

A ROADMAP FOR CHANGE:

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

By

Catherine Hanssens, Center for HIV Law and Policy

Aisha C. Moodie-Mills, Center for American Progress

Andrea J. Ritchie, Streetwise and Safe (SAS)

Dean Spade, Center for Gender and Sexuality Law, Columbia Law School

Urvashi Vaid, Center for Gender and Sexuality Law, Columbia Law School

May 2014



ACKNOWLEDGEMENTS

The authors would like to thank Prof. Russell Robinson, Berkeley Law, University of California for his extensive work on this report and on co-planning and executing the gathering that generated this report. We thank Iván Espinoza-Madrigal for his research and drafting work on this report. We also thank the designers of this report Hope Dector and Chris Powell, the editor Morgan Bassichis, and all of the people who contributed their knowledge and feedback to this document, listed in the Appendix. We thank Kerry Fitz-Gerald at Seattle University for extensive research support. We also thank Cindy Gao for her support in producing this report.

The Center for Gender & Sexuality Law thanks the Public Welfare Foundation, Ford Foundation, and Arcus Foundation for their support to enable the work on this report.

This report and companion documents are available at:
<http://law.columbia.edu/roadmap-for-change>

Please cite this report as: Catherine Hanssens, Aisha C. Moodie-Mills, Andrea J. Ritchie, Dean Spade, and Urvashi Vaid. 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.

Cover images:

Stop the Frisk Rally, New Orleans, May 2013. *Courtesy of BreakOUT!*

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

CeCe McDonald while incarcerated. *Courtesy of Leslie Feinberg*

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

Community United Against Violence (CUAV) members, staff and board at May Day march. *Courtesy of CUAV*

CONTENTS

2 PREFACE & FOREWORD

4 INTRODUCTION & SUMMARY

- 6 Nature of the Brief
- 8 Background: Contributors & Collaborators

10 POLICING & LAW ENFORCEMENT

- 14 Profiling
- 15 Policing Homelessness
- 16 Police Detention
- 18 Use of Possession of Condoms as Evidence to Engage in Prostitution-Related Offenses

20 PRISONS

- 22 Discrimination and Violence Inside Prisons and Related Facilities
- 24 Health & Nutrition
- 24 Access to Programming
- 25 Placement within Prison Facilities

26 IMMIGRATION

- 30 Violence and Abuse Against LGBT and PLWH in Federally Funded Immigrant Detention Facilities
- 32 Segregation and Housing
- 33 Medical Care
- 35 Immigration Hearings and Access To Counsel

36 CRIMINALIZATION OF YOUTH

- 38 Homelessness & Foster Care
- 40 School Climate
- 41 School Discipline Reform
- 43 Juvenile Justice
- 46 Detention Centers & Reentry

48 CRIMINALIZATION OF HIV

- 50 Addressing Widespread Ignorance About the Routes, Risks and Consequences of HIV
- 52 Addressing Government-Supported Stigma and Discrimination in the Criminal Justice System

54 DRIVERS OF INCARCERATION

- 55 Drug Policy
- 57 Collateral Consequences of Criminalization and Incarceration
- 58 Criminalization of Poverty and Homelessness
- 60 Lack of Access to ID and Social Services for Transgender People
- 63 Criminalization of Sex Work and Responses to Trafficking in Persons

66 ENDNOTES

80 APPENDIX A: CONTRIBUTORS & COLLABORATORS

PREFACE

BENJAMIN TODD JEALOUS

Former President, NAACP

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOREWORD

CECE MCDONALD*

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

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

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

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

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

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

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

from my wounds and kept me from the ambulance nearby. I had complications with my face for weeks after the incident because of the improper treatment.

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

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

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

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

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



CeCe McDonald while incarcerated
IMAGE: LESLIE FEINBERG

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

1 INTRODUCTION & SUMMARY



Members of FIERCE march in Silent March to End Stop and Frisk, New York City, June 2012

IMAGE: A. RITCHIE

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

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

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

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

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

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

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

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

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

What's more, LGBT people, specifically transgender women of color and LGBT youth of color, are endemically profiled as being engaged in sex work, public lewdness, or other sexual offenses. Police in many jurisdictions use possession of condoms as evidence supporting arrests for prostitution-related

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

offenses. Surely, no heterosexual white man would be arrested on suspicion of prostitution for carrying condoms in his pocket. Yet policing tactics that hyper-sexualize LGBT people, and presume guilt or dishonesty based on sexual orientation or gender identity, are deployed by law enforcement every day.

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

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

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

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

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

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

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

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

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

NATURE OF THE BRIEF

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

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



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

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



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

Six key topic areas organize the discussion:

Policing and Law Enforcement.

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

Prisons and Detention Centers.

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

Immigration-related Issues.

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

Criminalization of Youth.

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

HIV Criminalization.

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

Drivers of Incarceration.

