Kunzel (2008, p. 8) argues that “much of what is at stake in the anxiety over homosexuality in prison concerned its potential to reveal heterosexual identity as fragile, unstable, and itself situational.” Jenness et al. (2019) explain that the sexual victimization transgender women experience in prison is contextualized by asymmetrical power relations that are recognizably gendered. It is, simply put, violence perpetrated by men and experienced by women in an institutional environment in which masculinity is valorized and femininity is regularly subordinated (for more along these lines, see Jenness & Fenstermaker, 2014, 2016). As Mogul, Ritchie, and Whitlock (2011, pp. 96–97) succinctly put it, “in an effort to bolster heterosexuality and stamp out homosexuality prisons have become locations of magnified policing and punishment of sexual and gender nonconformity.”

Segregation

Although housing LGBT prisoners in facilities that align to their sex assigned at birth and in a way that integrates them into populations of non-LGBT prisoners is the most common housing arrangement in the United States and around the globe, it is not the only modality to constitute the living environment for LGBT people behind bars. In contrast, some LGBT people are locked up in carceral settings that are “segregationist” in one way or another. This approach takes many forms. In 2010, Italy proposed converting an unused medium-security prison near Florence into a prison that would exclusively house transgender women (“Italy ‘to

open first prison,” 2010). A move to an exclusively transgender prison would represent an evolution of the country’s already segregationist approach: transgender women are often housed within protective units inside prisons for men (Vitelli, Hochdorn, Faleiros, & Valerio, 2018).

Separate LGBT protective units within a sex-segregated facility are a form of segregation in prisons worldwide. Thailand, for example, segregates some of its more than 6,000 reported LGBT prisoners into protective units (Associated Press, 2017). Within Thailand’s Pattaya Remand Prison (PRP), 5% of the population has been identified as LGBT through intake questions about sexual orientation and gender identity, as well as genital inspection. At the end of this screening process, transgender women who have undergone gender affirmation surgery are integrated with the women’s general population (Yongcharoenchai, 2016). Lesbians, however, are assigned to a segregated unit, while gay and bisexual men and transgender women who have not undergone gender affirmation surgery are assigned to a second segregated unit (Yongcharoenchai, 2016). As a rationale for segregating LGBT prisoners, prison authorities cite prison safety, sexually transmitted infection (STI) prevention within general populations, and sex prohibition. A prison staff member in PRP explains:

As we do with male inmates, we separate those who behave more feminine from other male inmates when they sleep. Since we have nobody stopping people from having sex, I don’t want to give them the opportunity to engage in sexual stuff.

(Yongcharoenchai, 2016)

In addition, as previously proposed in Italy, Thailand intends to expand its segregation policy by building a prison exclusively for LGBT prisoners (Beresford, 2017).

Prison officials determine whether prisoners are LGBT for the purposes of segregation in a variety of ways, including the prisoner’s self-identification, screenings by medical professionals or other staff, or outside consultation (Petersen, Stephens, Dickey, & Lewis, 1996, p. 222). Genital-based approaches are inadequate, because they exclude a majority of transgender people who have not had gender affirmation surgery and because they cannot detect sexual orientation. Conversely, self-identification is criticized for its potential for prisoner abuse, as well as the risks associated with identifying as LGBT in the carceral context (i.e., susceptibility to violence). Some facilities have employed multifaceted approaches to identifying transgender prisoners that draw from a multidisciplinary team comprised of prison staff, medical personnel, advocates, and/or outside experts (Blight, 2000). In Western Australia, for example, Blight (2000) found that transgender women were partially segregated, and prison officials considered multiple criteria for identifying transgender prisoners, such as “family background,” “development of sexual identity,” “recent lifestyle,” “medical story with particular reference to hormonal and/or interventions,” “gender identity preference,” and genitals. A reassessment of Australian prison policy impacting transgender people in 2017 revealed that protocols vary greatly across the country, and in Western Australia, transgender prisoners continue to be segregated “until a placement decision is made in accordance” with prison rules (Lynch & Bartels, 2018).

In the United States, a handful of facilities also segregate transgender and gay prisoners. The Los Angeles County Jail, for example, houses transgender women and gay men in a separate unit: K6G. The Los Angeles County Jail has been recognized as unique in its approach to identifying detainees to be placed in K6G, insofar as they utilize a screening process (presumably) based on gay and transgender culture (Dolovich, 2011). Prisoners who identify themselves as gay or as transgender women are questioned about their experiences “coming out” to their families and about gay and transgender terminology (Dolovich, 2011). Facilities similar to K6G have operated in Los Angeles since 1985, when they replaced models of transgender and gay segregation that lacked access to “basic entitlements,” such as “vocational and educational programming, visitation, medical and mental health care” (Dolovich, 2011, p. 21). Previous models posed security risks for transgender and gay prisoners, “making its residents vulnerable to attack” (Dolovich, 2011, p. 21).

Dolovich (2011) documented the effects of segregating transgender and gay prisoners in the context of Los Angeles County Jail’s segregated K6G unit. In this setting, the author observed that nearly all K6G residents felt safe from sexual assault and other violence. Notably, 2 of the 31 detainees expressed feeling both “safe and unsafe” and one interviewee revealed feeling “pressure” from other inmates to conform to presenting as either male or female, though they were not “entirely comfortable” in either one of these binary gender identities (Dolovich, 2011, pp. 44–45). In their words, enforcement of the gender binary resulted in having to “constantly monitor myself in my actions” (Dolovich, 2011, p. 45). Another detainee reported feeling unsafe because of K6G staff, whom he viewed as threatening because of their use of excessive force against another K6G prisoner (Dolovich, 2011, p. 45). Compared with the reported experiences of interacting with the general population, however, the study concluded that prisoners felt “safer” in segregation (Dolovich, 2011, p. 6). As expressed by a K6G prisoner: “I won’t have to worry about, you know, when I’m taking a shower, to watch my back. In the general population, [...]ou have to watch your back all the time.” (Dolovich, 2011, p. 45).

As legal protections for prisoners have developed in the United States and internationally, prisons and other lock-up facilities have increasingly instituted segregationist policies for LGBT prisoners and attendant practices on the grounds that they provide protective environments for gender nonconforming prisoners. Homan (2015, p. 2) found that U.S. Immigration and Customs Enforcement (ICE) instituted a formal policy for identifying and housing transgender people in ICE custody, acknowledging that a person “may be at an elevated risk in a detention setting because of his or her actual or perceived gender identity and/or gender expression.” ICE staff screen individuals’ gender identity by asking whether a person is transgender or “identifies with a gender different from that which corresponds with his or her biological sex” (Homan, 2015, p. 2). ICE placement policies of transgender people prioritize facilities that have a designated protective custody unit for transgender people (Homan, 2015, p. 4).

Scholars raise a number of legal and critical issues related to the segregation of LGBT people in correctional facilities. Robinson (2011) argued that strategic segregation violates detainees’ and prisoners’ privacy and other rights when they are forced to “come out” to be placed in protective custody. The process of screening and segregating gay and transgender prisoners could also render prisoners vulnerable to violence, including those who are not gay or transgender, gay and transgender people who have not come out, or those who do not qualify within K6G’s limited perceptions of who is gay or transgender, such as gay and

transgender people of color (Robinson, 2011). Robinson (2011, p. 1313) concluded that “the [Los Angeles County] Jail’s screening policy constructs gay and transgender identity in a narrow, stereotypical fashion and excludes some of the most vulnerable inmates.” Howarth (1985), conversely, argued for judicial scrutiny on the procedural and substantive processes of LGBT protective custody, challenging compulsory segregation on the grounds that prisoners should be legally entitled to choice, fair placement hearings, and, when appropriate, segregationist conditions equal to those in the general population.

Isolation

A 2019 lawsuit in the United States claims that Candice Crowder, a Black bisexual transgender woman in a prison for men, experienced “extreme abuse, trauma, discrimination, and retaliation” at the hands of other prisoners and prison staff (*Crowder v. Diaz*, 2019, p. 1). In her lawsuit, she recounts staff beating her when she reported feeling unsafe being housed with a prisoner known to be transphobic (*Crowder v. Diaz*, 2019). After being transferred to a different facility, another prisoner repeatedly raped her, and staff ignored her requests for an official report, investigation, and medical examination. Instead, they placed her in solitary confinement for nine months. Crowder’s lawsuit characterizes this nine-month placement in isolation as “retaliatory” and details on staff’s comments after she was physically assaulted reveal their attitudes towards her:

Ms. Crowder’s ex-boyfriend violently assaulted her with a box cutter in the dining hall. . . . Following this incident, Ms. Crowder was blamed for the assault. According to correctional staff, it was her fault for choosing to live a transgender “lifestyle.” She was “asking for it.” Ms. Crowder reported this misconduct to no avail, catalyzing an escalating campaign of retaliation and leaving her with no other choice but to seek relief from litigation.

(*Crowder v. Diaz*, 2019)

In another high profile detention, the United States denied requests by the United Nations (UN) Special Rapporteur on Torture to privately interview Chelsea Manning, an army intelligence analyst and transgender woman who was detained for leaking classified military materials (Mendez, 2012, pp. 74–75). For 11 months, Manning was isolated in her cell for 23 hours a day and ordered to sleep naked while she awaited trial (Mendez, 2012, pp. 74–75; “The Abuse of Private Manning,” 2011). The United States claimed that she was placed in solitary confinement for protective purposes. In a UN report, however, the UN torture expert determined that Manning’s isolation violated her right to “physical and psychological integrity” and emphasized that “solitary confinement is a harsh measure which may cause serious psychological and physiological adverse effects on individuals regardless of their specific conditions” (Mendez, 2012, pp. 74–75). When she was sentenced at trial, a U.S. judge reduced Manning’s prison term because her “more rigorous than necessary” pre-trial conditions were “excessive in relation to legitimate government interests” (*United States v. Manning*, 2018). Before her sentence was ultimately commuted, Manning petitioned for transgender-inclusive healthcare and was returned to solitary confinement as a disciplinary measure for attempting suicide (Savage, 2016).

Cases such as these have elevated an ongoing public debate on solitary confinement and conditions of incarceration for transgender and other gender nonconforming prisoners around the world. Solitary confinement, also called administrative or disciplinary segregation, can involve isolation for up to 24 hours a day and substantially limit or eliminate essential elements from prisoners' daily routines, including "recreation, hygiene, work, and diet" (Howarth, 1985, pp.14-15). From the mid-19th century onward, prison studies concluded that the sensory and social deprivation of isolation adversely impacts prisoners (Cormier & Williams, 1966; Walters, Callaghan, & Newman, 1963; see also Haney, 2003). When Volkart (1983) compared isolated and non-isolated prisoners in Switzerland, he identified that prisoners in isolation more frequently exhibited symptoms of anxiety and other psychological disorders. Studying French prisons, Barte (1989) found that long-term isolation could even result in schizophrenia.

As Meyer et al. (2017) analyzed in U.S. prisons, LGBT prisoners are more frequently placed in isolation and more often exhibit symptoms of poor mental health, and the U.S. Bureau of Justice Statistics found that LGB prisoners are isolated more often than nearly any other group (Beck, 2014). Similar findings of differential use of isolation for LGBT prisoners, as well as the links between psychological distress and isolation, apply in other detention facilities, such as jails and immigrant detention facilities (Beck, 2014; Depoy, 2012). For these reasons, practices of solitary confinement for LGBT prisoners and other detainees are under increasing international scrutiny.

Context Matters: Human Rights Violations and Imprisonment for Being LGBT

The range of abuses LGBT prisoners experience is also contextualized by, and thus intimately connected to, the social and legal contexts in which prisons and other detention facilities exist: heteronormative cultural and legal systems that have, throughout history, condemned and, in many cases, criminalized non-normative sexual orientations and gender identities (Kunzel, 2008; Mogul et al., 2011). In 2015, for instance, a college student in Tunisia was detained for breaking a sodomy law that criminalized consensual same-sex sexual relations. The police extracted a confession from the student by threatening, "We're going to rape and brutalize you and make you sit on a glass Fanta Bottle" (Mzalouat, 2016). Subsequently, he was forced to undergo an anal examination that was, presumably, equipped to verify whether he engaged in anal sex. "Failing" this test, he was sentenced to 12 months in prison (Mzalouat, 2016). In the same year, at least six more men were arrested, submitted to similar examinations, and sentenced to imprisonment (Samti, 2015).

Countries throughout the world criminalize and imprison LGBT people under "blasphemy," "buggery," "sodomy," or "unnatural acts" laws instituted during colonization (Muntarbhorn, 2017, p. 16). Such laws punish consensual same-sex sexual relations in private or expressions of LGBT identities or relationships in public, such as same-sex flirting, conduct deemed a sexual advance, and displays of affection; nonconforming gender expressions; and the distribution of material with LGBT content. The International Lesbian, Gay, Bisexual, Trans and Intersex Association recorded that, in 2017, 72 countries, or 37% of UN member states criminalized private consensual same-sex sexual activity among adults (Carroll & Mendos, 2017).

