

RECOMMENDATIONS:

- The Department of Justice’s (DOJ) Office of Juvenile Delinquency and Prevention (OJJDP) should issue guidance discouraging the arrest and detainment of truant and homeless youth simply because they are truant and/or homeless.
- As a follow-up to the 2001 guidance issued by HHS for foster care agencies on eliminating discrimination on the basis of sexual orientation and gender identity, HHS should extend protections against discrimination based on HIV status and marital status in foster care facilities and placements, and provide support to staff and foster families to create safe and welcoming environments for LGBT youth.¹³⁰ HHS should continue to develop programs that foster family acceptance and increase permanency for youth.
- HHS should mandate elimination of exclusions of potential adoptive and foster parents solely because of their sexual orientation, gender identity, or marital status as a condition of receipt of federal funding (no matter which type of organizations states contract with to carry out services with the funding), and expand access to loving, permanent homes.
- HHS should dismantle policies that enable the promotion of gender conformity and/or suppress LGBT youth’s ability to express their sexual orientation and gender identity while in state custody, specifically through clothing and grooming.
- HHS should mandate, as a condition of federal funding, that states ensure that LGBT youth are not required or forced to participate in counseling, reparative therapy, programming or religious activities that condemn LGBT people or enforce heterosexuality or normative gender expressions while in foster care.
- HHS should require child welfare agencies to adopt strict confidentiality policies, specifically with respect to a young person’s sexual orientation, gender identity, and HIV status, including with respect to parents and guardians, as a condition of receipt of federal funding.
- HHS should strengthen home-based interventions to build strong supportive families to reduce LGBT youth homelessness, and support the Reconnecting Youth to Prevent Homelessness Act, which would improve permanency for older foster care youth and all homeless young people, LGBT or otherwise. Where home-based interventions are not possible, HHS should expand independent living programs focused on building skills for independence rather than mandatory group home-based programs that are frequent sites of violence and harm for LGBT youth. All federally supported programs should ensure LGBT youth have decision-making power regarding family reunification or independent living so that they are not relentlessly subjected to abusive homophobic or transphobic family environments.



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

IMAGE: S. NARASIMHAN

SCHOOL CLIMATE

Schools are among the most hostile environments for LGBT youth. According to one study, 63.5% of LGBT youth felt unsafe at school because of their sexual orientation, and 43.9% reported feeling unsafe due to their gender expression.¹³¹ LGBT students report extremely high rates of verbal (84%) and physical (40%) harassment at school,¹³² including by school officials and law enforcement officers in schools.¹³³ Transgender youth in particular have been found to be more likely to experience verbal assault or searches by school security and police in schools.¹³⁴ This hostile climate is exacerbated for LGBT youth of color, half

My mom [told the judge I was gay]. She told him I wouldn't go to school and I got kicked out. [But the problem was] I was getting harassed at school. My PO lied and said it wasn't as bad [at school] as it was.

Andrew, a 17-year-old Latino gay male youth¹⁴³

of whom also report often hearing racist taunts and slurs in schools, as well as for American Indian and Alaskan Native students. Eighty-six percent of American Indian and Alaska Native students expressing a transgender identity reported harassment, 51% physical assault, and 21% a sexual assault in school.¹³⁵

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

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

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

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

RECOMMENDATIONS:

- The Department of Education (ED) should require all districts to adopt enumerated anti-bullying policies that specifically include sexual orientation and gender identity as protected classes, and promote greater understanding and safety for all students without relying on punitive disciplinary measures that exclude students who engage in harassment.
- ED’s Office of Civil Rights (OCR) should expand its data collection efforts to better understand the experience of LGBT youth in schools. This includes adding a question to the Civil Rights Data Collection (CRDC) measure to quantify incidences of bullying, and should also include efforts to collect data on the impact of school discipline policies on LGBT youth.¹³⁹
- OCR should also further its research on the impact of implicit bias and the discriminatory application of school policies such as dress codes and codes of conduct on LGBT youth, and issue guidelines for teachers and administrators on fostering supportive environments that provide resources and reduce disparities for LGBT youth as a follow-up to the guidance on racial disparities in school discipline policies issued in January 2014.
- ED should create and disseminate materials to facilitate increased school programming on LGBT issues and HIV-related issues, featuring representations of LGBT and HIV-positive people, including LGBT and HIV-positive people of color and Indigenous peoples.

SCHOOL DISCIPLINE REFORM

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

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

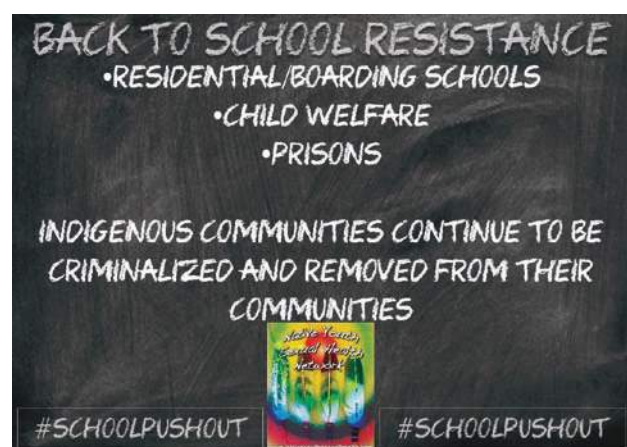
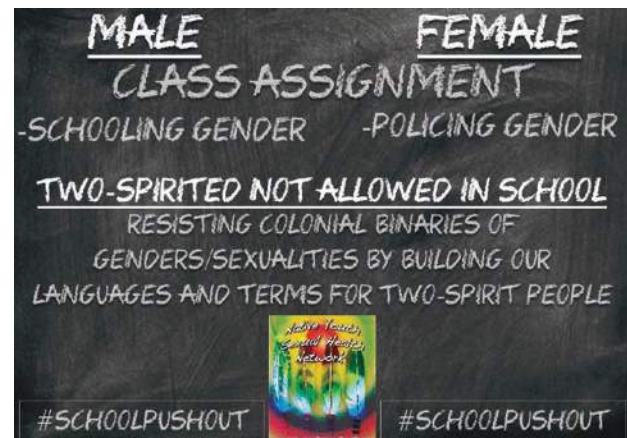
LGB and gender non-conforming youth, especially gender non-conforming girls, are three times more likely to experience harsh disciplinary treatment and wind up in this “school-to-prison pipeline” than their non-LGB counterparts.¹⁴¹ These differences in punishment cannot be explained by greater engagement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