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

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

BACKGROUND: CONTRIBUTORS AND COLLABORATORS

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

In May 2013, a working group made up of the authors of this report convened a group of over 50 activists, policy advocates, lawyers, and grassroots organizations working on LGBT, criminalization, and racial justice issues at the local, state, and federal levels for a two-day meeting at Columbia Law School⁷ to discuss and articulate a legislative and policy agenda for action on behalf of the communities we serve—namely LGBT people and PLWH who have come in contact with the criminal justice system.



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

Our goals were to gather the collective wisdom and expertise of individuals who have been advocating on various fronts to address the criminalization of LGBT people; foster communication across movements, sectors, and regions; and build a network of advocates that can more effectively and strategically achieve policy change in the administration of criminal justice at the federal, state, and local levels.

This brief reflects a crowdsourced aggregate of the ideas, recommendations, and proposed outcomes of that meeting in the federal realm, and aggregates the best thinking and visions of multiple perspectives of the movement, from incarcerated individuals to grassroots organizers, to academics, to litigators, to federal policy advocates. It represents an innovative and unprecedented feat of collaboration around a common purpose and a reminder that while tactics may occasionally differ, our end goal is ultimately the same: ending the criminalization of and miscarriages of justice towards LGBT people and PLWH.

“ I speak out for those people whom the justice system has failed, and there are far too many of us.”

CeCe McDonald

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



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

IMAGE: CUAV

2 POLICING & LAW ENFORCEMENT



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

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

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

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

As Mitchyll Mora, research and campaign staff at Streetwise and Safe (SAS), a New York City-

based organization focused on profiling and policing of LGBTQ youth of color, testified during recent debates around the NYPD’s discriminatory use of ‘stop and frisk’ practices:

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

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

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

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

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

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

No matter what form discriminatory policing of LGBTQ people takes, there can be no question that it contributes to the criminalization and mass incarceration of communities of color and low-income communities in the U.S. Police officers represent the first point of contact with the criminal legal system. Their day-to-day decisions regarding who to stop, question, search,

arrest, charge, or protect are deeply informed by enforcement of racialized gender and sexual norms, and play a significant role in driving LGBTQ people into the criminal legal system.

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

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

ANDREA J. RITCHIE

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

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

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

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

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

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

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

Member, BreakOUT!

While law enforcement is generally conceived as a state or local issue, the federal government has considerable influence over the operation of state and local law enforcement agencies through federal funding, Title VI of the Civil Rights Act of 1964, and the pattern and practice enforcement authority created through the Violent Crime Control and Law Enforcement Act (VCCLEA),²⁰ as well as through the Federal Law Enforcement Training Center and Department of Justice programs aimed at promoting best practices such as the Community Oriented Policing Services (COPS).

Additionally, the federal government exercises complete control over the actions of federal law enforcement agencies, and can issue specific regulations and guidance to federal officers such as the guidance on racial profiling issued by DOJ in 2003.²¹

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

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



LGBT community organizations join launch of Communities United for Police Reform, New York City, February 2012

IMAGE: COMMUNITIES UNITED FOR POLICE REFORM

PROFILING

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



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

IMAGE: A. RITCHIE

RECOMMENDATIONS:

- The Department of Justice (DOJ) should immediately adopt and enforce an updated directive on profiling by federal law enforcement agents prohibiting profiling based on actual or perceived sexual orientation, gender, gender identity and expression, disability, immigration, housing, marital and HIV status, and promptly issue and enforce an updated directive to federal law enforcement agents to that effect.
- All federal law enforcement agencies, including Immigration and Customs Enforcement (ICE), should adopt anti-discrimination and anti-profiling provisions of recent consent decrees entered into by DOJ with the New Orleans Police Department (NOPD) and the Commonwealth of Puerto Rico (PRPD) prohibiting the use of race, color, ethnicity, national origin, immigration status, religion, gender, disability, sexual orientation, or gender identity as a factor, to any extent or degree, in establishing reasonable suspicion or probable cause, exercising discretion to conduct a warrantless search or seek a search warrant, or effecting arrest, except as part of an actual and apparently credible description of specific suspect or suspects in a criminal investigation.²⁶
- DOJ should make promulgation and compliance with policies consistent with the above referenced anti-discrimination and anti-profiling provisions of recent consent decrees entered into by DOJ with NOPD and PRPD a condition of federal funding to local law enforcement agencies.²⁷
- DOJ should make collection of data concerning stops, frisks, and searches of pedestrians and motorists a condition of federal funding to local law enforcement agencies, promulgate guidelines for data collection, and collect and publish this data on an annual basis.
- The Administration should support and promote passage of the End Racial Profiling Act, with provisions inclusive of prohibitions on profiling based on gender, gender identity and expression, and sexual orientation.

POLICING HOMELESSNESS

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

RECOMMENDATIONS:

- DOJ should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances, intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.³¹
- DOJ should promote and support enactment of federal, state, and local legislation prohibiting profiling discrimination by law enforcement based on housing status.³²
- Federal agencies should leverage federal funding to discourage criminalization of homelessness and poverty through enforcement of anti-panhandling laws, laws prohibiting sitting or lying on sidewalks, loitering and vagrancy laws.³³ This could include providing bonus points in applications for funding for communities that do not engage criminalization of homelessness and pursue alternate solutions to housing instability along the lines of Utah's Housing First Program.³⁴

Gay men of color, along with women and transgender people of color, are among the Black and Latina/os disproportionately subjected to more than 685,000 stops and frisks by the NYPD last year. I know, because I am one of them.