A trend toward adopting laws criminalizing gender nonconforming expression in the Middle East, North Africa, and Eastern Europe has given license to renewed violence against LGBT people. In 2013, Russia passed a law widely known as the “Gay Propaganda Law,” which prohibits “promotion of non-traditional sexual relations” to children, and later prosecuted a minor for posting on the Internet a photo of two men holding hands (Barnes, 2018; Carroll & Mendos, 2017). Since the enactment of this law, reported hate crimes against LGBT people have doubled in Russia, nearby countries have introduced similar bills to their parliaments, and Chechnya began detaining and torturing gay men in detention centers in 2017 (“Chechnya LGBT,” 2019; Litvinova, 2017). In Algeria, where both same-sex sexual activity and LGBT expression is punishable by up to two years in prison, a local LGBT advocacy organization reports that those “sentenced to prison for homosexuality are predominantly men” (TransHomoDZ, 2016). In at least one prison, men identified as gay or bisexual are segregated in a small unit for up to 24 hours a day, where they are targeted for harassment and violence by prisoners and staff (TransHomoDZ, 2016).

Prisons throughout the world have also historically denied gender-specific access to healthcare for transgender prisoners, especially transgender women in prisons for men. In a sample of 64 jurisdictions in Australia, Canada, Denmark, England, Finland, Germany, Ireland, Sweden, Switzerland, and the United States in 1996, only 29 reported continuing hormone therapy for transgender prisoners who had started treatment prior to coming to prison, 26 decided on a case-by-case basis, and nine discontinued hormone therapy for transgender prisoners in all cases (Petersen et al., 1996). This variability is not uncommon and is perilous in light of the fact that the sudden cessation of transgender hormone treatment can have serious negative health effects (Sevelius & Jenness, 2017). Conversely, transgender healthcare interventions, especially those that qualify as gender-affirming care, have been found to have positive impacts on well-being (Kendig, Cubitt, Moss, & Sevelius, 2019; Sevelius & Jenness, 2017).

Well into the 21st century, in the United States, there continues to be substantial disparity in transgender healthcare for “gender dysphoria” or related conditions experienced by prisoners. According to an empirical analysis of policies, directives, memoranda, and other documents relevant to the placement and healthcare of transgender prisoners in the United States, “Most systems allowed for diagnostic evaluations. There was wide variability in access to cross-sex hormones, with some allowing for continuation of treatment and others allowing for both continuation and de novo initiation of treatment. There was uniformity in denial of surgical treatments for GID” (Brown & McDuffie, 2009, p. 280). In other words, consistent access to quality healthcare is sorely lacking (Kendig et al., 2019; Sevelius & Jenness, 2017).

Transgender prisoners encounter other challenges related to gender identity and expression affirmation. For example, in many facilities, the official dress code mandates clothing that does not align with their gender identity; verbal harassment and the use of slurs by prison staff take the form of referring to transgender prisoners by the wrong names and pronouns; and personal hygiene products relevant to one’s gender identity are not made available. These and other concerns related to, for example, strip searching and showering, culminate in what a frontpage article in the *New York Times* described as “the deliberate defeminizing” of transgender women in facilities for men. With the headline “Transgender Woman Cites Attacks and Abuse in Men’s Prison,” Sontag (2015, p. A1; emphasis added) describes it as follows:

Rome, Ga.—Before she fell on hard times and got into trouble with the law, Ashley Diamond had a wardrobe of wigs named after her favorite divas. “Darling, hand me Aretha” or Mariah or Madonna, she would say to her younger sister when they glammed up to go out on the town.

Ms. Diamond, 36, had lived openly and outspokenly as a transgender woman since adolescence, much of that time defying the norms in the conservative Southern city.

But on the day she arrived at a Georgia prison intake center in 2012, the *deliberate defeminizing* of Ms. Diamond began. Ordered to strip alongside male inmates, she froze but ultimately removed her long hair and the Hannah Montana pajamas in which she had been taken into custody, she said. She hugged her rounded breasts protectively.

Looking back, she said, it seemed an apt rite of initiation into what became three years of degrading and abusive treatment, starting with the state’s denial of the hormones she says she had taken for 17 years. . . .

“During intake, I kept saying: ‘Hello? I’m trans? I’m a woman?’” Ms. Diamond recounted in a phone conversation from prison a few weeks ago. “But, to them, I was gay. I was what they called a ‘sissy.’ So, finally I was like: ‘O.K., I’m a sissy. Do you have a place where sissies can go and be O.K.?’”

These and other types of concerns have prompted considerable political mobilization on behalf of LGBT detainees and prisoners.

Political Mobilization to Document, Shape, and End LGBT Incarceration

Globally, political mobilization to improve the lives of LGBT people has engendered new instruments that recognize and document the mistreatment of LGBT prisoners as human rights violations. While international human rights proliferated in the UN, LGBT social movements started in part as a response to the continuing criminalization and imprisonment of LGBT people after World War II. Two organizations in the United States, the Mattachine Society and Daughters of Bilitis, sparked global political mobilization for LGBT people by defending individuals accused of sodomy law violations, advancing sexual minority interests in political spaces, and leading the reform of penal codes (Adam, 1995). In 1961, Illinois became the first U.S. state to decriminalize consenting same-sex sexual activity among adults (Gunnison, 1969). At the same time, LGBT activists adopted the civil disobedience strategies of their contemporaries in the Civil Rights Movement to rally in major cities and college campuses, where they protested police raids of bars catering to LGBT people (Gunnison, 1969).

These events became part of the social changes sweeping across various parts of the world in the 1960s and shifted the discourse on LGBT people as sex and gender criminals to a bona fide constituency that should be liberated, legally and otherwise (Adam, 1995). In North America and Europe, advocacy groups set sophisticated agendas for criminal justice reform to repeal criminalization statutes, equalize the age of consent for homosexuality and heterosexuality, and institute protections for LGBT people under human and civil rights law

(Jackson & Persky, 1982). These efforts led to the decriminalization of homosexuality in the United Kingdom and Canada by 1967 and 1969, respectively. However, backlash from right-wing religious groups delayed legalization in the United States and implementation was challenged in other parts of the world. From 1975 to 1981, citing “indecent” laws, Canadian police systematically arrested men in gay bars and bathhouses and, in 1989, British courts convicted 3,000 gay men using similar provisions (Adam, 1995; Tatchell, 1992).

Interest in the study and reform of prison policies for LGBT people, particularly gay and transgender prisoners, followed this expanded awareness of LGBT human rights abuses worldwide. Previously ignored in the criminological literature, save an assortment of mid-century studies posing a link between criminal activity and gender dysphoria or sexual deviancy, criminology turned in the 1990s toward introducing other explanations for gay and transgender criminality and turned to the effects of the status quo of prison management on these prisoners (Dickey, 1990). The prevalence of problems for incarcerated gay and transgender people has piqued the interest of researchers, advocates, and lawyers in multiple countries, giving rise to an array of new proposed policies (Barnes, 1998; Mann, 2006; Petersen, et al., 1996; Rosenblum, 2000).

During this time, social scientific understandings on prison homosexuality underwent substantive changes that inevitably led to a new way of framing the mistreatment of LGBT prisoners. Earlier literature viewed both consensual and coercive prison sexual activity as stemming from predatory homosexuals in prisons, despite the preponderance of this behavior involving prisoners who engage exclusively in heterosexuality outside of prison (Howarth, 1985; Ward & Kassebaum, 1965; Wooden & Parker, 1982). Scholars shifted their understandings of prison rape from a frame of “perversion” to a frame that emphasizes expressions of power within single-sex institutions (Donaldson, 2001; see also Scacco, 1975). Some prisons followed a similar change in logic in prison management: gay and transgender prisoners who were segregated for their perceived perpetration of same-sex rape began to be segregated to prevent their victimization (Howarth, 1985, pp. 14-15).

In the late 1990s and early 2000s, scholars produced an influential body of work on coercive and consensual sex in U.S. prisons for men and women that ultimately led to historic legislation. A major corrections journal, *The Prison Journal*, exclusively published research on sex in prison for its December 2000 issue, and the 2002 book *Prison Sex: Practice and Policy* provided an extensive volume of new research on sexual activity and assault. In the 2000s, a path-breaking report by the international NGO Human Rights Watch exposed the deleterious conditions and endemic of rape for gay men in prisons (Mariner, 2001). The report underscored sexual minority status as a substantial risk factor for prison sexual victimization and is attributed as triggering the passage of the U.S. Prison Rape Elimination Act (PREA), which called for data collection and the development of strategies for the prevention of prison sexual assault (Smith, 2008). Signed into law by President George W. Bush on September 4, 2003, PREA has many objectives. Its overall purpose is “to provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and the funding to protect individuals from prison rape” (Prison Rape Elimination Act of 2003, Pub. L. No. 108-179, 117 Stat. 978).

Prisons across the world began to respond to this crisis by instituting prison reform. Spain introduced one of the first systems allowing prisoners to be housed in facilities according to gender identity in 2006 (Mendez, 2011) while Canadian prisons spearheaded changes in the management of transgender prisoners by adding LGBT anti-discrimination protections to its human rights legislation. In 1993, Correctional Services Canada (CSC) amended its transgender prisoner policy to allow hormone therapy for prisoners who had not yet begun treatment prior to incarceration, as well as briefly permitting gender affirmation surgery in 1995, before reversing course in 1997. Following Canada's lead, the United States made significant changes in policy and practice. In particular, PREA focused newfound national attention on the victimization of gender nonconforming people behind bars; in 2010, the U.S. State Department announced a new policy to issue passports that reflect a person's current gender when either a previous passport or other personal documentation presented by an applicant reflects a different gender; in 2012, U.S. Citizenship and Immigration Services (USCIS) issued a Policy Memorandum permitting transgender people to change the gender designation on their immigration documents; and in 2015, President Obama became the first U.S. president to use the term "transgender" in a State of the Union address and the Department of Homeland Security issued a memorandum that provides further guidance regarding the care of transgender adult detainees in the custody of ICE.

Shortly thereafter, the Canadian Human Rights Tribunal heard complaints brought by Synthia Kavanagh, a transgender prisoner housed in a men's prison, who challenged the prison's policies on gender affirmation surgery and housing placement (*Kavanagh v. Canada*, 2001). In response to these complaints, the Tribunal ordered CSC to reform its policies to address the housing and healthcare needs of transgender prisoner (Mann, 2006). Prison authorities are instructed to address prisoners by their chosen name and pronouns or use gender neutral language in all oral and written communication; accommodate requests for searches, shower facilities, and other services based on gender identity or expression; allow access to clothing and commissary items of a prisoner's choosing wherever possible; and institute measures to protect the confidentiality of prisoners' gender identities (CSC, 2017).

These and other historic changes, in one way or another, attend to the ways in which LGBT prisoners are vulnerable to threats to their health and well-being, promote respect for the non-normative sexual orientations and gender identities, and recognize the dignity of transgender people. These (historically) newfound ways of thinking about the experiences of LGBT prisoners are constitutive (also) of thinking about LGBT prisoners as rights-bearing subjects endowed with human rights that are universal and internationally recognizable.

International Forces at Work: LGBT Prisoners and Human Rights

In 1994, nearly 50 years after the founding of the UN, a committee that monitors compliance with international human rights law heard a complaint brought by Australian gay activist Nicholas Toonen (*Toonen v. Australia*, 1994). Toonen argued the Australian state of Tasmania's criminalization of same-sex sexual activity violated his rights to privacy and freedom from discrimination under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), a major UN human rights treaty (*Toonen v. Australia*, 1994). The UN

committee found in his favor and ruled that same-sex sexual activity criminalization violates international human rights law (*Toonen v. Australia*, 1994). This was a historic ruling for LGBT people subjected to prison sentences for their suspected or actual sexual orientation.

In the modern moment, numerous provisions of UN treaties, human rights affirmations, and international law are formally recognized to guard against the criminalization of LGBT people and mistreatment of LGBT prisoners. An influential body of human rights provisions, the International Bill of Rights, encompasses treaties binding to many UN member states. To this end, the ICCPR and the International Covenant on Economic, Social and Cultural Rights contain human rights protections that secure the rights to life, privacy, and expression; freedoms from discrimination, arbitrary detention, and torture; and other economic, cultural, procedural, and personal safeguards that protect LGBT people from unlawful detention and inhumane prison conditions.

UN international human rights law monitoring and enforcement mechanisms actively address LGBT prisoners. A central body, the Human Rights Council, has overseen compliance to human rights and reported on violations since its establishment in 2006. One instrument it employs to assess human rights is the Universal Periodic Review (UPR), which reviews UN member country every four years. Since the first cycle UPR in 2008, the imprisonment of LGBT people has been recorded in numerous countries' reports.

In 2011, these human rights violations culminated in a report by the UN High Commissioner for Human Rights that identified discriminatory laws, practices, and violence related to sexual orientation in UN member countries. The report states:

Seventy-six countries retain laws that are used to criminalize people on the basis of sexual orientation or gender identity. Such laws, including so-called "sodomy laws," are often relics of colonial-era legislation. They typically prohibit either certain types of sexual activity or any intimacy or sexual activity between persons of the same sex. In some cases, the wording used refers to vague and undefined concepts, such as "crimes against the order of nature" or "morality," or "debauchery." What these laws have in common is their use to harass and prosecute individuals because of their actual or perceived sexuality or gender identity. Penalties range from short-term to life imprisonment, and even the death penalty.