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

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

RECOMMENDATIONS:

- ED should eliminate funding of law enforcement officers in schools and promote alternatives including counseling, peer-to-peer accountability mechanisms, and family supports through federal funding.
- DOJ should provide guidance to state and local legislators and law enforcement on truancy policies to stop penalizing youth for being out of school, loosen day-time curfew restrictions, and eliminate police enforcement of truancy laws through police sweeps and arrests of youth for minor offenses.
- ED should require the adoption of positive behavioral interventions as alternatives to punitive school discipline policies, including in the context of efforts to address bullying in schools, as a condition of federal funding to Local Education Agencies (LEA).
- ED should also promote restorative justice practices, and issue guidance on reentry to reconnect youth with schools rather than pipelining them into alternative programs. The administration should also promote and support passage of the Positive Behavior for Safe and Effective Schools Act (PBSESA),¹⁴⁵ the Ending Corporal Punishment in Schools Act,¹⁴⁶ and the Restorative Justice in Schools Act.¹⁴⁷
- ED should also issue guidance to LEA, law enforcement agencies, and state legislators urging elimination of vague and subjective status offenses such as “willful defiance” and “ungovernability” which are susceptible to biased application by school resource officers.
- ED and DOJ should include LGBT youth and Two Spirit youth in all research and recommendations on dismantling the school-to-prison pipeline, including any future work of the Supportive School Discipline Initiative.



IMAGES: NATIVE YOUTH SEXUAL HEALTH NETWORK

JUVENILE JUSTICE

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

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

Dean Spade, Former Staff Attorney, Sylvia Rivera Law Project

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

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

Of note, as with the adult criminal justice system, jurisdictional complexities and inadequacies have adverse impacts on the operation of the juvenile justice system in Indian country. The federal court system—

which currently exercises jurisdiction over Indian reservations—has no juvenile division, specialized juvenile court judges, or juvenile probation system. The Federal Bureau of Prisons (BOP) has no juvenile detention, diversion, or rehabilitation facilities. In the event that Indian country youth are funneled into state juvenile justice systems, there is generally no requirement that a child’s Tribe be contacted. As a result, the unique circumstances and outcomes of Native youth are often overlooked and difficult to track, and they effectively “go missing” from the Tribe.¹⁵¹

RECOMMENDATIONS

- The Administration should support and promote reauthorization of the Juvenile Justice and Delinquency Prevention Act (JJDP A) to include key items essential to LGBT youth:
 - Deinstitutionalize status offenses, including removal of the valid court order (VCO) and Interstate Compact exceptions.
 - Update Disproportionate Minority Contact mandate to require states to take concrete steps to reduce racial and ethnic disparities in the juvenile justice system, which will also benefit LGBT youth in the system who are predominately youth of color and Native.
 - Expand training, technical assistance, and research and evaluation to include LGBT and Two Spirit youth.
 - Mandate that juvenile justice facilities ensure that all policies, practices, and programs recognize the unique needs of LGBT and Two Spirit youth.
- DOJ should issue guidance to states with respect to age of consent laws. These laws expose adolescents to sanctions for engaging in consensual sexual behavior with other adolescents.
- DOJ should support and promote amendment of the Sex Offender Registration and Notification Act (SORNA) to exclude youth who are convicted of sex-based offenses from mandatory sex offender registration.
- DOJ should issue guidance on parole regulations that discourages the use discriminatory “special parole regulations” which restrict gender identity or sexual expression, such as restrictions on clothing.
- DOJ should provide guidance to states and localities regarding training and resources for juvenile professionals (including judges, defense attorneys, prosecutors, probation officers, and detention staff) regarding the unique societal, familial, and developmental challenges confronting LGBT youth and the relevance of these issues to court proceedings.
- DOJ should issue guidance to states on improvement of juvenile court procedures to streamline case processing, reduce length of stay in custody, expand the availability of non-secure program slots, and ensure that interventions with youth are timely and appropriate.