Sometimes our experiences are no different than the rest of our communities. For instance, I was first stopped and frisked just months after I moved to New York as I was riding my bicycle in Fort Greene, as part of the NYPD's "quality of life" policing. The second time I was stopped, police rummaged through my bags of recently washed clothes as I was on my way home from a laundromat in Bed-Stuy. This time, presumably the goal was finding weapons or drugs. But, as in 99.9% of stops conducted by the NYPD [in 2011], no gun or contraband was found among my clean boxer briefs.

At other times, our experiences are marked by homophobia and transphobia in addition to racism and policing of poverty. This past December, my friends and I were stopped, questioned, and searched in Marcus Garvey Park in Harlem—not on the pretense that we had weapons or contraband—but because we were three Black gay men in a park. The fact that we were dancing to Beyoncé was presumably enough to give rise to reasonable suspicion that we were engaged in unlawful sexual activity.

*Chris Bilal, Campaign Staff,
Streetwise and Safe (SAS)*

POLICE DETENTION

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

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

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

RECOMMENDATIONS:

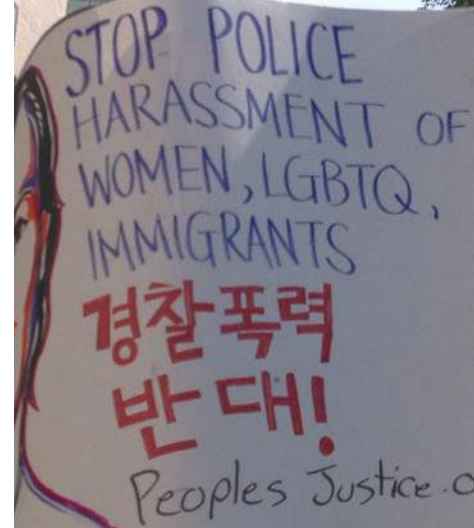
- DOJ should aggressively pursue enforcement of existing PREA standards for police lock-ups.
- DOJ should issue a clarification that the definition of "lock-ups" contained in the PREA regulations includes police cars and other temporary locations of police detention.
- DOJ should initiate new rulemaking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

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

*Don Thomas, Youth Leader,
Streetwise and Safe (SAS)*

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

- DOJ should provide necessary guidance regarding searches and placement of transgender and gender non-conforming individuals in police custody, and issue a clarification through the Frequently Asked Questions section on the PREA Resource Center’s website⁴⁰ indicating that that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.⁴¹
- The Bureau of Justice Statistics (BJS) should develop a survey analogous to the National Inmate Survey (NIS) that would enable annual data collection concerning reports of sexual harassment and assault in police custody by mandating that selected agencies participate in the survey as a condition of receipt of federal funding.
- Federal law enforcement agencies should adopt policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the recommendations of the International Association of Chiefs of Police (IACP).⁴²
- DOJ should condition federal funding to local law enforcement agencies on adoption of policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the IACP recommendations.⁴³
- DOJ should condition federal funding to local law enforcement agencies on adoption of provisions of NOPD and PRPD consent decrees with respect to regulation of consent searches.⁴⁴
- In consultation with groups who have successfully advocated for local policies, DOJ should promulgate guidance for local law enforcement agencies relating to placement, searches, and interactions with transgender and gender non-conforming individuals consistent with those contained in NOPD and PRPD consent decrees,⁴⁵ and make adoption of policies consistent with the guidance a condition of receipt of federal funding.



Sign by People’s Justice at Silent March to End Stop and Frisk, New York City, June 2012