(UN General Assembly, 2011)

The report also pointed to "arbitrary arrests and detention . . . not directly related to sexual conduct, such as those pertaining to physical appearance or so-called 'public scandal,'" which related to criminalization of minority gender identities and expressions (UN General Assembly, 2011). In his recommendations, the High Commissioner called all member states to "repeal laws used to criminalize individuals on grounds of homosexuality" (UN General Assembly, 2011, p. 25).

UN awareness of LGBT criminalization and vulnerability to state violence led to the creation of an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity in 2016. Coincidentally, the UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment released a report condemning the status quo of prison conditions for LGBT people:

Violence against lesbian, gay, bisexual, transgender and intersex persons is exacerbated in situations of deprivation of liberty. Such persons often experience serious discrimination, even before arrest, as arbitrary detention may occur as the result of homophobic or transphobic bias. . . . With very few exceptions, State officers are not trained to understand the needs of lesbian, gay, bisexual, transgender and intersex persons and there are no institutional policies and methods to adequately address self-identification, classification, risk assessment and placement. That results in violence against such persons and a lack of access to necessary resources and services, such as physical and mental care.

(UNCAT, 2016)

Calls to Abolish the Prison

Beyond the repeal of laws criminalizing LGBT people and reform of conditions that put LGBT prisoners at risk of violence and deny them access to adequate healthcare, each of which are increasingly identifiable as human rights violations, there is a robust movement that calls for prison abolition. Transgender and other queer prison abolitionists in the United States trace their heritage from abolitionists of slavery and the radical beginnings of the LGBT movement and call for abolition of the prison industrial complex (PIC). In a forward for *Captive Genders*, CeCe McDonald, a Black bisexual transgender activist who was previously incarcerated writes:

Like slavery, there is no other way around the violence of the PIC, so we have to destroy it. We can't hold onto these powerful institutions that oppress people and expect that they will go away just because we reform them. Of course, change is good, but in instances of systematic oppression like prisons, there is no way for it to be reformed. That's just like saying we can reform racism—there's no "better" form of racism—you have to abolish it.

(Stanley & Smith, 2015)

As McDonald put it, transgender women of color and "millions of other people . . . get caught up in this system that evolved from the slave trade and is still maintained through racism, imperialism, patriarchy, and every other form of hierarchy" (Stanley & Smith, 2015). Because all forms of oppression are interrelated, prison abolition directly impacts incarcerated and non-incarcerated LGBT people alike.

By abolishing the PIC, queer and transgender prison abolitionists seek to advance LGBT decriminalization and liberation that sparked the beginnings of the movement. Founded in 2002 by transgender activist, scholar, and abolitionist Dean Spade, the Sylvia Rivera Law Project provides legal representation for transgender, intersex, and gender nonconforming prisoners, and advocates for an abolitionist vision of prison justice. Placing queer injustices in the context of broader systemic forces that, in effect, disproportionately impact communities of color and poor people, Spade calls for the dismantling of queer oppression through abolition. Spade (2012, 190) argues for the insufficiency of prison reform in light of the "central role of racialized gender violence" in contemporary legal systems. In 2014, Spade

joined the plethora of activists advocating the end of solitary confinement for LGBT prisoners by proposing government invention to alleviate structural drivers of LGBT incarceration (Hanssens, Moodie-Mills, Ritchie, Spade, & Vaid, 2014).

At the same time, so-called “reformist” advocates have called for improvement in housing assignments for LGBT prisoners, especially transgender women, that are based on self-identification and/or for housing this group in a separate wing or unit (as is done in Los Angeles and Santa Ana jails). The expectation is that this will lead to increased physical safety and the protection of mental health, a hypothesis that needs to be systematically tested (but see Dolovich, 2011). Recent work, however, complicates this issue. The Sylvia Rivera Law Project (2007) and Emmer, Lowe, and Marshall (2011) found that the respondents in the studies were not in agreement regarding housing preferences. Some felt it was better to manage prison life while in segregation most of the day; others prefer to be housed in the general population. Related, Jenness et al. (2011, 2019) found that the majority of transgender women in California’s prisons for men would prefer to be housed in facilities for men.

Future Research

While the 20th century has produced greater understandings of carceral conditions for LGBT and other gender nonconforming prisoners, much remains undertheorized and untested within the domains of sexual orientation and gender identity behind bars. Since the end of the 20th century, social scientific research has concluded that LGBT people are particularly vulnerable in prisons, jails, and other lock-up facilities and identified challenges that may be compounded by various prison management contexts. More systematic testing on the relative safety of housing environments is needed to confirm which (and whether) policy measures can reduce the violence experienced by LGBT prisoners.

Furthermore, future research should assess LGBT prisoner healthcare. Prisoners’ access to healthcare has emerged as an especially visible issue for transgender people who continue or begin treatment in prison. A wide variety of responses to the healthcare needs of transgender prisons across the world have given rise to recent human rights and other legal challenges.

Scholars can shed light on both the healthcare needs of transgender prisoners and the impact of healthcare models instituted inside prisons. Additionally, research may consider other policies and practices impacting LGBT prisoner populations, such as mental health treatment, sexually transmitted infections prevention, and other healthcare provisions, as well as prison sex prohibition, religious programs, and educational services.

Finally, in the 21st century, scholars can focus on the ways homogenization of policies and practices impacting LGBT prisoners proliferates internationally, the effect of globalization on incarceration of LGBT people, and the models and strategies employed to alleviate stratification in prisons worldwide. Through the human rights apparatus and other international systems, processes of globalization increasingly seek to influence LGBT people inside and outside prisons. These changes call for the prioritization of sexual orientation and gender identity scholarship—across race, class, and national origin—within the greater body of criminological and criminal justice research.

References

- Adam, B. D. (1995). *The rise of a gay and lesbian movement*. Boston, MA: Twayne.
- Associated Press (2017, January 30). "Thailand separates LGBT inmates, considers segregated prison [<https://dpo.st/2XgJQoM>](https://dpo.st/2XgJQoM)." *Denver Post*.
- Barnes, A. C. (1998). The sexual continuum: Transsexual prisoners. *New England Journal on Criminal and Civil Confinement*, 24, 599-646.
- Barnes, T. (2018, August 11). Teenager becomes first minor prosecuted under Russia's anti-gay 'propaganda' laws [<https://ind.pn/2w1KEls>](https://ind.pn/2w1KEls). *Independent*.
- Barte, H. (1989). Solitary confinement. *Perspectives Psychiatriques*, 28, 252-255.
- Beck, A. (2014). *Sexual victimization in prisons and jails reported by inmates 2011-12: Supplemental tables: Prevalence of sexual victimization among transgender adult inmates*. Washington, DC: Office of Justice Programs, Bureau of Justice Statistics.
- Beresford, M. (2017, January 29). Thailand begins to separate inmates as it considers opening LGBT specific prison [<https://www.pinknews.co.uk/2017/01/29/thailand-begins-to-separate-inmates-as-it-considers-opening-lgbt-specific-prison/>](https://www.pinknews.co.uk/2017/01/29/thailand-begins-to-separate-inmates-as-it-considers-opening-lgbt-specific-prison/). *Pink News*.
- Blight, J. (2000). *Transgender inmates: Trends and issues in crime and criminal justice*. Canberra, Australia: Australian Institute of Criminology.
- Brown, G., & McDuffie, E. (2009). Health care policies addressing transgender inmates in prison systems in the United States. *Journal of Correctional Health Care*, 15(4), 280-291.
- CAP-MAP (Center for American Progress-Movement Advancement Project). (2016). *Unjust: How the Broken Criminal Justice Program Fails LGBT People* [<http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>](http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf). Washington, DC: Center for American Progress.
- Carroll, A., & Mendos, L. R. (2017). *State-sponsored homophobia: A world survey of sexual orientation laws* [<https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf>](https://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf). Geneva, Switzerland: ILGA.
- Chechnya LGBT: Dozens "detained in new gay purge." (2019). *BBC News*.
- Chonco, N. R. (1989). Sexual assaults among male inmates: A descriptive study. *The Prison Journal*, 69, 72-82.
- Cormier, B., & Williams, P. (1966). Excessive deprivation of liberty. *Canadian Psychiatric Association Journal*, 11, 470-484.
- Crowder v. Diaz (2019, August 7). Amended complaint [<https://static1.squarespace.com/static/58ed2a0b20099e2bf03888c3/t/5c33a083898583a64c766878/1546887302129/2019-01-07+Crowder+Complaint.pdf>](https://static1.squarespace.com/static/58ed2a0b20099e2bf03888c3/t/5c33a083898583a64c766878/1546887302129/2019-01-07+Crowder+Complaint.pdf). No. 2:17-cv-01657.
- CSC (Correctional Services Canada). (2017). Bill C-16 (gender identity or expression) [<https://www.csc-scc.gc.ca/acts-and-regulations/584-pb-en.shtml>](https://www.csc-scc.gc.ca/acts-and-regulations/584-pb-en.shtml). Interim Policy Bulletin 584.

- Davis, A. (1968). Sexual assault in the Philadelphia prison system and sheriff's vans. In A. M. Scacco, Jr. (Ed.), *Male rape: A casebook of sexual aggressions* (pp. 107-120). New York: AMS Press.
- DePoy, P. (2012). *Ending solitary confinement: The dangers of isolation for LGBTI prisoners and detainees*. Washington, DC: ACLU Legislative Office.
- Dickey, R. (1990). Gender dysphoria and anti-social behavior. In R. Blanchard & B. W. Steiner (Eds.), *Clinical management of gender identity disorders in children and adults* (pp. 192-199). Washington, DC: American Psychiatric Press.
- Dolovich, S. (2011). Strategic segregation in the modern prison. *American Criminal Law Review*, 48(1), 1-110.
- Donaldson, S. (2001). A million jockers, punks, and queens. In T. A. Don Sabo & W. Kupers (Eds.), *Prison masculinities* (pp. 118-126). Philadelphia, PA: Temple University Press.
- Emmer, P., Lowe, A., & Marshall, R. B. (2011). *This is a prison, glitter is not allowed: Experiences of trans and gender variant people in Pennsylvania's prison systems*. Philadelphia, PA: Hearts on a Wire Collective.
- Farmer v. Brennan* (1994). 511 US 825.
- Gear, S. (2007). Behind the bars of masculinity: Male rape and homophobia in and about South African men's prisons. *Sexualities*, 10(2), 209-227.
- Gear, S., & Ngubeni, K. (2002). *Daai Ding: Sex, sexual violence and coercion in men's prisons*. Johannesburg, South Africa: Centre for the Study of Violence and Reconciliation.
- Gunnison, F. (1969). The homophile movement in America. In R. W. Weltge (Ed.), *The same sex: An appraisal of homosexuality* (pp. 113-145). Philadelphia, PA: Pilgrim Press.
- Haney, C. (2003). Mental health issues in long-term solitary and "supermax" confinement. *Crime & Delinquency*, 49, 124-156.
- Hanssens, C., Moodie-Mills, A. C., Ritchie, A. J., Spade, D., & Vaid, U. (2014). *A roadmap for change: Federal policy recommendations for addressing the criminalization of LGBT people and people living with HIV*. New York: Center for Gender & Sexuality Law at Columbia Law School.
- Homan, T. (2015). *Further guidance regarding the care of transgender detainees*. Washington, DC: National Center for Transgender Equality.
- Howarth, J. W. (1985). Prisons within prisons: Gay prisoners and protective custody. In I. P. Robbins (Ed.), *Prisoners and the law* (pp. 14-3-14-23). St. Paul, MN: Thomson/West.
- Italy "to open first prison for transgender inmates." <<http://news.bbc.co.uk/2/hi/europe/8455191.stm>> (2010). *BBC News*.
- Jackson, E., & Persky, S. (1982). *Flaunting it! A decade of gay journalism from the body politic: An anthology*. Vancouver, BC: New Star Books.
- Jenness, V. (2010). From policy to prisoners to people: A "soft-mixed methods" approach to studying transgender prisoners. *Journal of Contemporary Ethnography*, 39(5), 517-553.