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

- DOJ should mandate automatic and free expungement of juvenile criminal records once youth turn 21.
- DOJ should provide federal guidance to states and localities regarding the development of alternatives to youth incarceration including prevention and diversion,¹⁵² and elimination of excessive sentencing which effectively replicates sentences of juvenile life without parole struck down by the Supreme Court.
- DOJ should issue guidance with respect to the impacts of criminal gang injunctions, including the impacts of youth profiling and racial profiling, and constitutional challenges to curfew laws.¹⁵³
- The Administration should support and promote passage of the Youth PROMISE Act.¹⁵⁴
- DOJ should issue guidance to states encouraging judicial discretion to consider a young person’s unique circumstances, such as age, maturity, role in the charged offense, and dependency on any adult involved in the offense.
- DOJ should issue guidance to states with respect to addressing “placement delay” where youth remain incarcerated despite a court order directing alternate placement. This is particularly important to LGBT youth in light of family rejection and the dearth of programs that are appropriate or welcoming to LGBT and gender non-conforming youth.
- DOJ should issue federal guidance to states encouraging them to change Medicaid procedures that pose a barrier to health care access for youth coming out of custody.¹⁵⁵
- Federal resources for Tribal juvenile justice should be consolidated in a single Federal agency within the DOJ, allocated to Tribes in block funding rather than unpredictable and burdensome grant programs, and provided at a level of parity with non-Indian systems. Tribes should be able to redirect funds currently devoted to detaining juveniles to more demonstrably beneficial programs, such as trauma-informed treatment and greater coordination between Tribal child welfare and juvenile justice agencies. Additionally, regardless of whether they are in federal, state, or Tribal juvenile justice systems, Native youth brought before juvenile authorities for behavior that took place in Tribal communities should be provided with trauma-informed screening and care within a reasonable distance from the juvenile’s home which may entail close collaboration among juvenile justice agencies, Tribal child welfare, and behavioral health agencies. A legal preference should be established in state and federal juvenile justice systems for community-based treatment of Indian country juveniles rather than detention in distant locations.
- The Administration should initiate, support, and promote amendment of the Indian Child Welfare Act (ICWA) to provide that when a state court initiates any delinquency proceeding involving an Indian child for acts that took place on the reservation, all of the notice, intervention, and transfer provisions of ICWA will apply. For all other Indian children involved in state delinquency proceedings, ICWA should be amended to require notice to the Tribe and a right to intervene.¹⁵⁶

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

DETENTION CENTERS & REENTRY

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

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

Tyler, 22¹⁶¹

“ I knew in my heart that the only reason I didn’t have a roommate was because I’m gay.”

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

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

RECOMMENDATIONS

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

[My probation officer] used to think I was lower than everybody just because I was a lesbian ... I want [probation officers] to understand we are the same, we are not different from anybody else.

Yvonne, a 15-year-old Latina lesbian¹⁶²



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

IMAGE: NEW YORK CIVIL LIBERTIES UNION

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

6 CRIMINALIZATION OF HIV

HIV: no longer
a death sentence,
today it is a
prison sentence

IMAGE: CAMILO GODOY

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

And then, suddenly there he was, crying in my office. He had been indicted on charges brought by a partner of several months of having sex

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

without disclosing his HIV status the night he was discharged sick and wasted from the hospital after a treatment interruption. Similar accusations, by the same partner brought in another county, had been dismissed. But that night they had stayed in a hotel in a different county and these charges stuck. Although Paul insisted he had disclosed and although the partner was tested for HIV and continued to test negative, the District Attorney in that county moved the case forward.

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

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

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

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

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

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

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

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

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

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

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

DR. WENDY ARMSTRONG

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



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

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

Nearly three dozen states and U.S. territories have laws that criminalize the conduct of PLWH without requiring any evidence of an intent to do harm, including HIV transmission.¹⁶³ In the ten states that add mandatory sex offender classification and registration to those convicted under these laws, defendants suffer additional, irreparable damage to most aspects of their lives:

their ability to work, to choose where they live, even to continue relationships with their own children and other minor relatives.¹⁶⁴ There is no evidence that criminalization has any positive impact on disclosure or risk-taking behavior.¹⁶⁵ In fact, research suggests that HIV criminalization may in some cases delay HIV testing and, in turn, entry into care.¹⁶⁶

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

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

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

RECOMMENDATIONS

- The Surgeon General should create a public awareness campaign including detailed information that both explains the specific routes, relative risks, and modern-day consequence of HIV and STI infection, and dispels myths and ignorance contributing to criminalization of people with HIV.¹⁷³ The campaign should reflect the substantial input of medical and research experts on current HIV risk/transmission data in the context of everyday risks and events, and consultation with people affected by HIV and their advocates.
- The Department of Health and Human Services (HHS) and the Centers for Disease Control and Prevention (CDC) should mandate development and support of accurate, age-appropriate and LGBT-inclusive HIV and STI literacy programs for students and staff of all federally supported school systems as a condition of federal funding.
- HHS, the Health Resources and Services Administration (HRSA), and other responsible federal agencies should require proof of written policies and standards for the provision of sexual health care and HIV-inclusive sexual health literacy programs for police lock-ups, juvenile, corrections and detention facilities receiving federal funds. Staff education should include training on avoiding discriminatory enforcement of regulations against PLWH and on maintaining confidentiality about prisoners' HIV statuses.
- CDC must develop and distribute more direct and explicit public service announcements on the routes, risks and consequences of all sexually transmitted diseases, including HIV, dispelling myths that fuel HIV criminalization, via mainstream and new media.

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

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

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

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

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

David Plunkett

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

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

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

RECOMMENDATIONS

- CDC and the Department of Justice (DOJ) should fund and support trainings and information sharing about HIV transmission risks and myths to criminal justice personnel, state health departments, and the general public.
- CDC and DOJ should release the long-promised joint publication on the current state of HIV criminal law in the U.S., including recommendations for how states should evaluate and modernize current laws and prosecution policies relating to HIV.
- The Department of Defense (DOD) should discontinue use of a service member’s HIV diagnosis as the basis for prosecution, enhanced penalties, or discharge from military service.
- CDC should create incentive mechanisms, such as research and prevention project grants, that will encourage states to modernize existing laws criminalizing HIV.¹⁷⁷

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

SEX OFFENDER REGISTRATION: SNAPSHOT OF POTENTIAL HARMS

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

Employment

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

Housing

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

Education

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

Immigration

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

Family Relationships

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

7 DRIVERS OF INCARCERATION



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

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

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

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

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

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

REINA GOSSETT AND THE SYLVIA RIVERA LAW PROJECT

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

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

Reina Gossett and the Sylvia Rivera Law Project

DRUG POLICY

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

RECOMMENDATIONS:

- The Administration should initiate, support, and promote legislation to reduce and eliminate mandatory minimum sentences for drug offenses at the federal and state levels, and specifically support passage of the Smarter Sentencing Act.¹⁹⁰
- The Department of Health and Human Services (HHS) should expand funding for evidence-based health approaches to drug use, including harm reduction and drug treatment, and reduce reliance on punishment-centered approaches, which consistently increase costs and harms of drug use.¹⁹¹
- President Obama should use his pardon power to release individuals convicted of drug offenses.¹⁹²

- HHS should support the development of Supervised Injection Facilities to improve the health and safety of people using injection drugs and the communities in which they live and reduce criminal activity.¹⁹³
- The Administration should work with Congress to restore federal funding to syringe exchange programs. The Centers for Disease Control and Prevention (CDC) and other agencies should promote syringe exchange as a useful tool for reducing HIV infection and drug use.¹⁹⁴
- HHS should develop anti-LGBT discrimination guidelines for substance use treatment programs and ensure that no one is denied access to treatment because of their sexual orientation or gender identity, and that residential substance use programs receiving federal funds are respecting the gender identities of their participants.¹⁹⁵
- The Administration should oppose drug testing for food stamps and other benefits. Drug testing is costly and ineffective.¹⁹⁶

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

Alisha Williams, Staff Attorney, Sylvia Rivera Law Project



IMAGE: MICKEY DEHN

COLLATERAL CONSEQUENCES OF CRIMINALIZATION AND INCARCERATION

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

RECOMMENDATIONS:

- The Administration should work with Congress to repeal the Souder Amendment and restore access to federal financial aid to students with drug convictions.
- The Administration should work with Congress to eliminate the exclusion of people with a felony drug conviction from receiving food stamps and public assistance.¹⁹⁸
- The Department of Housing and Urban Development (HUD) should eliminate public housing guidelines that terminate leases of people convicted of crimes and/or ban people from accessing housing who have criminal convictions.
- The Administration should ban questions about criminal history in applications and interviews for federal jobs, and initiate, support and promote federal “ban the box” legislation to prohibit such practices nationally.¹⁹⁹
- The Administration should develop, support and promote legislation that would eliminate federal bans on access to public housing, Temporary Assistance for Needy Families (TANF) benefits, and Medicaid for people with criminal convictions.²⁰⁰
- The Administration should lead efforts to eliminate sex offender registries. The Department of Justice (DOJ) should provide guidance to states about the efficacy of shifting resources from registration programs toward prevention programs.²⁰¹



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

CRIMINALIZATION OF POVERTY AND HOMELESSNESS

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

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

Krystle L

“I am a homeless transgender woman, and I have faced ongoing harassment from staff at women’s shelters ...”

RECOMMENDATIONS:

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

- Increase Supplemental Nutrition Assistance Program (SNAP) benefits.²⁰⁷
- Shift the Department of Agriculture’s (USDA) Food and Nutrition Service (FNS) priorities away from food stamp fraud. The current focus on food stamp fraud is producing sweeping prosecutions in some states resulting in lost benefits to many beneficiaries. FNS should also direct states that two people who use the same address should not be presumed to share the same household for the purpose of investigating food stamp fraud.²⁰⁸
- Enhance enforcement of language access requirements in the food stamp program to prevent programs from turning people away who do not speak English.
- Provide guidance to states encouraging them to reduce or eliminate sanctions regimes that suspend TANF and SNAP to people in need, and encouraging them to entirely eliminate sanctions tied to housing subsidies which contribute to homelessness.²⁰⁹
- Eliminate work requirements in TANF, retaining job training and other skills building services. While work requirements remain, students should be exempted.
- Develop new HUD guidelines that eliminate barriers to public housing for people based on a history of criminalization.²¹⁰
- Increasing funding for homeless shelters, supportive housing programs, voluntary drug rehabilitation, and mental health services, earmarking some funding for training programs to reduce discrimination against LGBT people and PLWH in such programs.²¹¹
- HHS should provide guidance to states to encourage states to stop taking driver’s licenses away from people who are behind on child support.
- HHS should make it optional, rather than mandatory, for applicants for aid to identify co-parents who can be pursued for child support.



IMAGE: KEVIN CALICKI

- DOJ should issue guidance encouraging the use of crisis response teams that can direct people to services and away from law enforcement and the criminal justice system.²¹²
- HUD should provide extra points on the annual homeless assistance funding application to communities that avoid criminalization by instead adopting positive alternatives like housing and supportive services.²¹³
- The federal government should review its grant programs, particularly community policing grants at DOJ, to ensure that federal funds support positive efforts to end homelessness, and are not being used to support criminalization. The DOJ Civil Rights Division should actively support legal challenges to ordinances that unconstitutionally criminalize homeless people.²¹⁴
- HHS should fund preventative and educational programs about HIV/AIDS at shelters, soup kitchens, and other locations that are easily accessible to homeless people.
- HHS should provide federal funding to implement public hygiene centers, public bathrooms,²¹⁵ and syringe access and overdose prevention programs that significantly improve health outcomes for low-income and homeless people.
- HUD should create enforcement mechanism for the Home Affordable Modification Program (HAMP) loan modification to hold banks accountable and require them to actually modify mortgages to amounts that people can afford to pay.
- The Department of Labor (DOL) should establish sexual orientation and gender identity and expression non-discrimination guidelines for Job Corps sites and One-Stop Career Centers.
- The Administration should lead efforts to reassess the federal poverty measure to better capture the realities of individuals and families in need.²¹⁶
- Expand the Earned Income Tax Credit to reach more workers, including childless workers.²¹⁷

LACK OF ACCESS TO ID AND SOCIAL SERVICES FOR TRANSGENDER PEOPLE

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

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

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

RECOMMENDATIONS:

- The Administration should finalize the updated Model State Vital Statistics Act and include an administrative process for gender change on birth certificates based on certification by a licensed health care provider (similar to recent District of Columbia legislation).
- The Department of Defense (DOD) should adopt clear policies to permit transgender veterans to obtain proof of service that does not show their enlisted name but rather shows their current legal name, in order to protect personal privacy and prevent discrimination and victimization.
- The State Department, Social Security Administration (SSA), Office of Personnel Management (OPM), Veterans Health Administration (VHA), and Department of Homeland Security's (DHS) Citizenship and Immigration Services (USCIS) should update policies for gender change in federal records and documents to accept certifications from licensed non-physician health care providers.
- HUD should clarify that homeless shelter programs receiving federal funding must provide placement based on a resident's current gender identity, rather than birth assigned gender, unless the individual requests a different placement because of safety concerns, consistent with the Fair Housing Act and the HUD Equal Access Rule.²¹⁹
- DOJ should provide guidance to state criminal courts regarding ensuring that mandatory programs, such as drug treatment programs, are non-discriminatory and place transgender patients according to current gender identity.
- HHS should direct states to eliminate bars to gender confirming health care for transgender people in Medicaid programs, which violate the federal Medicaid statute's prohibition on diagnosis discrimination.²²⁰

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

Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project

- The Veteran’s Administration (VA) should eliminate bars to gender confirming health care for transgender people receiving their healthcare through VA benefits.²²¹
- HHS should issue clear guidance mandating provision of gender confirming health care for transgender people in private insurance programs in compliance with the Affordable Care Act’s non-discrimination clause.²²²
- HHS should provide guidance to state welfare agencies about establishing clear and accessible procedures for changing name and gender on public benefits records and preventing discrimination in welfare offices and mandatory job training programs.
- The Substance Abuse and Mental Health Services Administration (SAMHSA), VA, and other federal agencies should follow the example HUD has set by using their general authority over grant program administration to adopt regulations expressly prohibiting discrimination based on sexual orientation and gender identity in federally funded programs.²²³

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

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

Belkys Garcia, Staff Attorney, Legal Aid Society

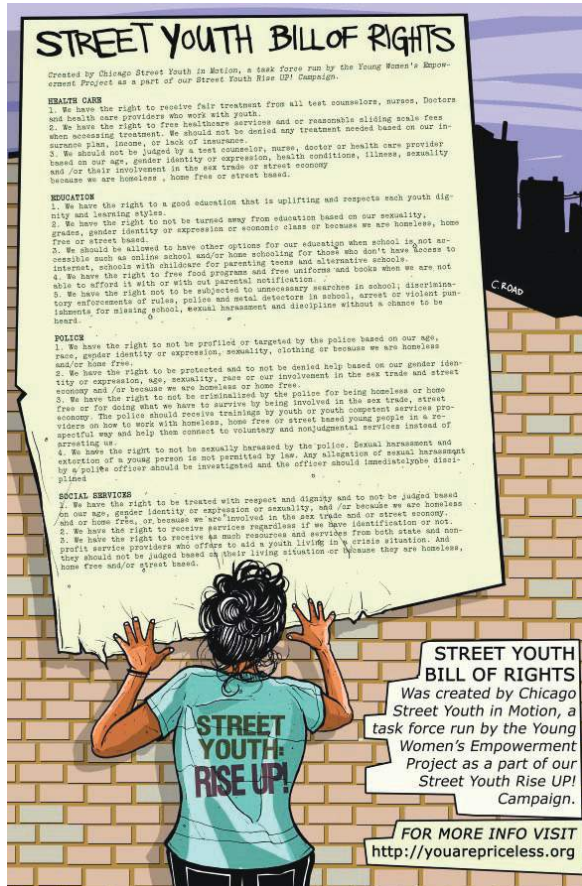


IMAGE: YOUNG WOMEN'S EMPOWERMENT PROJECT

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

Pooja Gehi, Staff Attorney, Sylvia Rivera Law Project

CRIMINALIZATION OF SEX WORK AND RESPONSES TO TRAFFICKING IN PERSONS

Due to widespread discrimination in schools, the workplace, family courts, social services, medical care, immigration benefits, and the criminal legal system, LGBT youth and adults are disproportionately homeless²²⁴ and involved in the sex trades and other forms of criminalized, unregulated, and poorly regulated employment to meet their basic needs. An even greater number of LGBT people, and particularly transgender women of color, LGBT youth of color, and gay men of color, are routinely profiled by law enforcement as being involved in the sex trades.²²⁵

Law enforcement-based responses to involvement in the sex trades and to trafficking in persons—which includes direct targeting through both anti-prostitution initiatives and anti-trafficking raids²²⁶—further increase the social and economic marginalization of individuals in the sex trades, sex workers, and of individuals who are vulnerable to all forms of trafficking, including labor trafficking, while failing to meet basic needs, address the root causes of involvement, or reduce vulnerability to violence and exploitation.²²⁷ Additional barriers faced by LGBT youth and adults involved in the sex trades include profiling and indifference from police²²⁸ and service providers who do not recognize LGBT people as survivors of violence regardless of actual circumstances or the complexities and nuances of LGBT experiences in the sex trades which may place them outside predominant narratives. Another significant barrier is the conditioning of access to services on mandatory collaboration with law enforcement, compliance with services offered by religious agencies, participation in family courts,

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

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

RECOMMENDATIONS:

- The Administration should develop, promote, and support legislation that would increase federal funding for affordable housing and improve access to public housing Section 8 vouchers for LGBT youth and adults as part of anti-trafficking efforts.
- HHS should eliminate discriminatory Medicare and Medicaid exclusions that limit transgender people’s access to medically appropriate health coverage as part of anti-trafficking efforts.
- The Administration should support and promote passage of immigration reform legislation that does not place LGBT immigrants at greater risk of enforcement action or deportation by condoning or legitimizing profiling, or through implementation of the S-Comm Program and Criminal Alien Program (CAP).
- Federal funding to combat human trafficking allocated through the Federal Strategic Action Plan on Services for Victims of Human Trafficking (SAP) should prioritize meeting critical needs identified by survivors of trafficking themselves over law enforcement-based responses.²³⁰ Grants awarded pursuant to the SAP should prioritize resourcing non-judgmental, harm reduction-based services which recognize the uniqueness and complexity of each individual’s experiences, as well as the multiple gender, racial, and cultural identities of survivors of all forms of trafficking. Access to services should not be premised on recognition or identification as a “victim,” a status that continues to be denied LGBT survivors of trafficking and other forms of violence due to predominant narratives.
- The Administration should develop, promote, and support an amendment to the Trafficking Victims Protection Reauthorization Act (TVPRA) to eliminate mandatory collaboration with law enforcement in order to obtain immigration relief or services. Such collaboration often presents a significant barrier to access to services for all survivors of trafficking, and particularly for LGBT youth and adults who are routinely denied help by law enforcement agencies, profiled as perpetrators of violence, or subjected to dual arrest even as they are targets of violence.²³¹
- The Administration should involve survivors of all forms of trafficking, including LGBT youth and adults, in every aspect of implementation of SAP—from awareness raising to assessment and evaluation of outreach materials and identification practices, to identification of barriers to housing, immigration

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

- DOJ should offer guidance to local law enforcement agencies with respect to policies and practices that place survivors of trafficking, people in the sex trades, and sex workers at greater risk, such as the widespread confiscation and use of condoms as evidence of intent to engage in prostitution-related offenses.²³²
- The Administration should seek additional input for SAP from organizations working with Two Spirit and Indigenous youth and adults.
- Partnerships with faith-based organizations promoted through SAP must be premised on an established track record of LGBT affirming services and approaches, excluding faith-based organizations which promote “reparative therapy” or otherwise offer anti-LGBT services.
- The Administration should establish a task force to investigate the impact of criminalization of involvement in the sex trades on public health, safety, budgets, and the economy, and examine alternative approaches to addressing harms to individuals in the sex trades by reducing poverty, homelessness, and basic needs in populations most represented in the sex trade.
- DOJ should provide guidance for local law enforcement agencies with respect to enforcement of prostitution and anti-trafficking laws encouraging deprioritization of arrest-based responses.
- The Administration should ensure full implementation of Recommendation 86 of the UN Human Rights Commission pursuant to the 2011 Universal Periodic Review of the U.S. government’s compliance with international human rights instruments and take concrete steps to eliminate violence against sex workers.



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

“ Today we stand on the shoulders of those who bravely fought back against police violence at Stonewall in 1969, still daring to dream of a world in which none of us face rejection, discrimination, or violence for being ourselves.”

Reina Gossett and the Sylvia Rivera Law Project

ENDNOTES

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- 2 Ibid.
- 3 Shannan Wilber, Caitlin Ryan, and Jody Marksamer, “Best Practice Guidelines for Serving LGBT Youth in Out-of-Home Care” (Washington: Child Welfare League of America, 2006), available at <http://www.nclrights.org/wp-content/uploads/2013/07/bestpracticeslgbtyouth.pdf>.
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- 5 Glennisha Morgan, “NYPD’s ‘Stop And Frisk’ Policy Angers LGBT Advocacy Groups,” *The Huffington Post*, March 29, 2013, available at http://www.huffingtonpost.com/2013/03/29/nypd-stop-and-frisk-lgbt-groups_n_2979135.html.
- 6 National Coalition of Anti-Violence Programs, “Lesbian, Gay, Bisexual, and Transgender Hate Violence in 2012” (2013), available at http://www.avp.org/storage/documents/2012_mr_ncavp_hvreport.pdf.
- 7 See Appendix A for full list of contributors and collaborators.
- 8 This document represents an aggregation of viewpoints, and the recommendations herein may not reflect, or be attributed to, individual authors, reviewers, or convening participants.
- 9 In addition to profiling based on race, poverty and immigration status, American Indian and Alaska Native people face additional forms of discrimination by police and law enforcement connected to ongoing legacies of colonialism and jurisdictional issues of tribal sovereignty.
- 10 See Brett G. Stoudt, Michelle Fine, and Madeline Fox, “Growing Up Policed in the Age of Aggressive Policing Policies,” *New York Law School Law Review* 56 (4) (2011): 1331-1370 (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 preceding six months.); Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011); Kathryn E. W. Himmelstein and Hannah Brückner, “Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study,” *Pediatrics* 127 (1) (2011): 49-57 (non-heterosexual youth more likely to be stopped by the police and experience greater criminal justice sanctions not explained by greater involvement in violating the law or engaging in transgressive behavior.); Amnesty International, “Stonewalled: Police Abuse and Misconduct Against LGBT People in the United States” (2005), available at <http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf>.
- 11 Lambda Legal, “Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security—Preliminary Findings” (2012).
- 12 Lambda Legal, “Protected and Served? Survey of LGBT/HIV Contact with Police, Prisons, Courts, and Schools—Treatment by the Police” (2014).
- 13 Ibid.
- 14 Himmelstein and Brückner, “Criminal-Justice and School Sanctions Against Nonheterosexual Youth.”
- 15 Stoudt, Fine, and Fox, “Growing Up Policed in the Age of Aggressive Policing Policies.”
- 16 Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, “Injustice at Every Turn: A Report of the National Transgender Discrimination Survey” (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011).
- 17 Grant, Mottet, Tanis, “Injustice at Every Turn”; see also National Coalition of Anti-Violence Programs, “Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2012.”
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- 19 Ibid.
- 20 Willard M. Oliver and Cecil A. Meier, “The Siren’s Song: Federalism and the COPS Grants,” *American Journal of Criminal Justice* 25 (2001): 223, 225-228.
- 21 Department of Justice, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies” (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.
- 22 Indian Law and Order Commission, “A Roadmap to Making Native America Safer: A Report to the President and Congress” (2013), available at http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf.
- 23 Stoudt, Fine, and Fox, “Growing Up Policed in the Age of Aggressive Policing Policies” (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 preceding six months.); Himmelstein and Brückner, “Criminal-Justice and School Sanctions Against Nonheterosexual Youth” (Non-heterosexual youth more likely to be stopped by the police and experience greater criminal justice sanctions not explained by greater involvement in violating the law or engaging in transgressive behavior.).
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- 25 Mogul, Ritchie, and Whitlock, *Queer (In)Justice*; Make the Road New York, “Transgressive Policing: Police Abuse of LGBT Communities of Color in Jackson Heights” (New York: Make the Road, 2012), available at http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf; Frank H. Galvan and Mohsen Bazargan, “Interactions of Latina Transgender Women with Law Enforcement” (Los Angeles: Bienestar, 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf>; BreakOUT!, “BreakOUT!’s Proposed LGBTQ Policy for NOPD” (2012), available at http://www.youthbreakout.org/sites/g/files/g189161/f/BreakOUT!%20Proposed%20Policy_0.pdf.