IMAGE: YUL-SAN LIEM

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

Rev. Jason Lydon, Black and Pink

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

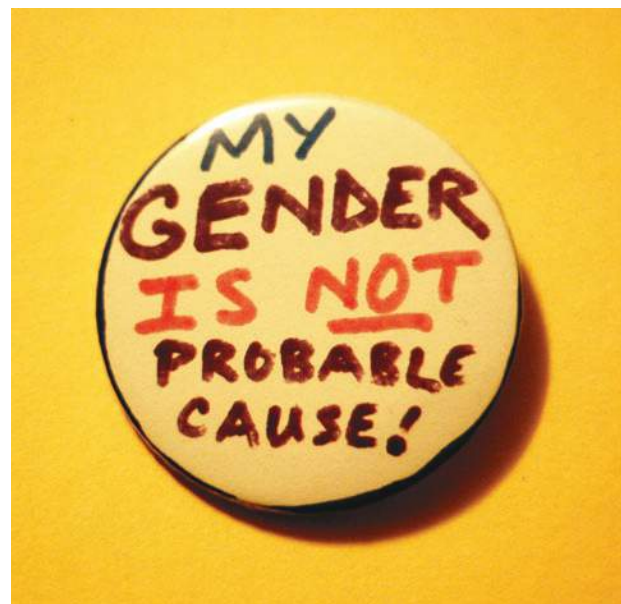
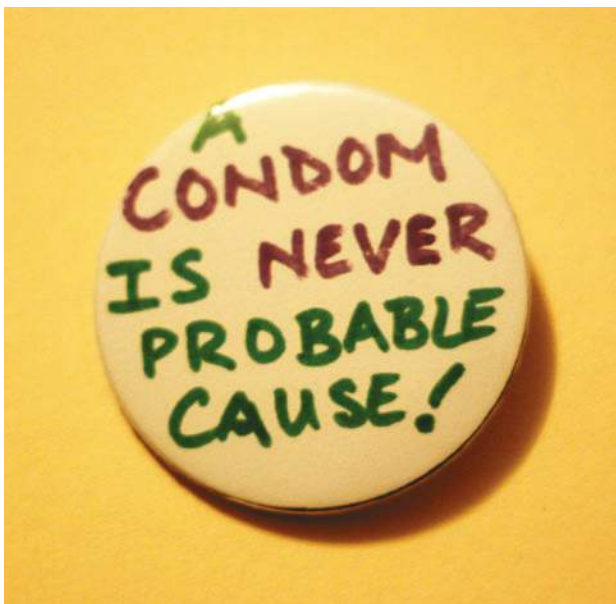
As documented by Human Rights Watch in four major cities across the United States and reported in many other jurisdictions,⁴⁶ local law enforcement agencies and prosecutors routinely use possession or presence of condoms as evidence of intent to engage in prostitution-related offenses. This harmful practice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

“ When the police take our condoms or lock us up for carrying condoms, they are putting our lives at risk. How am I supposed to protect myself from HIV and STIs when I am scared to leave my house with condoms in my purse?”

*Trina, Youth Leader,
Streetwise and Safe (SAS)*

RECOMMENDATIONS:

- The Centers for Disease Control and Prevention (CDC) and DOJ should issue and publicize guidance condemning reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity, and encouraging local law enforcement agencies to adopt policies prohibiting this practice.
- Consistent with the resolution of the Presidential Advisory Council on HIV/AIDS, DOJ and CDC should develop, disseminate, publicize, and promote guidance to state lawmakers and prosecutors to adopt legislation and policies that would eliminate the practice of using possession or presence of condoms as the basis of criminal prosecutions or sentence enhancements.



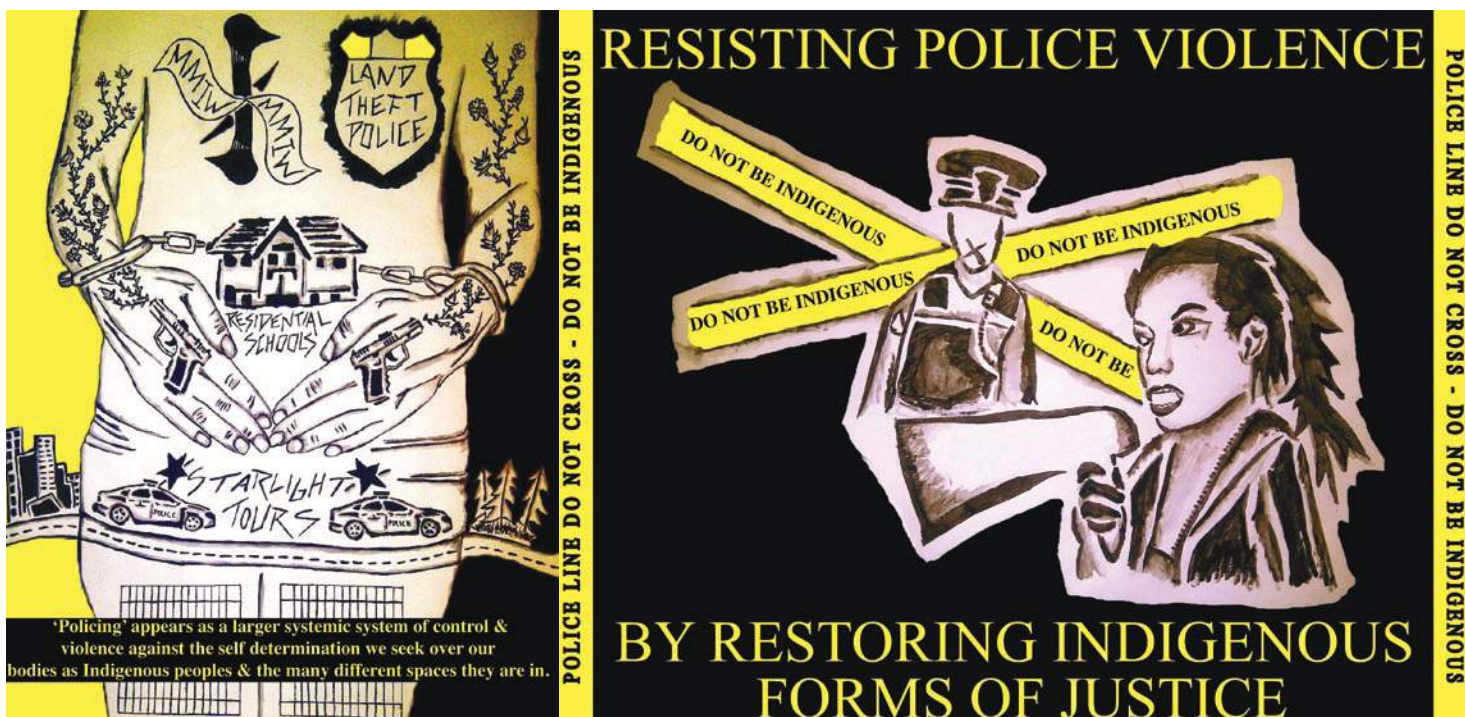
“Know Your Rights” buttons created by LGBT youth leaders at Streetwise and Safe (SAS), IMAGE: K. LUNDIE