- Jenness, V., & Fenstermaker, S. (2014). Agnes goes to prison: Gender authenticity, transgender inmates in prisons for men, and the pursuit of "the real deal." *Gender & Society*, 28(1), 5-31.
- Jenness, V., & Fenstermaker, S. (2016). Forty years after Brownmiller: Prisons for men, transgender inmates, and the rape of the feminine. *Gender & Society*, 30(1), 14-29.
- Jenness, V., Maxson, C. L., Matsuda, K. N., & Sumner, J. (2007). *Violence in California correctional facilities: An empirical examination of sexual assault*. Sacramento: California Department of Corrections and Rehabilitation.
- Jenness, V, Sexton, L., & Sumner, J. M. (2011, June 15). *Transgender inmates in California's prisons: An empirical study of a vulnerable population*. Sacramento: California Department of Corrections and Rehabilitation.
- Jenness, V, Sexton, L., & Sumner, J. M. (2019). The sexual victimization of transgender women in men's prisons: A mixed-methods analysis of institutional and relational dynamics. *Criminology*, 57, 603-631.
- Jones, T. R., & Pratt, T. C. (2008). The prevalence of sexual violence in prison: The state of the knowledge base and implications for evidence-based correctional policy making. *International Journal of Offender Therapy and Comparative Criminology*, 52, 280-295.
- Kavanagh v. Canada*. (2001). CanLII 8496 (CHRT).
- Kendig, N. E., Cubitt, A., Moss, A., & Sevelius, J. (2019). Developing correctional policy, practice, and clinical care considerations for incarcerated transgender patients through collaborative stakeholder engagement. *Journal of Correctional Health Care*, 5(3), 277-286.
- Kunzel, R. (2008). *Criminal intimacy: Prison and the uneven history of modern American sexuality*. Chicago, IL: The University of Chicago Press.
- Litvinova, D. (2017, November 21). LGBT hate crimes double in Russia after ban on "gay propaganda" <<https://reut.rs/2wxEPvJ>>." *Reuters*.
- Lydon, J., Carrington, K., Low, H., Miller, R., & Yazdy, M. (2015). *Coming out of concrete closets: A report on Black & Pink's national LGBTQ prisoner survey*. Omaha, NE: Black & Pink.
- Lynch, S., & Bartels, L. (2018). Transgender prisoners in Australia: An examination of the issues, law and policy. *Flinders Law Journal*, 19(2), 185-231.
- Mann, R. (2006). The treatment of transgender prisoners, not just an American problem: A comparative analysis of American, Australian, and Canadian prison policies concerning the treatment of transgender prisoners and a "universal" recommendation to improve treatment. *Law and Sexuality: Review of Lesbian, Gay, Bisexual, and Transgender Legal Issues*, 15, 91-133.
- Mariner, J. (2001). *No escape. Male rape in U.S. prisons*. New York: Human Rights Watch.
- Mendez, J. (2012). The Special Rapporteur report on torture and other cruel, inhuman or degrading treatment or punishment. UN Doc. A/HRC/19/61/A dd.4. Human Rights Council, Nineteenth session, Agenda item 3.
- Méndez, R. L. P. (2011). The narratives of transgender rights mobilization in Spain. *Sexualities*, 14(5), 597-614.

- Meyer, I. H., Flores, A. R., Stemple, L., Romero, A. P., Wilson, B. D. M., & Herman, J. L. (2017). Incarceration rates and traits of sexual minorities in the United States: National inmate survey, 2011–2012. *American Journal of Public Health, 107*, 234–240.
- Mogul, J. L., Ritchie, A. K., & Whitlock, K. (2011). *Queer (in)justice: The criminalization of LGBT people in the United States*. Boston, MA: Beacon Press.
- Muntarbhorn, V. (2017). Protection against violence and discrimination based on sexual orientation and gender identity <<https://bit.ly/2q1TZo7>>. UN Doc. A/72/172.
- Mzalouat, H. (2016). LGBT rights in Tunisia: The fight will be televised <<https://www.boell.de/en/2016/06/17/lgbt-rights-tunisia-fight-will-be-televised>>. The Green Political Foundation.
- NCTE (National Center for Transgender Rights). (2012). *LGBT People and the Prison Rape Elimination Act* <https://transequality.org/sites/default/files/docs/resources/PREA_July2012.pdf>. Washington, DC: National Center for Transgender Rights.
- Oparah, J. C. (2012). Feminism and the (trans)gender entrapment of gender nonconforming prisoners. *UCLA Women's Law Journal, 18*, 238–271.
- Panfil, V. R., & Miller, J. (2014). Beyond the straight and narrow: The import of queer criminology for criminology and criminal justice. *The Criminologist, 39*(4), 1–9.
- Petersen, M., Stephens, J., Dickey, R., & Lewis, W. (1996). Transsexuals within the prison system: An international survey of correctional services policies. *Behavioral Sciences and the Law, 14*, 219–229.
- Robinson, R. (2011). Masculinity as prison: Sexual identity, race, and incarceration. *California Law Review, 99*(5), 1309–1408.
- Rosenblum, D. (2000). “Trapped” in sing sing: Transgendered prisoners caught in the gender binarism. *Michigan Journal of Gender and Law, 6*, 499–571.
- Samti, F. (2015, December 17). On human rights day, a Tunisian court sent six men to prison for being gay <<https://foreignpolicy.com/2015/12/17/on-human-rights-day-a-tunisian-court-sent-six-men-to-prison-for-being-gay/>>. *Foreign Policy*.
- Savage, C. (2016, September 24). Chelsea Manning sentenced to solitary over suicide attempt <<https://www.nytimes.com/2016/09/24/us/chelsea-manning-fort-leavenworth-attempted-suicide.html>>. *New York Times*.
- Scacco, A. M. (1975). *Rape in prison*. Springfield, IL: Charles C. Thomas.
- Sevelius, J., & Jenness V. (2017). Challenges and opportunities for gender-affirming health care for transgender women in prison. *International Journal of Prison Health, 13*(1), 32–40.
- Sexton, L., Jenness, V., & Sumner, J. M. (2010). Where the margins meet: A demographic assessment of transgender inmates in men's prisons. *Justice Quarterly, 27*, 835–860.
- Smith, B. V. (2008). The Prison Rape Elimination Act: Implementation and unresolved issues. *Criminal Law Brief, 3*(2), 10–18.

Smith, N. E., & Batiuk, M. E. (1989). Sexual victimization and inmate social interaction. *The Prison Journal*, 69, 29–38.

Sontag, D. (2015, April 6). Transgender woman cites attacks and abuse in men's prison <<https://www.nytimes.com/2015/04/06/us/ashley-diamond-transgender-inmate-cites-attacks-and-abuse-in-mens-prison.html>>. *The New York Times*.

Spade, D. (2012). The only way to end racialized gender violence in prisons is to end prisons: A response to Russell Robinson's "masculinity as prison." *California Law Review Circuit*, 3, 184–189.

Stanley, E. A., & Smith, N. (Eds.). (2015). *Captive genders: Trans embodiment and the prison industrial complex*. Oakland, CA: AK Press.

Stümke, H. G., & Finkler, R. (1981). *Rosa Winkel, Rosa Listen. Homosexuelle und "Gesundes Volksempfinden" von Auschwitz bis heute*. Reinbek: Rowohlt.

Sumner, J., & Jenness, V. (2014). Gender integration in sex-segregated prisons. In D. Peterson & V. R. Panfil (Eds.), *The handbook of LGBT communities, crime, and justice* (pp. 229–259). New York: Springer.

Sykes, G. (1958). *The society of captives: A study of a maximum security prison*. Princeton, NJ: Princeton University Press.

Sylvia Rivera Law Project (2007). *"It's war in here": A report on the treatment of transgender and intersex people in New York State's men's prisons* <<https://srlp.org/files/warinhere.pdf>>. New York: Sylvia Rivera Law Project.

Tatchell, P. (1992). *Europe in the pink: Lesbian and gay equality in the new Europe*. London, UK: GMP.

The Abuse of Private Manning <<https://www.nytimes.com/2011/03/15/opinion/15tue3.html>>. (2011, March 15). *The New York Times*.

Toonen v. Australia <<http://hrlibrary.umn.edu/undocs/html/vws488.htm>>. (1994). UN Doc. CCPR/C/50/D/488/1992.

TransHomosDZ (2016). *LGBTQI in Algeria, violence in everyday life* <<https://bit.ly/2T6z856>>.

UN General Assembly (2011). Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity <https://www.ohchr.org/documents/issues/discrimination/a.hrc.19.41_english.pdf>. UN Doc. A/HRC/19/41.

UNCAT (United Nations Committee Against Torture). (2016). Ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/059/73/PDF/G1605973.pdf?OpenElement>>. UN Doc. CAT/C/57/4.

United States v. Manning <<https://www.court-martial-ucmj.com/files/2018/06/oc-manning-be.pdf>>. (2018). ARMY 20130739 (Army Crim. App.).

Vitelli, R., Hochdorn, A., Faleiros, V., & Valerio, P. (2018). Transgender inmates and Italian penitentiary system: An explorative research. *Mediterranean Journal of Clinical Psychology*, 6(2), 87.

Volkart, R. (1983). Solitary confinement: A literature survey. *Schweizerische Zeitschrift für Psychologie und ihre Anwendungen*, 42(1), 1–24.

Walters, R. H., Callaghan, J. E., & Newman, A. F. (1963). Effects of solitary confinement on prisoners. *American Journal of Psychiatry*, 119, 771–773.

Ward, D. A., & Kassebaum, G. G. (1965). *Women's prison: Sex and social structure*. New Brunswick, NJ: Aldine Transaction.

Wilson, M., Simpson, P. L., Butler, T. G., Richters, J., Yap, L., & Donovan, B. (2017). “You’re a woman, a convenience, a cat, a poof, a thing, an idiot”: Transgender women negotiating sexual experiences in men’s prisons in Australia. *Sexualities*, 20(3), 380–402.

Wooden, W. S., & Parker, J. (1982). *Men behind bars: Sexual exploitation in prison*. New York: Plenum.

Yongcharoenchai, C. (2016, December 4). A cell of their own <<https://www.bangkokpost.com/thailand/special-reports/1151305/a-cell-of-their-own>>. *Bangkok Post*.

Related Articles

The Criminalization of Homosexuality in Popular Cinema

Prisons in Popular Culture

Prisoner Experiences

Disciplinary Segregation in Prison

Sexuality and Gang Involvement

Prison History

Using Action Research to Improve Race Relations in Prisons

Making Gender-Responsive Programming More Queer Responsive

Queering Criminology Globally

Prison Gangs

Aging in Prison and Correction Policy in Global Perspectives

NOTE: TRANSGENDER YOUTH IN FEDERAL PRISONS: FINDING A CIVIL CAUSE OF ACTION BASED ON HOUSING DISCRIMINATION

Fall / Winter, 2019

Reporter

41 Women's Rights L. Rep. 29 *

Length: 40580 words

Author: Alexa Scarpaci

Text

[*29]

Introduction

"I constantly told them I don't feel comfortable with being who I am while being around a bunch of boys." ¹

These are the words of a nineteen-year-old transgender woman who was housed with males during her two years in a juvenile detention center at age nineteen. ²This young woman was hospitalized after being jumped twice while in a secure unit. ³Her nose was broken, she was stomped on, and she was knocked unconscious. ⁴She attempted suicide several

1

Eric Gay, *Juvenile Detention Centers Struggle with Transgender Inmates*, NBC News (Dec. 12, 2016, 5:51 PM), <https://www.nbcnews.com/feature/nbc-out/juvenile-detention-centers-struggle-transgender-inmates-n695121>.<https://www.nbcnews.com/feature/nbc-out/juvenile-detention-centers-struggle-transgender-inmates-n695121>.

2

Id.

3

Id.

4

times. ⁵Her education suffered because she always had to pay attention to her surroundings to stay safe, instead of paying attention in class. ⁶These experiences, and worse, are common for transgender youth housed according to their anatomy and not their gender identity.

Recent history has seen the securing of many rights and victories for transgender individuals. ⁷However, these victories and rights are not guaranteed to last. ⁸The Prison Rape Elimination Act (hereinafter "PREA") created [*30] the National Prison Rape Elimination Commission to develop standards to eliminate sexual assault. ⁹In 2012, the Prison Rape Elimination Act National Standards (hereinafter "PREA National Standards") outlined important rights that should be secured for transgender inmates. ¹⁰For example, PREA National Standards state that transgender inmates should be

Id.

5

Id.

6

Id.

7

See generally Prison Rape Elimination Act, [34 U.S.C.A. §§30301-09](#) (2012).