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- 27 *Id.* at ¶ 184.
- 28 Nico Sifra Quintana, Josh Rosenthal, and Jeff Krehely, “On the Streets: The Federal Response to Gay and Transgender Homeless Youth” (Washington: Center for American Progress, 2010), (LGBT youth make up 5-7% of the youth population but 40% of the homeless youth population).
- 29 National Coalition for the Homeless, “HIV/AIDS and Homelessness” (2009), available at <http://www.nationalhomeless.org/factsheets/hiv.html> (It is estimated that 3.4% of homeless people were HIV-positive in 2006, compared to 0.4% of adults and adolescents in the general population.); Alan Greenblatt, “In Some Cities, Gays Face Greater Risk of Becoming Homeless,” *National Public Radio*, August 7, 2013, available at <http://www.npr.org/2013/08/06/209510271/in-some-cities-gays-face-greater-risk-of-becoming-homeless> (A recent census in San Francisco found that 29% of the city’s homeless population identifies as gay.); Human Rights Campaign, “HRC Issue Brief: Housing and Homelessness” (2012), available at http://www.hrc.org/files/assets/resources/HousingAndHomeless_Document.pdf (“Homelessness and housing insecurity is a growing problem confronting LGBT individuals of all ages across the country.”); Welfare Warriors Research Collaborative, “A Fabulous Attitude: Low Income LGBTGNC People Surviving and Thriving with Love, Shelter, and Knowledge” (New York: Queers for Economic Justice, 2010), available at http://d3n8a8pro7vhm.cloudfront.net/q4ej/pages/22/attachments/original/1375201785/compressed_afabulousattitudefinalreport.pdf?1375201785.
- 30 Welfare Warriors Research Collaborative, “A Fabulous Attitude”.
- 31 For instance, the Department of Justice could intervene in litigation such *Pottinger v. Miami* which is now being challenged by the City of Miami, in which a settlement reduced the ability of police to arrest homeless people for “life sustaining activities” (such as loitering, littering, and blocking sidewalks) that homeless people without recourse to shelter need to carry out in public, without fear of arrest, to survive. The result was a drastic increase in services to homeless people and decrease in the downtown Miami homeless population. Similar policies could be included in federal consent decrees and promoted through federal guidance to law enforcement agencies. Charles Rabin and Andres Viglucci, “Miami to go to federal court to undo homeless-protection act,” *Miami Herald*, April 11, 2013, available at <http://www.miamiherald.com/2013/04/11/3339297/miami-to-go-to-federal-court-to.html>.
- 32 Legislation offering protection from discriminatory treatment by police based on housing status or homelessness has been enacted in the State of Rhode Island, the District of Columbia, and the Municipality of Cook County, IL. D.C. Code §2-1402.31 (2012); Cook Cnty., Ill. Code of Ordinances § 42-31, 42-37 (2012); R.I. Gen. Laws § 34-37.1-3 (2012). Additionally, a number of police departments across the country have adopted policies prohibiting discriminatory law enforcement action based on housing status or actual or perceived homelessness. See e.g., Metro. Police Dep’t Gen. Ord. 308-14 (2011); S.F. Police Dep’t DGO 5.03, Investigative Detentions (2003).
- 33 Courts have struck down such laws. See *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013); *Wilkinson v. Utah*, 860 F. Supp. 2d 1284 (D. Utah 2012); *State v. Boehler*, 262 P.3d 637 (Ariz. Ct. App. 2011); National Law Center on Homelessness & Poverty, “Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities” (2011), available at http://www.nlchp.org/Criminalizing_Crisis.
- 34 See, Comprehensive Report on Homelessness, State of Utah 2013, Utah Housing and Community Development Division, available at: <http://jobs.utah.gov/housing/documents/homelessness2013.pdf>.
- 35 National Prison Rape Elimination Commission, “National Prison Rape Elimination Commission Report” (2011), available at http://static.nicic.gov/UserShared/2013-03-29_nprec_finalreport.pdf.
- 36 United Nations Office on Drugs and Crime, “Handbook on Prisoners with Special Needs” (2009), available at <https://www.unodc.org/documents/justice-and-prison-reform/Prisoners-with-special-needs.pdf>; Amnesty International, “Rights for All” (1998), available at <http://www.amnesty.org/en/library/asset/AMR51/035/1998/en/0440cd04-da99-11dd-80bc-797022e51902/amr510351998en.pdf>; “Survivor Testimony,” available at http://www.justdetention.org/en/survivor_testimony.aspx (last accessed December 2013); Jamie Fellner, “Sexually Abused: The Nightmare of Juveniles in Confinement” (Washington: Human Rights Watch, 2010), available at <http://www.hrw.org/news/2010/02/02/sexually-abused-nightmare-juveniles-confinement>.
- 37 Amnesty International, “Stonewalled”: 40.
- 38 Amnesty International, “Stonewalled”; Alex Coolman, Lamar Glover, and Kara Gotsch, “Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners” (Los Angeles and Washington: Stop Prisoner Rape and ACLU National Prison Project, 2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf>; Terry Schuster and Will Harrell, “Prisons: The Next Frontier for LGBTI Rights,” *The Life of the Law*, August 9, 2013, available at <http://www.lifeofthelaw.org/prisons-the-next-frontier-for-lgbti-rights/>.
- 39 Invasive and degrading genital searches conducted by law enforcement as “gender checks” are unfortunately commonplace, as documented by Amnesty International in “Stonewalled.” The current language in PREA, which prohibits such searches “unless part of a broader medical examination,” leaves too much discretion as to what constitutes a “broader medical examination,” given the ongoing problem of harassing and assaultive genital searching of LGBT detainees.
- 40 See, Frequently Asked Questions, PREA Resource Center, <http://www.prearesourcecenter.org/faq>.
- 41 See, e.g., Harris County Texas Sheriff, Policy No. 413: Lesbian, Gay, Bisexual, Transgender and Intersex (2013).
- 42 International Association of Chiefs of Police, “Addressing Sexual Offenses and Misconduct by Law Enforcement Officers: An Executive Guide” (2011), available at <http://www.theiacp.org/Portals/0/pdfs/>.
- 43 *Ibid.*