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

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

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

*Trina, Youth Leader,
Streetwise and Safe (SAS)*



IMAGES: NATIVE YOUTH SEXUAL HEALTH NETWORK

3 PRISONS



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

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

“Prisons aren’t safe for anyone, and that’s the key issue.”

CeCe McDonald

Yet, there are many serious problems with the implementation of PREA, and LGBT people face ongoing violence in custody. In my work as an attorney serving imprisoned LGBT people, it is clear that “sexual violence is central to the operation of the prison regime...[where i]

ncarceration is itself an act of racialized sexual violence.”⁴⁹ As black trans activist and prison survivor, CeCe McDonald, said when she was released from prison this year, “Prisons aren’t safe for anyone, and that’s the key issue.”⁵⁰ For LGBT people, some particularly widespread and harmful sites of violence include the systemic denial of healthcare and the regular use of isolation.

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

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

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

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

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

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

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

CHASE STRANGIO

Staff Attorney, American Civil Liberties Union



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

LGBT people and PLWH are overrepresented in U.S. prisons and jails, and face widespread and pervasive violence, inadequate health care, nutritional deprivation, and exclusion from much-needed services and programs.⁵⁶ LGBT prisoners and prisoners with HIV are more likely to be placed in administrative segregation or solitary confinement, to face harassment and sexual assault, and to be denied access to mail, jobs, and programs while in custody.⁵⁷ LGBT prisoners have also experienced unanticipated negative impacts from the Prison Rape

Elimination Act (PREA), including being punished through new policies purportedly created to comply with PREA that forbid gender non-conforming behavior and punish consensual physical contact.⁵⁸ Transgender women are routinely placed in men's prisons and jails in virtually every jurisdiction, where they face harassment and violence, often for extended periods in isolation ostensibly for their own protection. A 2009 survey found that transgender prisoners experience sexual victimization at a rate 13 times higher than non-transgender prisoners.⁵⁹ These conditions not only cause LGBT prisoners and prisoners with HIV harm while incarcerated, but also make them more vulnerable upon release since they are more likely to suffer unmet medical needs, mental health consequences from discrimination and violence, and fewer benefits of educational and other programming inside prisons.

DISCRIMINATION AND VIOLENCE INSIDE PRISONS AND RELATED FACILITIES

RECOMMENDATIONS:

- The Federal Bureau of Prisons (BOP) should provide guidance clarifying that federal regulations that prohibit discrimination based on “sex” include gender identity and expression-based discrimination.⁶⁰ This guidance should explicitly discuss examples of discrimination experienced by transgender and gender non-conforming prisoners and describe how it is to be avoided. This guidance should also recognize the right to identify in culturally specific ways, such as Two Spirit and tribal specific forms of gender identity and expression, and the forms of discrimination targeting individuals who express these identities.
- The Department of Justice (DOJ) and BOP should amend their regulations to explicitly add sexual orientation, gender identity, marital status, and HIV status to the forms of discrimination that federal law prohibits.⁶¹
- DOJ should amend the PREA regulations to require prisons to eliminate bans on consensual sex among incarcerated people. Current BOP policy authorizes prison administrators to ban consensual sex among people in custody, which undermines PREA's goals by discouraging prisoners from reporting sexual violence. In some cases, people who have claimed that they were raped have been punished for purportedly engaging in consensual sex after staff determined that their claim was unsubstantiated.⁶² DOJ should convene a working group of relevant agency personnel and outside experts, including people who have been incarcerated and survivors of sexual assault, to recommend modifications to BOP's existing policy with the purpose of creating a policy that allows for appropriate, consensual sexual contact among prisoners but does not undermine the purposes of PREA or authorize relationships between a prisoner and a prison staff