8

See The Discrimination Administration, Nat'l Ctr. for Transgender Equal., <https://transequality.org/the-discrimination-administration> (last visited Nov. 25, 2019). On February 22, 2017, "the Departments of Justice and Education withdrew landmark 2016 guidance explaining how schools must protect transgender students under federal Title IX law." *Id.* On March 10, 2017, "[t]he Department of Housing and Urban Development (HUD) announced it would withdraw two important agency-proposed policies designed to protect LGBT people experiencing homelessness." *Id.* On March 28, 2018, "the Census Bureau retracted a proposal to collect demographic information on LGBT people in the 2020 Census." *Id.* On October 25, 2017, "the Justice Department released a memo instructing Department of Justice attorneys to take the legal position that federal law does not protect transgender workers from discrimination." *Id.* On February 26, 2018, "the Department of Education announced it will summarily dismiss complaints from transgender students involving exclusion from school facilities and other claims based solely on gender identity discrimination." *Id.* On May 11, 2018, "the Bureau of Prisons in the Department of Justice adopted an illegal policy of almost entirely housing transgender people in federal prison facilities that match their sex assigned at birth, rolling back existing protections." *Id.* On November 23, 2018, "the U.S. Office of Personnel Management (OPM) erased critical guidance that helped federal agency managers understand how to support transgender federal workers and respect their rights." *Id.*

9

National Prison Rape Elimination Commission, Fed. Register, <https://www.federalregister.gov/agencies/national-prison-rape-elimination-commission> (last visited Nov. 17, 2019).

housed according to their gender identity. ¹¹However, the regulations are not part of PREA itself, and many facilities are "ignoring PREA standards" meant to protect transgender juveniles. ¹²

Per the protections outlined in PREA, the Federal Bureau of **Prisons** (hereinafter "the BOP") authored the Transgender Offender Manual (hereinafter "the Manual") to identify, track, and provide services to the incarcerated transgender population. ¹³However, on May 11, 2018, the BOP amended the Manual to affect a decrease in the rights and protections of transgender inmates, including juveniles, in federal **prisons** by mandating that gender identity no longer be taken into account when determining housing placements of transgender inmates. ¹⁴

This Note begins by describing the juvenile justice system in general. ¹⁵I will then outline the disproportionate prevalence of transgender youth in the juvenile justice system. ¹⁶Further, this Note describes the harm suffered by transgender youth due to inappropriate housing placement. ¹⁷I also discuss the current housing practices of transgender

10

See generally **Prison** Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

11

Id.

12

Julie Moreau, *Bureau of **Prisons** Rolls Back Obama-Era Transgender Inmate Protections*, NBC News, <https://www.nbcnews.com/feature/nbc-out/bureau-prisons-rolls-back-obama-era-transgender-inmate-protections-n873966> (last updated May 14, 2018, 2:19 PM).

13

U.S. Dep't of Justice Fed. Bureau of **Prisons**, Transgender Offender Manual 1 (2017) [hereinafter Transgender Offender Manual].

14

Moreau, *supra*note 12.

15

*Infra*Section II.A.

16

*Infra*Section II.B.

inmates within the juvenile justice system. ¹⁸I then outline the protections offered by the **Prison** Rape Elimination Act National Standards. ¹⁹This Note then argues that the Federal Bureau of **Prisons**' amendment of the Transgender Offender Manual violates [*31] PREA, a safety statute intended to protect transgender individuals, including juveniles. ²⁰Because PREA itself does not create a private right of action, this Note further argues that transgender juveniles who are injured either physically, mentally, or emotionally by the Federal Bureau of **Prisons**' housing policy have a negligence per se tort claim against the Federal Bureau of **Prisons** for damages. ²¹

I. Transgender Youth in Federal **Prisons**

A. The Juvenile Justice System

On any given day in the United States, nearly 53,000 juveniles are held in juvenile or criminal facilities. ²²Furthermore, thousands of youth are detained before they are even found to be delinquent. ²³Fifty-eight percent of

17

*Infra*Section II.C.

18

*Infra*Section III.

19

*Infra*Section IV.A.2.

20

*Infra*Section VII.A.

21

Gabriel Arkles, **Prison** Rape Elimination Act Litigation and the Perpetuation of Sexual Harm, [17 N.Y.U. J. Legis. & Pub. Pol'y 801, 802 \(2014\)](#); *infra*Section VII.

22

Press Release, Wendy Sawyer, **Prison** Policy Initiative, Youth Confinement: The Whole Pie (Feb. 27, 2018).

23

Id.

detained youth are housed in correction facilities, including detention centers, long-term secure facilities, and reception or diagnostic centers. ²⁴About thirty-four percent of those youth are in detention centers. ²⁵Detention centers for youth are the equivalent of jails in the adult criminal justice system. ²⁶The youth prison system is the most harmful, ineffective, and expensive component of the justice system. ²⁷The largest share of juvenile justice resources is devoted to youth prisons: \$ 5 billion annually. ²⁸

Entering a youth prison is a very similar experience to entering an adult prison: youth are restrained in handcuffs and leg irons, patted down and strip-searched, issued institutional clothing, and then locked in cell blocks. ²⁹Youth prisons emphasize order and control, which disrupts normal adolescent behavior. ³⁰Youth who disobey rules lose

24

See id.

25

Id.

26

Id.

27

System 1 (2017). *See* Ctr. for Am. Progress et al., Unjust: LGBTQ Youth Incarcerated in the Juvenile Justice

28

Id.

29

Id.

30

Id.

"privileges" such as showers, recreation, or phone calls home. ³¹Additionally, youth who act out can be subjected to solitary confinement, physical restraints, or chemical restraints such as pepper spray. ³²

[*32] According to common practice of the Federal Bureau of Prisons, factors such as "age, offense, length of commitment, [and] mental and physical health" are considered when placing juveniles in federal facilities. ³³Juveniles are either placed in secure or non-secure facilities, depending on which facility provides the appropriate level of security. ³⁴Secure facilities provide "rehabilitation and accountability for federal juvenile offenders in a secure setting, thereby ensuring the protection of the public." ³⁵Non-secure facilities are those that are not surrounded by a perimeter fence and promote reintegration of the juveniles back into the community. ³⁶Research shows that juvenile prisons "do not meet the needs of youth and do little to ensure their safety and well-being or to provide effective services to help youth when they are released." ³⁷

The closed nature of youth facilities, particularly secure facilities, makes juveniles vulnerable to physical and sexual abuse. ³⁸In a 2012 survey, the Bureau of Justice Statistics found a 2.1% rate of youth-on-youth victimization and a 3.1%

31

Id.

32

Id.

33

Custody & Care: Juveniles, Fed. Bureau of Prisons,
https://www.bop.gov/inmates/custody_and_care/juveniles.jsp (last visited Nov. 25, 2019).

34

Id.

35

Id.

36

Id.

37

Ctr. for Am. Progress et al., *supranote* 27, at 4.

rate of staff sexual victimization among non-state facilities.³⁹ Youth in confinement also face other dangerous conditions such as physical and chemical restraints, high suicide risk, physical abuse, and solitary confinement.⁴⁰

B. Prevalence of Transgender Youth in the Juvenile Justice System

As of November 16, 2019, 2,019 individuals under the age of 21 were being held in federal facilities.⁴¹ The number of self-identified transgender youth present in these facilities continues to rise.⁴² However, identifying the exact amount of transgender youth in the federal juvenile justice system is difficult. Many statistics-gathering efforts require the youth to self-report their transgender status, or the efforts simply do not collect information as to transgender status.⁴³ Furthermore, transgender youth commonly hide their gender identity or sexual orientation out of fear.⁴⁴

38

Id. at 1.

39

Leanne Heaton et al., Bureau of Justice Statistics, Facility-level and Individual-level Correlates of Sexual Victimization in Juvenile Facilities, 2012 8 (2016).

40

Ctr. for Am. Progress et al., *supra* note 27, at 3.

41

Inmate Age, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp (last visited Nov. 25, 2019).

42

James Alec Gelin, *Unwarranted Punishment: Why the Practice of Isolating Transgender Youth in Juvenile Detention Facilities Violates the Eighth Amendment*, [18 UC Davis J. Juv. L. & Pol'y 1, 3 \(2014\)](#).

43

Office of Juvenile Justice and Delinquency Prevention, LGBTQ Youths in the Juvenile Justice Sys. 2 (2014) [hereinafter OJJDP].

44

Id.

[*33] The available research, however, shows a disparity in the detention of transgender youth: Lesbian, gay, bisexual, and transgender (hereinafter "LGBT") youth represent 5 to 7 percent of the overall youth population in the United States, but comprise 13 to 15 percent of the youth population in juvenile detention.⁴⁵ Some studies have indicated that the number of LGBT youth in the juvenile justice system is as high as 20 percent.⁴⁶ Moreover, half of all LGBT youth in the United States are at risk of being arrested and entering the juvenile justice system, or eventually, the criminal justice system, during their lifetime.⁴⁷ Additionally, 85 percent of LGBT and gender-nonconforming youth in juvenile justice facilities are youth of color.⁴⁸

LGBT youth are more likely to be detained for low-level and victimless offenses such as "truancy, warrants, probation violations, running away, and prostitution."⁴⁹

Furthermore, LGBT youth report that they are subjected to profiling, indiscriminate stops and searches, and verbal, physical, or sexual harassment.⁵⁰ LGBT youth are often arrested for prostitution solely due to their transgender status or non-conforming appearance.⁵¹ Additionally, LGBT youth are more likely than straight and cisgender youth to be charged

45

Id.

46

Christina Wilson Remlin et al., Safe Havens: Closing the Gap Between Recommended Practice and Reality for Transgender and Gender-Expansive Youth in Out-of-Home Care 2 (2017).

47

Ctr. for Am. Progress et al., *supranote* 27, at 3.

48

Id. at 2.

49

Shannan Wilber, The Annie E. Casey Found., Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System 11 (2015).

50

Id.

51

See id.

with sex offense for consensual acts.
youth in the juvenile justice system.

⁵²Taken together, these factors help to account for the overrepresentation of LGBT

Furthermore, research surveying over 400 juvenile justice professionals found that LGBTQ youth face higher risks of detention due to biases and misconceptions.

⁵³For example, a perceived lack of family support may influence a court's decision to detain LGBTQ youth. ⁵⁴Relatedly, judges may believe that it is in the youth's best interest to be removed from what could be a hostile home environment.

⁵⁵Also, courts and judges may perceive LGBTQ youths as aggressive or hostile. ⁵⁶Risk-screening instruments also rate LGBTQ youth as "higher risk" of reoffending merely if they have had same-sex sexual experiences. ⁵⁷

[*34]

C. Problems Faced by Transgender Youth in the Juvenile Justice System

Until relatively recently, juvenile justice professionals have ignored, denied, or dismissed the presence of LGBT youth in the juvenile justice system. ⁵⁸Because of this neglect, the juvenile justice system did not consider LGBT youth

52

Id.

53

OJJDP, *supranote* 43, at 5-6.

54

Id. at 5.

55

Id.

56

Id. at 6.

57

Id.

when determining policy and practice. ⁵⁹However, the juvenile justice system has since turned its attention to **LGBT** youth and has begun to change policies and practices to address their needs better. ⁶⁰

Within the juvenile justice system today, transgender inmates face many of the same challenges as do other inmates, but prejudice and a lack of knowledge concerning gender identity cause additional difficulties. ⁶¹Furthermore, many transgender youths have been rejected by their families or kicked out of their homes, only to be rejected again through their inappropriate placements in the juvenile justice system. ⁶²

Despite increased protections for incarcerated juveniles, transgender youth are more likely to experience abuses during confinement, often due to stigmatization of their gender identity and/or sexual orientation. ⁶³Transgender youth face harassment, emotional abuse, physical and sexual assault, and isolation in detention facilities. ⁶⁴In 2012, the Bureau

58

Wilber, *supra*note 49, at 3.

59

Id.

60

Id.

61

Meredith Duffy et al., *A Jailhouse Lawyer's Manual*, 922 Colum. Hum. Rts. L. Rev. 1, 922 (2017).

62

Remlin et al., *supra*note 46, at 6.

63

Sonja Marrett, *Beyond Rehabilitation: Constitutional Violations Associated with the Isolation and Discrimination of Transgender Youth in the Juvenile Justice System*, [58 B.C. L. Rev. 351, 352 \(2017\)](#).

64

OJJDP, *supra*note 43, at 5-6.

of Justice Statistics conducted the National Survey of Youth in Custody and found that 10.3 percent of non-heterosexual youth, compared with 1.5 percent of heterosexual youth, experienced youth-on-youth sexual victimization. ⁶⁵

Transgender youth also face abuse from staff members. ⁶⁶Facility staff has been shown to instigate fights between youth in detention, as well as to allow injury to transgender youth. ⁶⁷Additionally, transgender youth are at risk of sexual assault perpetrated by facility staff. ⁶⁸Custodial staff of juvenile facilities acknowledges that youth who are perceived to transgress gender norms are at an increased risk of verbal, physical, and sexual assault. ⁶⁹In some instances, LGBT youth have been forced to undergo conversion therapy. ⁷⁰In other cases, the youth are required to participate in sex-offender counseling based solely on their sexual orientation or gender identity. ⁷¹

[*35]

II. Housing Placement of Transgender Youth in the Juvenile Justice System

65

Id.

66

Marrett, *supranote* 63, at 352-53.

67

Id.

68

Ctr. for Am. Progress et al., *supranote* 27, at 5.

69

Wilber, *supranote* 49, at 12.

70

Ctr. for Am. Progress et al., *supranote* 27, at 6.

71

Id.

A. Housing Issues Unique to Transgender Youth

Transgender youth are often placed in facilities according to the sex listed on their birth certificate or based on their genitalia.⁷²The gender identity and gender expression of the youth are rarely taken into account.⁷³Transgender youth are at an increased risk of harassment, violence, and sexual assault when they are placed in facilities that do not correspond to their gender identity. Additionally, inappropriate placement can make it hard for transgender youth to receive the services that they need, including access to gender-affirming clothing, personal care products, and medical care.⁷⁴

Transgender youth are often placed in isolation in juvenile detention centers and correctional facilities out of concern for their safety.⁷⁵Separation causes significant physical and emotional distress for transgender youth.⁷⁶Also, isolation reduces access to programs and services.⁷⁷Isolation also creates an increased risk of harassment and abuse by

72

Id. at 4.