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

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

Rev. Jason Lydon, Black and Pink

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

- DOJ and BOP should ensure that prison visitation policies, including conjugal visitation policies, do not permit discrimination or harassment on the basis of sexual orientation, gender identity, or marital status.
- PREA regulations extend important new protections to transgender people, including limitations on bodily searches and segregated housing.⁶⁴ However, the current PREA regulations provide no clarity regarding what constitutes a cross-gender search for transgender prisoners and detainees. DOJ should issue a clarification through the Frequently Asked Questions section on the PREA Resource Center's website⁶⁵ indicating that that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.⁶⁶
- DOJ should amend PREA regulations to include an explicit prohibition on search for the sole purpose of determining genital characteristics, regardless of whether genital characteristics are known or whether as part of a broader medical examination.⁶⁷
- The Administration should initiate, support and promote legislation that would create a private right of action to enforce the PREA regulations.
- The Administration should work with Congress to reform the Prison Litigation Reform Act (PLRA). PLRA creates significant obstacles for prisoners seeking redress for harm and violence, including sexual violence. Reforms should include repeal of the physical injury requirement, repeal or amendment of the exhaustion requirement, and repeal of the provisions extending the law to children.⁶⁸

HEALTH AND NUTRITION

- BOP should ensure that LGBT-inclusive sexual health care is available as part of essential medical care in its facilities, and make condoms and other barriers freely available to federal prisoners as part of basic sexual health care and sexual health care literacy programs. BOP should also provide guidance⁶⁹ to states and local recipients of federal law enforcement funding on the elements of basic sexual health care and literacy programming, including condom availability in all facilities of confinement.⁷⁰
- Ensure all prisoners and detainees receive access to quality necessary medical care, including continuity of care during transfers between facilities and after release, access to treatment based on contemporary medical standards, and full informed consent for all treatment.⁷¹ This should include screening, diagnosis, and evidence-based treatment for substance use-related conditions, including access to approved opiate replacement therapies such as methadone and buprenorphine. Prisoners who were previously receiving treatment with methadone or buprenorphine before incarceration should be continuously maintained on it throughout intake to any correctional facilities.⁷²
- BOP should complete an assessment of current practices to ensure that all prisoners with HIV receive regular evaluation and therapy consistent with current Department of Health and Human Services (HHS) treatment standards and guidelines and receive prescribed HIV medications immediately upon detention and transfer in a confidential and timely manner consistent with prescribed timing and dosage.
- BOP should ensure regular and comprehensive training of prison officials in the appropriate medical treatment for HIV-positive and LGBT prisoners and detainees.
- BOP should create rules and guidance ensuring that prisoners have access to gender-appropriate clothing and grooming items, which are often particularly denied to transgender prisoners. BOP should use the New York Office of Children and Family Services (OCFS) policy as a model.⁷³
- BOP should ensure that all confinement facilities follow standards set by the Department of Agriculture (USDA) and the CDC on nutritional adequacy for all people in custody, with an emphasis on creating menus that reflect the needs of people living with long-term illness, pregnant people, people with HIV, young people, and people over the age of 50.⁷⁴ Specific attention should be paid to resolving current problems of inadequate nutrition and lack of physical activity for prisoners in solitary confinement.⁷⁵

ACCESS TO PROGRAMMING

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

PLACEMENT WITHIN PRISON FACILITIES

- PREA regulations extend important new protections to transgender people, including limitations on segregated housing.⁷⁷ Consistent with these regulations, BOP should eliminate involuntary placement in protective custody in federal prisons and DOJ should provide guidance to state and local jurisdictions to do the same. Such placement is regularly used to effectively place LGBT prisoners in solitary confinement.⁷⁸
- BOP should eliminate all forms of solitary confinement in federal prisons and DOJ should provide guidance to state and local facilities to eliminate such placements, sometimes called “Intensive Management Units,” “Communication Management Units,” “Special Housing Units,” or “Security Housing Units.” LGBT prisoners, including youth, and prisoners with HIV and/or other serious health conditions are regularly placed in such units at the discretion of prison staff for long periods without justification, due process or outside oversight. Such placement causes significant psychological harm and adverse health outcomes, including suicidality.⁷⁹
- BOP should make transparent determinations of whether to place transgender prisoners in women’s or men’s facilities⁸⁰, and enable engagement of transgender advocates in those determinations. PREA regulations require officials to make case-by-case decisions that are not solely based on anatomy, and give serious consideration to the individual’s own views as to his or her safety.⁸¹ However, significant challenges remain regarding the pace of implementation of these requirements as well as the process for making the determination. BOP should ensure that this process is meaningful by making it transparent, disclosing statistics on the assignment of transgender people and the preferences that they expressed, and inviting advocates from the transgender community to play a role in the review process.

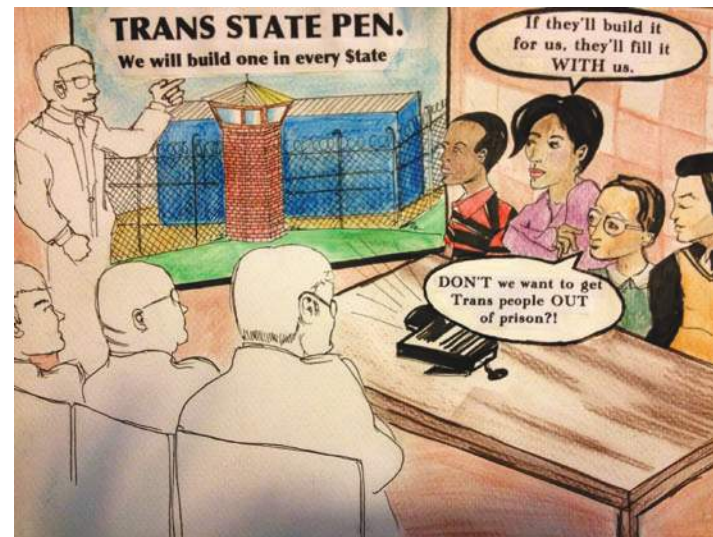


IMAGE: TALCOTT BROADHEAD

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

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

4 IMMIGRATION



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

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

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

reform. The results have been disastrous for immigrant communities, including LGBTQ immigrants and immigrants living with HIV.

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

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

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

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

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

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

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

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

ANGÉLICA CHÁZARO

Immigration Attorney and Professor, University of Washington School of Law

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

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

In March 2014, in response to significant pressure from immigrant rights groups, civil rights and labor advocates, and members of Congress—including the Congressional Hispanic Caucus, among others—President Obama ordered a review of his Administration’s deportation policy, which has already led to the deportation of nearly 2 million people since 2008.⁸⁸ Such mass deportations of undocumented people have been widely questioned and criticized by members of Congress, advocacy organizations, and immigrant rights and LGBT groups.⁸⁹

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



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

RECOMMENDATIONS:

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

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

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

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

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

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

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

RECOMMENDATIONS:

- DHS should immediately begin to implement its Final PREA Rule in all facilities that hold immigration detainees, including contract facilities, and should certify full implementation by May 2015.
- DHS should adopt the NPREC recommendation that ICE make case-by-case determinations about whether to release victims and witnesses to sexual assaults in immigration detention by balancing: the danger the detainee may face in custody; the ability of the facility to protect that detainee without transferring or isolating him or her; the potential threat the detainee poses to the community; and the burden of monitoring the individual in the community as an alternative. In many cases, it may be safer for the detainee and less burdensome to the facility to release the detainee who has been a victim of or witnessed sexual abuse in custody. The merits of the detainee’s immigration case should not be taken into consideration when making such a determination.⁹⁹ Additionally, DOJ should consider adoption of a similar procedure in Federal Bureau of Prisons (BOP) facilities.¹⁰⁰

- DHS and ICE should implement the recommendations of the GAO Report on Immigration Detention, GAO-14-38.
- DHS should provide comprehensive training for officers and contract facility staff on how to identify and protect vulnerable populations, including LGBT individuals, and ensure that such training is provided by LGBT community-based organizations.
- ICE should ensure that immigration detainees have the ability to report sexual assault easily to staff inside and outside the facility; that they receive immediate medical assistance; and that assault evidence-collection kits are available for medical staff at all facilities.
- DHS should issue guidelines ensuring that all family structures are treated equally and LGBT parents or parents of LGBT children are not discriminated against in terms of access to visits, correspondence, video visiting, and other necessary steps to both ensure the strength of their family and meet the demands placed on them by local Departments of Social Services.
- In consultation with LGBT advocates, ICE should implement its Risk Assessment & Classification Tool (RACT) nationally to improve its ability to determine self-identified LGBT and HIV-positive detainees in the system.



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

SEGREGATION AND HOUSING

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

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

RECOMMENDATIONS:

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



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

MEDICAL CARE

The 2013 GAO report on immigration detention¹⁰⁷ documented that the Performance-Based National Detention Standards (PBNDS) governing the provision of medical care at immigration detention facilities are not uniformly applied to all ICE detention facilities.¹⁰⁸

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

RECOMMENDATIONS:

- DHS should ensure all detainees receive access to necessary medical care to the same extent that is available to persons outside of immigration detention.
- DHS and ICE should immediately extend the 2011 PBNDS to all facilities which it manages or with which it contracts, and must enforce compliance with these and other applicable medical standards.
- DHS should complete an assessment of medical services available to detainees of all federally operated immigration detention centers to determine whether people detained in these facilities are afforded the same level of care afforded to people in the custody of other BOP facilities, including but not limited to voluntary and confidential screening, evaluation, counseling and treatment for all sexually-transmitted and infectious diseases, and uninterrupted, confidential access to all appropriate medications and therapy, including HIV-related care and hormone therapy, consistent with current federal treatment standards and guidelines. DHS should issue a report for plans to remedy any deficiencies in care by January 2015.
- DHS must ensure that all HIV-positive detainees receive medication immediately upon detention and transfer in a confidential and timely manner, consistent with prescribed timing and dosage.
- DHS must ensure all detainees receive hormone and gender affirming medical treatment in a confidential and timely manner, in accordance with prescribed timing and dosage, and consistent with, but not contingent on, pre-detention treatment.
- DHS should ensure regular and comprehensive training of ICE detention officials in appropriate medical treatment for HIV-positive and LGBT people in detention.