73

Id.

74

Id.

75

Id. at 5.

76

Gelin, *supra*note 42.

77

Ctr. for Am. Progress et al., *supra*note 27, at 5.

staff due to reduced visibility and oversight.
risk of suicide for youth.

⁷⁸Additionally, research has found a connection between isolation and the

⁷⁹

B. Support for the Protection of Transgender Youth

The American Academy of Child and Adolescent Psychiatry (hereinafter "the Academy") "opposes discrimination based on gender identity."⁸⁰ Consequently, the Academy recommends that transgender youth be housed based on their gender identity.⁸¹ The Academy further recommends that transgender youth be referred to by their preferred name and pronoun.⁸² Placing transgender youth in the wrong sex-based housing assignment can have detrimental effects on the individual youth.⁸³ Furthermore, transgender youth can face "significant stress from being forced to conform to societal [*36] gender roles, as well as physical and sexual abuse perpetrated by residents and facility staff."⁸⁴

⁷⁸

Id.

⁷⁹

Id.

⁸⁰

Transgender Youth in Juvenile Justice and Other Correctional Systems, Am. Acad. of Child & Adolescent Psychiatry (Mar. 16, 2016), https://www.aacap.org/aacap/policy_statements/2016/Policy_Statement_on_Transgender_Youth_in_Juvenile_Justice_and_other_Correctional_Systems.aspx [hereinafter AACAP].

⁸¹

Id.

⁸²

Id.

⁸³

Mudasar Khan et al., *Challenges Facing LGBTQ Youth*, [18 Geo. J. Gender & L. 475, 530 \(2017\)](#).

⁸⁴

Id.

The American Medical Association (hereinafter "the AMA") also supports the housing of transgender inmates based on gender identity. ⁸⁵Placing transgender inmates in housing assignments based on their anatomy causes severe and well-documented problems to the health and safety of transgender individuals who are incarcerated. ⁸⁶For example, one study has shown that housing transgender inmates based on anatomy alone has caused a thirty four percent rate of rape, harassment, and physical violence among transgender inmates, compared with ten percent of the overall prison population. ⁸⁷To improve these risks, the AMA supports housing transgender inmates based on gender identity. ⁸⁸

The Coalition for Juvenile Justice created the National Standards for the Care of Youth Charged with Status Offenses. ⁸⁹These standards address the particular difficulties faced by LGBT youth in the juvenile justice system. ⁹⁰For example, the rules instruct juvenile justice system professionals to "ensure that LGBT youths have access to care consistent with best practices for these populations." ⁹¹Professionals must treat LGBT youth with respect and fairness and

85

Press Release, Robert J. Mills, Am. Ass'n, AMA Urges Appropriate Placement of Transgender Prisoners (Jun. 11, 2018).

86

Id. ("Transgender prisoners are disproportionately the victims of sexual assault, suffering higher rates of sexual assault than general population inmates.").

87

Id.

88

Id.

89

OJJDP, *supra*note 43, at 8.

90

Id.

91

Id.

ensure that they receive appropriate services. ⁹²Professionals should also recognize that LGTB youth "may need support, intervention, or treatment for trauma." ⁹³

The Equity Project is another initiative aimed at ensuring that LGBT youth in the juvenile justice system are treated with dignity, respect, and fairness. ⁹⁴In 2009, the Equity Project released "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts," a report concentrated on the juvenile court process. ⁹⁵The report provides recommendations for court personnel dealing with LGBT youth. ⁹⁶Among its recommendations, the report encourages juvenile justice professionals to "treat all LGBT youths with fairness, dignity, and respect, including prohibiting any attempts to ridicule or change youths' sexual orientation or gender identity." ⁹⁷Professionals should also allow youth to express themselves through choice of name, [*37] clothing, hairstyle, and other means of self-expression. ⁹⁸Additionally, "all agencies and offices involved in the juvenile justice system must develop, adopt, and enforce policies that explicitly prohibit

92

Id.

93

Id.

94

Id. at 8.

95

Id.

96

Id. at 9.

97

Id.

98

Id.

discrimination and mistreatment of youth based on actual or perceived sexual orientation and gender identity at all stages of the juvenile justice process." ⁹⁹

III. Legal Implications of Housing Transgender Youth in the Juvenile Justice System

A. Existing Protections for Transgender Youth

1. Constitutional Protections

Courts around the country are increasingly including sex stereotyping and gender identity-based discrimination as part of sex discrimination. ¹⁰⁰When confining youth, the State has a duty "to provide adequate food, shelter, clothing, and medical care." ¹⁰¹For transgender youth, the right to adequate medical care extends to care that may be particularized to transgender youth. ¹⁰²Additionally, due process "encompasses a right to protection from psychological as well as physical abuse." ¹⁰³

Moreover, "the Due Process Clause guarantees to juveniles who are incarcerated the right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraint, and minimally adequate training to protect those interests." ¹⁰⁴A juvenile's right to safety encompasses the "right to reasonable protection from the aggression of others,"

⁹⁹

Id.

¹⁰⁰

Remlin et al., *supra*note 46, at 7.

¹⁰¹

[*Youngberg v. Romeo*, 457 U.S. 307, 324 \(1982\).](#)

¹⁰²

See [*Meriwether v. Faulkner*, 821 F.2d 408, 411 \(7th Cir. 1987\).](#)

¹⁰³

[*R.G. v. Koller*, 415 F.Supp.2d 1129, 1156 \(D. Haw. 2006\).](#)

¹⁰⁴

including other youth who may physically or sexually attack them.¹⁰⁵ Furthermore, the court has held that a youth's constitutional right to freedom from unreasonable bodily restraint extends to unreasonably restrictive conditions of confinement.¹⁰⁶

Courts have concluded that the isolation of juveniles violates Due Process.¹⁰⁷ The courts also found that juvenile justice facilities must maintain [*38] some form of professionally acceptable methods of maintaining order and safety, including: "(1) policies and training necessary to protect LGBT youth; (2) adequate staffing and supervision; (3) a functioning grievance system; and (4) a classification system to protect vulnerable youth."¹⁰⁸ While the Constitution does not require specific policies or safeguards in youth prisons, such as grievance and classification systems, the failure to adopt "any professionally acceptable methods of maintaining order" constitutes deliberate indifference on the institution's part.¹⁰⁹

2. Statutory Protections

[*Alexander S. v. Boyd*, 876 F.Supp. 773, 797 \(D.S.C. 1995\)](#) (citing [*Youngberg v. Romero*, 457 U.S. 307, 324 \(1982\)](#)).

105

[*Alexander S.*, 876 F.Supp. at 798](#) (citing [*Thomas S. v. Flaherty*, 699 F.Supp. 1178, 1200 \(1988\)](#)).

106

Id.

107

See [*Koller*, 415 F.Supp.2d at 1155](#); [*H.C. v. Jarrad*, 786 F.2d 1080, 1088 \(1986\)](#) ("Juveniles are even more susceptible to mental anguish than adult convicts."); [*Milonas v. Williams*, 691 F.2d 931, 942-43 \(1982\)](#) (affirming judgment against placing children in isolation); [*D.B. v. Tewksbury*, 545 F. Supp. 896, 905 \(1982\)](#) ("Placement of younger children in isolation cells as a means of protecting them from older children" violates Due Process.); [*Feliciano v. Barcelo*, 497 F.Supp. 14, 35 \(1979\)](#) ("Solitary confinement of young adults is unconstitutional."); [*Lollis v. New York Dep't of Social Services*, 322 F. Supp. 473, 480 \(1970\)](#) (finding that solitary confinement was unconstitutional after considering expert evidence that stated that extended isolation on children was "cruel and inhuman" and "counterproductive to the development of the child.").

108

[*Koller*, 415 F.Supp.2d at 1157.](#)

109

Id.

Both the Juvenile Justice and Delinquency Prevention Act and the Omnibus Crime Control and Safe Streets Act prohibit sex discrimination by federal grant recipients, including juvenile justice facilities.¹¹⁰ Since courts have held that sex discrimination includes discriminating based on transgender identity, this prohibition includes discrimination based on gender identity in the juvenile justice system.¹¹¹

3. Prison Rape Elimination Act National Standards

The Prison Rape Elimination Act (PREA) standards are "a comprehensive set of federal rules that address all aspects of a facility's operations as they relate to preventing, detecting, and responding to abuse."¹¹² PREA mandates that "the Attorney General shall publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape."¹¹³ Furthermore, "the national standards...shall apply to the Federal Bureau of Prisons immediately upon adoption of the final rule."¹¹⁴

[*39] The PREA National Standards specifically include standards for juvenile facilities.¹¹⁵ On May 17, 2012, the Department of Justice issued a summary of the final PREA regulations and recognized "the particular

110

Juvenile Justice and Delinquency Prevention Act, [34 U.S.C.A. § 11101](#) (West 2017); Omnibus Crime Control and Safe Streets Act of 1968, 34, U.S.C. § 10101 (2017); *Civil rights requirements associated with OJP awards*, U.S. Dep't of Justice Office of Justice Programs, <https://ojp.gov/funding/Explore/SolicitationRequirements/CivilRightsRequirements.htm> (last visited Nov.25, 2019).

111

See EEOC v. [Equal Emp. Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.](#), [884 F.3d 560, 600 \(6th Cir. 2018\)](#) (granting summary judgment for a transgender employee who was fired due to her refusal to conform to her employer's stereotypical conception of sex); [Rosa v. Park West Bank & Tr. Co.](#), [214 F.3d 213, 216 \(1st Cir. 2000\)](#) (holding that refusal to serve a transgender customer constitutes sex-based discrimination); [Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.](#), [858 F.3d 1034, 1049 \(7th Cir. 2017\)](#) (holding that "a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turns violates Title IX.").

112

Nat'l Ctr. for Transgender Equal., LGBT People and the Prison Rape Elimination Act, (2012).

113

Prison Rape Elimination Act, [34 U.S.C.A. § 30307\(a\)\(1\)](#)(2012).

114

[34 U.S.C. § 30307\(4\)\(b\)](#) (2019).

115

vulnerabilities of inmates who are [Lesbian, Gay, Bisexual, Transgender, and Intersex] LGBTI or whose appearance or manner does not conform to traditional gender expectations." ¹¹⁶The Standards included landmark protections against the assault, harassment, and isolation commonly experienced by transgender individuals in confinement. ¹¹⁷

4. Housing Determinations

The National Standards mandate that within seventy-two hours of arrival and periodically throughout confinement, "the agency shall obtain and use information about each resident's personal history and behavior to reduce the risk of sexual abuse by or upon a resident." ¹¹⁸In assessing the risk of sexual victimization, the screening is to specifically consider "any gender nonconforming appearance or manner or identification as lesbian, gay, bisexual, transgender, or intersex, and whether the resident may, therefore, be vulnerable to sexual abuse." ¹¹⁹If an inmate's genital status is unknown, "the facility shall not search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate's genital status." ¹²⁰The PREA further stipulates that genital status "may be determined during conversations with the inmate, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner." ¹²¹

See Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.311-89 (2012).

116

Am. Civil Liberties Union, End the Abuse: Protecting LGBT Prisoners from Sexual Assault 1.

117

Id.

118

[28 C.F.R. § 115.341\(a\).](#)

119

[28 C.F.R. § 115.341\(c\)\(2\).](#)

120

[28 C.F.R. § 115.15\(e\).](#)

121

Id.

Housing determinations should be made based on the information from the risk screening, and transgender juveniles "shall not be placed in particular housing, bed, or other assignments solely based on such identification or status."¹²² Furthermore, when considering the housing assignment of a transgender juvenile, "the agency shall consider on a case-by-case basis whether a placement would ensure the resident's health and safety."¹²³ Notably, "serious consideration" is given to a transgender inmate's own views on his or her safety."¹²⁴

[*40] Housing determinations are to be made to keep all inmates, including transgender inmates, free from sexual abuse.¹²⁵ Placements of transgender inmates are to be reassessed at least twice per year to review threats to safety experienced by the inmate.¹²⁶ In addition, transgender inmates shall be allowed to shower separately from other inmates.¹²⁷

5. Prevention Planning

The National Standards mandate that all agencies shall have a written zero-tolerance policy toward all forms of sexual abuse and harassment.¹²⁸ The statement must also outline the agency's approach to "preventing, detecting, and

122

[28 C.F.R. § 115.342\(a\); 28 C.F.R. § 115.342\(c\).](#)

123

[28 C. F. R. § 115.342\(d\).](#)

124

[28 C.F.R. § 115.342\(e\).](#)

125

[28 C.F.R. § 115.342\(a\).](#)

126

[28 C.F.R. § 115.342\(e\).](#)

127

[28 C.F.R. § 115.342\(g\).](#)

128

[28 C.F.R. § 115.311\(a\).](#)

responding to such conduct." ¹²⁹Compliance with the PREA National Standards includes taking measures such as screening procedures for hiring new staff, monitoring procedures such as video surveillance, and complying with staff-to-youth ratios. ¹³⁰All of these practices are done to reduce the incidence of prison rape.