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

- DHS should create an independent oversight organization to monitor provision of health care in all facilities that house immigration detainees, including tracking of health care metrics such as morbidity and mortality rates, immunization and preventive health utilization, and other standard measures of quality performance in health care settings.
- DHS should require that health care professionals working in detention facilities report to health organizations, such as the Department of Health and Human Services (HHS), rather than to DHS or for-profit private contractors, so that they may maintain clinical independence.
- DHS should address chronic staffing shortages so that health professionals have adequate time to spend with each patient.
- DHS should ensure that lines of accountability for provision of quality health care to individuals in immigration detention are clear to health professionals, patients, and security personnel.¹¹²
- Because of the strong evidence that confirms the beneficial impact of drug treatment in detention centers, DHS should ensure that all detainees receive screening, diagnosis, and evidence-based treatment for substance use-related conditions, including access to approved opiate replacement therapies.¹¹³

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

*Angélica Cházaro
Immigration Attorney and Professor*



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



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

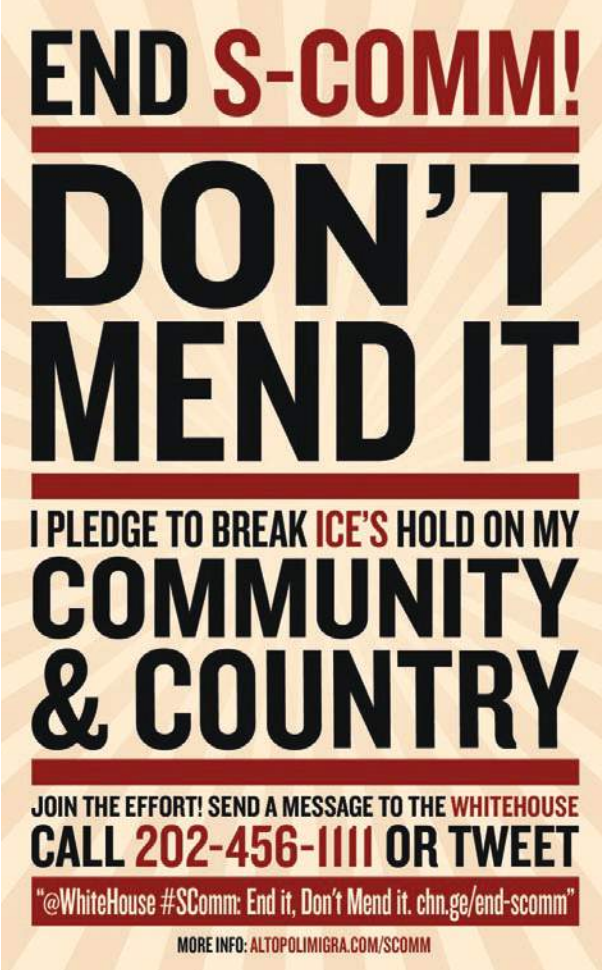
IMMIGRATION HEARINGS AND ACCESS TO COUNSEL

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

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

RECOMMENDATIONS:

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



END S-COMM!

DON'T MEND IT

I PLEDGE TO BREAK ICE'S HOLD ON MY COMMUNITY & COUNTRY

JOIN THE EFFORT! SEND A MESSAGE TO THE WHITEHOUSE CALL 202-456-1111 OR TWEET @WhiteHouse #SComm: End it, Don't Mend it. chn.ge/end-scomm'

MORE INFO: ALTOPOLIMIGRA.COM/SCOMM

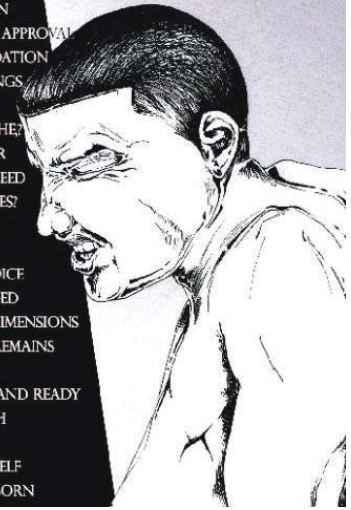
5 CRIMINALIZATION OF YOUTH

AT TIMES I WALK AROUND
AS A LOADED GUN
A CHILD SEEKING APPROVAL
VALUE AND VALIDATION
FOR SIMPLE FEELINGS

DID I NOT BREATHE?
LIVE UNDER THEIR
ROOF? EAT AND FEED
OVER THEIR TABLES?

AT TIMES THIS VOICE
BECOMING GAGGED
INSIDE WARPED DIMENSIONS
IN WHICH GOD REMAINS

SILENT, FACELESS, AND READY
READY TO PUNISH
READY TO KILL
ONE FOR BEING SELF
ONE FOR BEING BORN



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

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

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

leads a precarious life that leaves him vulnerable to violence and criminal justice involvement.

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

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

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

ANGELA IRVINE, PH.D.

Director of Research—Oakland, National Council on Crime and Delinquency

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

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

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

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

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

HOMELESSNESS AND FOSTER CARE

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

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

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

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

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

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