6. Training

PREA requires security staff to be trained on the agency's zero-tolerance policy and how to fulfill their responsibilities to prevent, detect, report, and respond to sexual abuse and harassment. ¹³¹Prison staff shall further be trained on the dynamics of sexual abuse and harassment in juvenile facilities and the typical reactions of juvenile victims to sexual abuse and harassment. ¹³²Staff shall also be trained on how to detect and respond to signs of sexual abuse. ¹³³In addition, the staff is also trained on how to conduct cross-gender pat-down searches and searches of transgender individuals in a respectful and least-intrusive manner possible. ¹³⁴Staff must **[*41]** also be trained on how to communicate with transgender inmates professionally. ¹³⁵

129

Id.

130

Heaton et al., *supra* note 39, at 21-24.

131

[28 C.F.R. § 115.331\(a\)\(1-2\).](#)

132

[28 C.F.R. § 115.331\(a\)\(5-6\).](#)

133

[28 C.F.R. § 115.331\(a\)\(7\).](#)

134

[28 C.F.R. § 115.15\(f\)\(2012\).](#)

135

[28 C.F.R. § 115.331\(a\)\(9\).](#)

7. U.S. Department of Justice Federal Bureau of Prisons' Transgender Offender Manual

The Federal Bureau of Prisons has a " **zero-tolerance** policy against sexual abuse and is committed to respecting and protecting the rights of its incarcerated population."¹³⁶ To identify, track, and provide services to the incarcerated transgender population, the BOP authored the Transgender Offender Manual ("Manual").¹³⁷

On May 11, 2018, the BOP amended the Manual after four female inmates sued the federal government claiming that "their constitutional rights and their rights under the Religious Freedom Restoration Act were being violated by being housed with a transgender woman."¹³⁸ As a result of this suit, the most significant change to the Manual is the elimination of the language "The TEC [Transgender Executive Council] will recommend housing by gender identity when appropriate."¹³⁹ Further, the Manual now mandates that the choice of housing assignment for transgender inmates be made on a case-by-case basis with biological sex used as the initial designation determination.¹⁴⁰

The added language to the Manual dictates that housing based on gender identity is appropriate "only in rare cases after consideration of the above factors and where there has been significant progress towards transition as demonstrated by

136

Sexual Abuse Prevention, Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/sexual_abuse_prevention.jsp (last visited Nov. 25, 2019).

137

Transgender Offender Manual, *supra* note 13.

138

Moreau, *supra* note 12.

139

U.S. Dep't of Justice, Transgender Offender Manual Change Notice (May 11, 2018), <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf> [hereinafter Change Notice].

140

Id. ("The TEC will use biological sex as the initial determination for designation; the TEC will consider the health and safety of the transgender inmate, exploring appropriate options available to assist with mitigating risk to the transgender offender, to include but not limited to cell and/or unit assignments, application of management variables, programming missions of the facility, etc; the TEC will consider factors specific to the transgender inmate, such as behavioral history, overall demeanor, and likely interactions with other inmates; and the TEC will consider whether placement would threaten the management and security of the institution and/or pose a risk to other inmates in the institution (e.g., considering inmates with history of trauma, privacy concerns, etc.).").

medical and mental health history." ¹⁴¹The former Manual allowed each transgender inmate to assess the living arrangements that were [*42] safest for them. ¹⁴²Before the amendment of the Manual, a person's gender identity played a central role in housing designation. ¹⁴³The current Manual dictates that biological sex determines housing designation. ¹⁴⁴The BOP is violating the law by not following the Prison Rape Elimination Act (PREA), which is mandatory for federal and state prisons and jails around the country." ¹⁴⁵

IV. Evaluation of Governmental Interests

The purpose of the Change Notice to the Manual is to "ensure that the Transgender Executive Council (TEC) considers issues related to prison management and security in determining appropriate housing of transgender inmates, including risks posed to staff, other inmates, and members of the public." ¹⁴⁶The Change Notice does not identify what

141

Id.

142

Chase Strangio & Amy Fetting, *The Trump Administration is Attacking Trans People in Federal Prison*, ACLU (May 25, 2018, 12:30 PM), <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/trump-administration-attacking-trans-people>.

143

Id.

144

Id.

145

Id.

146

Change Notice, *supra* note 139.

these "risks" are. ¹⁴⁷Further, the Change Notice was meant to ensure that the BOP accurately identifies, tracks, and provides services to its transgender inmates, while also maintaining security and good order in federal prisons. ¹⁴⁸

Before the Change Notice, many facilities were "ignoring PREA standards" meant to protect transgender inmates. ¹⁴⁹Instead of enforcing PREA standards, the BOP's Change Notice will "lead to increased violence against transgender individuals." ¹⁵⁰Following a bright-line rule of placing youth in housing based on their biological sex may facilitate easier prison administration, but this practice subjects transgender youth to degradation, assaults, and sexual violence. ¹⁵¹

[*43]

V. Current Remedies Available to Federal Prisoners (Or Lack Thereof)

A. Civil Rights Act

The Civil Rights Act permits an individual to sue a person who, while acting on behalf of the state, violates federal statutory rights or constitutional rights. ¹⁵²Section 1983 claims can be brought for an assault perpetrated by prison

147

Id.

148

Id.

149

Moreau, *supra* note 12.

150

Id.

151

Sydney Scott, "One Is Not Born, But Becomes a Woman": A Fourteenth Amendment Argument in Support of Housing Male-to-Female Transgender Inmates in Female Facilities, [15 U. Pa. J. Const. L. 1259, 1261 \(2013\)](#).

152

Duffy et al., *supra*note 61, at 922.

officials. ¹⁵³Courts are reluctant to find constitutional violations where prison officials use force to maintain or restore security, but force that has no identifiable purpose and is solely meant to harm a prisoner can be found to be excessive. ¹⁵⁴A Section 1983 claim can also be brought against prison officials alleging failure to protect if another prisoner perpetrates the assault. ¹⁵⁵

Section 1983 claims can also be brought for sexual abuse. ¹⁵⁶To bring a claim against a prison official, the official must have acted, maliciously and the prisoner must have suffered harm. ¹⁵⁷Section 1331 of the Civil Rights Act gives federal courts the power "to hear civil claims involving the Constitution or federal laws, and these claims can include

153

[*Id. at 934.*](#)

154

Id.

155

[*Id. at 935.*](#)

156

[*Id. at 936-37.*](#)

157

Id.

lawsuits against federal officials." ¹⁵⁸Lawsuits of this type are called "Bivens" actions. ¹⁵⁹Federal prisoners may file a Bivens action or a Federal Tort Claim to seek monetary damages. ¹⁶⁰

B. Prisoner Litigation Reform Act

The Prisoner Litigation Reform Act (hereinafter "PLRA") makes it harder for prisoners to file complaints in federal court. ¹⁶¹The PLRA requires prisoners to exhaust all administrative remedies available to them in prison before filing a suit. ¹⁶²In practical terms, this means that a prisoner must file a grievance or complaint and pursue all appeals within the prison system before filing a suit. ¹⁶³This requirement must be fulfilled even if the prisoner is seeking monetary damages, and the grievance system does not allow for damages. ¹⁶⁴The exhaustion requirement applies to all cases filed about [*44] "prison conditions." ¹⁶⁵The Supreme Court has held that "prison conditions" apply to "all inmate suits about

158

Duffy et al., *supra*note 61.

159

[*Id.* at 922-23.](#)

160

[*Id.* at 923-24; *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 \(1971\).](#)

161

Duffy et al., *supra*note 61, at 938.

162

[*Id.* at 935.](#)

163

[*Id.* at 934.](#)

164

[*Id.* at 940.](#)

165

prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." ¹⁶⁶

The PLRA does not allow claims for mental or emotional injury that is not accompanied by physical injury. ¹⁶⁷Courts have upheld the constitutionality of this provision of the PLRA for damage claims. ¹⁶⁸Some courts have held that unconstitutional living conditions, or conditions that deny a "minimal civilized measure of life's necessities," are claims of mental or emotional injury. ¹⁶⁹This provision of the PLRA refers to actions "brought by a prisoner confined in a jail," and most courts have held that the provision does not apply to individuals who sue after being released from prison. ¹⁷⁰However, some courts disagree on this issue. ¹⁷¹Overall, the PLRA makes it harder to have claims heard in federal court. ¹⁷²

[*Porter v. Nussle*, 534 U.S. 516, 516 \(2002\).](#)

166

[*Id.* at 532.](#)

167

Duffy et al., *supra*note 61, at 936.

168

Elaine M. Levine, Note, *Compensatory Damages Are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment*, [92 Notre Dame L. Rev. 2203, 2215 n.63 \(2017\)](#).

169

Duffy et al., *supra*note 61, at 930.

170

[*Id.* at 929.](#)

171

[*Id.* at 938-39.](#)

172

[*Id.* at 939.](#)

C. Unsuccessful Suits Brought by Transgender Inmates Challenging Classification Based on Biological

Sex

Many issues that are unique to transgender inmates have not been litigated extensively. ¹⁷³When prisons are faced with claims that transgender prisoners are being treated differently than other prisoners, they often claim that the disparate treatment is necessary to protect the transgender prisoners, who are more vulnerable to attack. ¹⁷⁴

Prisoners do not have a constitutional right to choose their place of confinement. ¹⁷⁵In *Lamb v. Maschner*, the court held that a male prisoner claiming to be transgender could not be held in a women's prison, even though a transfer may relieve the prisoner's anxieties about harassment and assault in the male prison. ¹⁷⁶The court further stated that a transfer would create a violation of the female inmates' rights. ¹⁷⁷

[*45] Prisons are given great deference to formulate rules so long as they serve a rational purpose, and segregation of sexes is a rational purpose in the court's view. ¹⁷⁸Further, the court stated that prison authorities have discretion to decide what clothing is permissible in a male prison and that denial of female clothing and cosmetics is not a constitutional violation. ¹⁷⁹In *Lamb v. Maschner*, the transgender individual was denied the requested relief, which

173

[*Id.* at 922.](#)

174

[*Id.* at 923.](#)

175

[*Lamb v. Maschner*, 633 F. Supp. 351, 353 \(D. Kan. 1986\).](#)

176

Id.

177

Id.

178

Id.

179

included: transfer to a female prison, cosmetics and female clothing or, pre-operative hormone therapy and gender reassignment surgery. ¹⁸⁰

In *Long v. Nix*, the plaintiff alleged that the defendant prison officials violated the Eighth Amendment right to be free from cruel and unusual punishment by refusing to provide transfer to another prison or female clothing. ¹⁸¹The court held that no violation occurred because prison officials were not deliberately indifferent to the plaintiff's medical needs as a "transsexual." ¹⁸²In addition, the plaintiff alleged Fourteenth Amendment Due Process violations for refusing to provide "adequate living conditions and meaningful medical treatment." ¹⁸³The court held that placement in an "inappropriate" facility and denial of desired medical treatment did not violate the Fourteenth Amendment because there was no property or liberty interest in being classified in any specific way or in any particular type of medical treatment. ¹⁸⁴All in all, transgender inmates who have brought suit against prison officials for categorizing them as their biological sex and placing them in prisons accordingly are not typically successful in court using constitutional claims. ¹⁸⁵

VI. Negligence Per Se

Id.

180

[*Id.* at 354.](#)

181

[*Long v. Nix*, 877 F. Supp. 1358, 1360 \(S.D. Iowa 1995\).](#)

182

[*Id.* at 1364, 1366.](#)

183

[*Id.* at 1366.](#)

184

[*Id.* at 1367.](#)

185

Ctr. for Const. Rts. and & The Nat'l Law. Guild, *A Jailhouse Lawyer's Handbook: How to Bring a Federal Lawsuit to Challenge Violations of Your Rights in Prison* 52 (Rachel Meeropol & Ian Head eds., 5th ed. 2010) [hereinafter *Jailhouse Lawyer's Handbook*].

Negligence per se is a concept that has been a settled tort doctrine for over a century.¹⁸⁶ In fact, it was first developed at common law.¹⁸⁷ Courts have noted when an act "is so universally wrongful as to attract the attention of the lawmaking power, and this concrete wrong is expressly prohibited by law or ordinance, a violation of this law, a commission of the specific act forbidden, is, for civil purposes, correctly called negligence per se."¹⁸⁸ [*46] Today, the negligence per se doctrine states that "if an actor violates a pertinent safety statute, and the violation results in injury, the fact of the violation itself -'per se'-conclusively establishes the actor's negligence."¹⁸⁹ The statutes involved in negligence per se cases do not themselves "authorize civil lawsuits for recovery of damages [due to] injury caused by noncompliance."¹⁹⁰

The doctrine of negligence per se is applicable where "the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."¹⁹¹ However, breach of a statute by itself does not automatically establish liability under negligence per se; duty, breach, causation, and injury must still be shown.¹⁹²

186

Barbara Kritchevsky, [*Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 Am. U. L. Rev., 71, 73 n.6 \(2010\).](#)

187

Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 Whittier L. Rev. 831, 877 (1992).

188

Platt v. S. Photo Material Co., 60 S.E. 1068, 1070 (Ga. Ct. App. 1908).

189

Robert E. Keeton et al., *Tort and Accident Law Cases and Materials* 398 (4th ed. 2004).

190

Id.

191

Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 14 (Am. Law Inst. 2010) [hereinafter Restatement (Third)].

192

Sherman, *supra*note 187, at 880.

States take different approaches to negligence per se claims.¹⁹³The majority approach treats the violation of a statute as negligent conduct.¹⁹⁴The minority approach, on the other hand, addresses the violation as evidence of negligence.¹⁹⁵Finally, in a third approach, followed only in California, the violation of the statute creates a presumption of negligence.¹⁹⁶In any case, the statute in question may be federal, but the suit for damages retains state-law character.¹⁹⁷In fact, "most courts treat violations of state and federal law identically in applying the doctrine of negligence per se."¹⁹⁸This practice is so commonplace that the Restatement (Third) of Torts explains that its negligence per se provision applies to federal law.¹⁹⁹

A. The Statute

Most importantly, negligence per se is only applicable in cases where the violated statute is a safety statute.²⁰⁰Claims can involve statutes promulgated by federal authorities.²⁰¹The statute itself need not create civil liability.

193

Id. at 879.

194

Id. at 878.

195

Id.

196

Id. at 878-79.

197

Keeton et al., *supra* note 189, at 409.

198

Kritchevsky, *supra* note 186, at 72-73.

199

Id. at 73.

200

²⁰²In fact, courts can exercise their common law authority to shape tort doctrine in finding that an unexcused violation of the statute is negligence per se. ²⁰³Even though the legislature has not chosen to attach liability to the [*47] statute's prohibition, it would not make sense for the court to find reasonable the conduct that the statute proscribed as prohibited. ²⁰⁴The statute defines the limits of reasonable conduct. ²⁰⁵Compliance with the statute is perceived to be the conduct of a reasonably prudent person. ²⁰⁶Conversely, non-compliance with the statute amounts to unreasonable conduct. ²⁰⁷

The Prison Rape Elimination Act was enacted to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; make the prevention of prison rape a top priority in each prison system; [and] develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape." ²⁰⁸In sum, in

[*Id. at 84.*](#)

201

Restatement (Third), *supra*note 191, at § 14(a).

202

Id. at § 14(c).

203

Id.

204

Id.

205

Sherman, *supra*note 187, at 877.

206

Id.

207

Id.

208

[*34 U.S.C.A. § 30302\(2\)*](#)(2012).

passing PREA, Congress intended to promote safety. Thus, it is the type of statute to which the doctrine of negligence per se is applicable.²⁰⁹

Furthermore, the Federal Bureau of Prisons is legally obligated to adopt PREA's National Standards.²¹⁰ The amendment of the BOP's Transgender Offender Manual dictating that housing of transgender inmates will primarily be assigned based on anatomy directly contradicts the legally binding National Standards.²¹¹ Therefore, any transgender juvenile in federal prison who suffers sexual victimization while housed not by chance with their gender identity should have a right of action against the Federal Bureau of Prisons under the doctrine of negligence per se.

B. Class Membership

The Prison Rape Elimination Act is meant to protect all prisoners in all confinement facilities in the United States, including local jails, police lockups, and juvenile facilities.²¹² Specifically, the statute recognizes that "young first-time offenders are at increased risk of sexual victimization."²¹³ Juveniles fall squarely into the class meant to be protected by PREA. Furthermore, in its summary of the final PREA regulations, the Department of Justice recognized "the particular vulnerabilities of inmates who are [Lesbian, [*48] Gay, Bisexual, Transgender, and Intersex] LGBTI or whose appearance or manner does not conform to traditional gender expectations."²¹⁴ Transgender youth are particularly susceptible to

209

Kritchevsky, *supra* note 186, at 84; Mest v. Cabot Corp., 449 F.3d 502, 518 (3d Cir. 2006) ("To assert a claim for negligence per se, a plaintiff must demonstrate that: (1) the statute or regulation clearly applies to the conduct of the defendant; (2) the defendant violated the statute or regulation; (3) the violation of the statute proximately caused the plaintiff's injuries; and (4) the statute's purpose is, at least in part, to protect the interest of the plaintiff individually, as opposed to the public.").

210

34 U.S.C.A. § 30307(b) (2012).

211

Strangio & Fettig, *supra* note 142.

212

What Facilities are Covered Under PREA and the PREA Standards?, Nat'l PREA Resource Ctr. (July 2, 2013), <https://www.prearesourcecenter.org/node/3200>. <https://www.prearesourcecenter.org/node/3200https://www.prearesourcecenter.org/node/3200https://www.prearesourcecenter.org/node/3200https://www.prearesourcecenter.org/node/3200>.

213

34 U.S.C.A. § 30301(4) (2012).

sexual victimization while in confinement. ²¹⁵Therefore, they comprise precisely the class that PREA was enacted to protect.

C. Type of Harm

Negligence per se "applies only when the accident that injures the plaintiff is the type of accident that the statute seeks to avert." ²¹⁶This principle prevents the doctrine of negligence per se from being used to penalize individuals for simply violating a law. ²¹⁷

PREA was authored to "make the prevention of prison rape a top priority in each prison system." ²¹⁸Accordingly, the PREA National Standards were authored to detect, prevent, reduce, and punish prison rape. ²¹⁹Further, PREA recognizes that prison rape endangers public safety by making victimized inmates more likely to commit crimes when released ²²⁰, exacerbates interracial tensions both within prison and upon release ²²¹, increases the rate

214

Restatement (Third), Am. Civil Liberties Union, *supra* note 191, at § 14(f).

215

OJJDP, *supra*note 43.

216

Restatement (Third), *supra*note 191, at § 12(f).

217

Kritchevsky, *supra*note 186, at 80.

218

[34 U.S.C.A. § 30302\(3\)](#) (2012).

219

[34 U.S.C.A. § 30307\(a\)\(1\)](#).

220

[34 U.S.C.A. § 30301\(8\)](#).

of homicides and other violence against both inmates and staff²²², raises the risk of insurrections and riots²²³, and causes victims to suffer severe physical and psychological effects.²²⁴ Taken together, these purposes and findings show that prison rape, and all of its resulting adverse effects, is precisely the harm that PREA seeks to prevent.²²⁵

D. Causation and Duty of Care

The standard of care in negligence per se actions is the standard adopted by the statute.²²⁶ This standard border on strict or absolute liability.²²⁷ Furthermore, for the doctrine of negligence per se to be applicable, a plaintiff must establish the defendant owed them a duty, which was breached.²²⁸

221

[34 U.S.C.A. § 30301\(9\).](#)

222

[34 U.S.C.A. § 30302 \(10\).](#)

223

Id.

224

[34 U.S.C.A. § 30301\(11\).](#)

225

See generally [34 U.S.C.A. § 30302.](#)

226

Sherman, *supranote* 187, at 880.

227

Id.

228

Id.

[*49] Inappropriate housing placements negatively affect transgender youth. ²²⁹In particular, transgender youth are at an increased risk of sexual assault and victimization when they are housed in facilities that do not correspond to their gender identities. ²³⁰In fact, non-heterosexual youth, including transgender youth, are ten times more likely to experience sexual victimization while in confinement. ²³¹A juvenile's constitutional right to safety encompasses the "right to reasonable protection from the aggression of others," including other youth who may physically or sexually attack them. ²³²In other words, juvenile detention centers have to protect all youth, including transgender youth, who are in their care while in confinement from the abuse of others. Inappropriate housing placement is a significant cause of harm to transgender youth. ²³³Therefore, by not protecting transgender youth through appropriate housing placement based on gender identity, federal juvenile detention facilities are breaching their duty of care to the youth.

Conclusion

Transgender youth are disproportionately represented in the juvenile justice system. ²³⁴This overrepresentation is often due to biases, misconceptions, and discrimination. ²³⁵While the juvenile justice system has

229

*Supra*Section III.A; National Center for Transgender Equality, LGBTQ People Behind Bars: A Guide to Understanding the Issues Facing Transgender Prisoners and Their Legal Rights 13 (2018).

230

Ctr. for Am. Progress et al., *supra*note 27, at 4.

231

Id. at 1.

232

[*Alexander S. v. Boyd*, 876 F. Supp. 773, 798 \(D.S.C. 1995\)](#) (citing *Thomas S. v. Flaherty*, 699 Supp. 1178, 1200 (1988)).

233

Ctr. for Am. Progress et al., *supra*note 27, at 4.

234

OJJDP, *supra*note 43.

235

recently begun to take LGBT youth into account,²³⁶ it is still replete with prejudice, and there is a lack of knowledge concerning gender identity present in the system that causes additional difficulties for LGBT youth, as compared to non-LGBT inmates.²³⁷

Transgender youth, in particular, are more likely to face stigmatization of their gender identity and/or sexual orientation and, consequently, abuses while in confinement.²³⁸ Overall, transgender youth encounter many problems while in the juvenile justice system.²³⁹ Sexual victimization, perpetrated by staff and other inmates, is one major problem faced by transgender youth in confinement.²⁴⁰

The current housing policy for transgender youth in the juvenile justice system is placing them in facilities that correspond to their biological sex, [*50] not their gender identity.²⁴¹ When transgender youth are placed in housing that does not match their gender identities, the problems they face in confinement are exacerbated.²⁴² For example,

Id. at 5-6; Wilber, *supra* note 49, at 5.

236

Wilber, *supra* note 49, at 3.

237

Duffy et al., *supra* note 61, at 1.

238

Marrett, *supra* note 63.

239

Supra Section II.C.

240

OJJDP, *supra* note 43 at 6; Ctr. for Am. Progress et al., *supra* note 27, at 5.

241

Ctr. for Am. Progress et al., *supra* note 27, at 4.

242

Id.

transgender youth face increased physical and sexual violence and assault. ²⁴³It is also harder for the youth to get access to services that they need. ²⁴⁴Many agencies, associations, and initiatives, support the fair treatment of transgender inmates, including housing determinations that match gender identity. ²⁴⁵While some legal protections are in place for transgender youth in the juvenile justice system, they are not sufficient to adequately protect the well-being of transgender inmates. ²⁴⁶

The **Prison** Rape Elimination Act seemed to be a landmark statute that secured essential rights for prisoners. ²⁴⁷Specifically, the PREA National Standards, ²⁴⁸which were mandated to be adopted by the Federal Bureau of **Prisons**, should have secured many rights for federal prisoners, especially transgender inmates. ²⁴⁹However, despite this mandate, the Federal Bureau of **Prisons** amended its Transgender Offender Manual in May 2017 to dictate that transgender inmates, including juveniles, shall be housed based on their anatomy or biological sex. ²⁵⁰This change eliminated language

243

Id. at 5-6.

244

Id.

245

Supra Section III.B.

246

Supra Section IV.A.

247

See generally **Prison** Rape Elimination Act, 34 U.S.C.A. §§3031-39 (2012).

248

Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

249

[34 U.S.C.A. § 30307\(b\).](#)

250

Change Notice, *supra* note 139.

mandating that housing determinations for transgender inmates be made primarily based on gender identity. ²⁵¹The Federal Bureau of Prisons is violating the law by not following the Prison Rape Elimination Act and its National Standards. ²⁵²

While some remedies are available to federal prisoners, ²⁵³PREA does not provide a private right of action. ²⁵⁴To remedy the harm caused to transgender juveniles in federal prisons by the BOP's disregard of the PREA National Standards, the concept of negligence per se may be used. ²⁵⁵Negligence per se requires the violation of a safety statute meant to protect against the type of harm that actually occurred, and the victim to be within the class intended to be protected by the statute. ²⁵⁶Undoubtedly, PREA is a safety statute meant to protect against prison rape and its associated adverse effects. ²⁵⁷Further, transgender inmates in the juvenile justice system fall [*51] squarely within the class meant to be protected by PREA. ²⁵⁸Transgender juveniles are more likely to be victims of sexual violence when they are placed in

²⁵¹

Id.

²⁵²

Strangio & Fetting, *supra*note 142.

²⁵³

*See supra*Section VI.

²⁵⁴

Arkles, *supra* note 21, at 802.

²⁵⁵

*See supra*Section VII.

²⁵⁶

Restatement (Third), *supra*note 191, at § 14.

²⁵⁷

*See supra*Section VII.A.

²⁵⁸

*See*Arkles, *supra* note 21.

housing determinations that do not correspond to their gender identities. ²⁵⁹Thus, the BOP's violation of PREA and the National Standards causes the harm meant to be avoided by the statute. Transgender youth who are subjected to inappropriate housing placements while in federal juvenile justice facilities due to the BOP's violation of the PREA National Standard, therefore, have a claim of negligence per se against the BOP for any harm they suffer as a result of this violation.

Women's Rights Law Reporter
Copyright (c) 2019 Women's Rights Law Reporter--Rutgers, The State University of New Jersey
Women's Rights Law Reporter

End of Document