- 44 NOPD Consent Decree, ¶129,149,187.
- 45 *Id.* at ¶ 184,185, 187.
- 46 Acacia Shields, “Criminalizing Condoms: How Policing Practices Put Sex Workers and IV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe” (New York: Open Society Foundations, 2012), available at <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>; PROS Network and Leigh Tomppert, “Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City” (New York: PROS Network and Sex Workers Project, 2012), available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf>; Human Rights Watch, “Sex Workers at Risk: Condoms as Evidence of Prostitution in Four US Cities” (2012), available at http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf; Make the Road New York, “Transgressive Policing.”
- 47 National Prison Rape Elimination Commission, “National Prison Rape Elimination Commission Report:” 74-75.
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- 51 See, e.g., *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1810 (2012); *Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Allard v. Gomez*, 9 Fed. Appx. 793, 795 (9th Cir. 2001).
- 52 *De’Lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013).
- 53 Series of letters from prisoner on file with Chase Strangio, American Civil Liberties Union.
- 54 Pascal Emmer, Adrian Lowe, and R. Barrett Marshall, “This is a Prison, Glitter Not Allowed: Experiences of Trans and Gender Variant People in Pennsylvania’s Prison System” (Philadelphia: Hearts on a Wire Collective, 2011): 12, available at <http://www.galaei.org/documents/thisisaprison.pdf>.
- 55 Idaho Dep’t of Corr., Procedure Control No. 325.02.01.001, Prison Rape Elimination 5 (2009) (prohibiting prisoners in women’s prisons from having masculine haircuts and prisoners in men’s prisons from having effeminate haircuts under guise of compliance with PREA).
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- 57 Gabriel Arkles, “Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention,” *Temple Political & Civil Rights Law Review* 18 (515) (2009); Helen M. Eigenberg, “Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons,” *Prison Journal* 80 (4) (2000): 415- 433 (finding that half of officers said that some prisoners deserve to be raped).
- 58 See, e.g., *Everson v. Cline*, No. 101,914, 2009 WL 3172859 (Kan. App. Oct. 2, 2009) (plaintiff placed in PREA segregation after writing note inviting consensual sexual relationship); *Waller v. Maples*, 1:11CV00053 JLH-BD, 2011 WL 3861370 (E.D. Ark. July 26, 2011) report and recommendation adopted, 1:11CV00053 JLH-BD, 2011 WL 3861369 (E.D. Ark. Aug. 31, 2011) (plaintiff placed in isolation following PREA investigation into allegedly sexual consensual relationship with childhood friend); *McKnight v. Hobbs*, 2:10CV00168 DPM HDY, 2010 WL 5056024 (E.D. Ark. Nov. 18, 2010) report and recommendation adopted, 2:10-CV-168-DPM HDY, 2010 WL 5056013 (E.D. Ark. Dec. 6, 2010) (plaintiff placed on PREA status indefinitely after found guilty of having had consensual sex, which allegedly caused him to lose certain privileges and access to mental health care); Idaho Dep’t of Corr., Procedure Control No. 325.02.01.001, Prison Rape Elimination 5 (2009) (prohibiting prisoners in women’s prisons from having masculine haircuts and prisoners in men’s prisons from having effeminate haircuts under guise of compliance with PREA).
- 59 Lori Sexton, Val Jenness, and Jennifer Sumner, “Where the Margins Meet: A Demographic Assessment of Transgender Inmates in Men’s Prisons,” *Justice Quarterly* 27 (6) (2010): 835-866, available at <http://ucicorrections.seweb.uci.edu/files/2013/06/A-Demographic-Assessment-of-Transgender-Inmates-in-Mens-Prisons.pdf>; Mogul, Ritchie, and Whitlock, *Queer (In)Justice*.
- 60 “Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.” 28 C.F.R. § 551.90 (2013).
- 61 Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act, Feb. 23, 2011 (“Recent

- evolutions in legislation (including the pending repeal of Don't Ask, Don't Tell), in community practices and attitudes, in case law (including the Supreme Court's holdings in *Lawrence* and *Romer*), and in social science regarding sexual orientation all make clear that sexual orientation is not a characteristic that generally bears on legitimate policy objectives.”).
- 62 *Umber v. Murphy*, 304 A.D.2d 931, 931-32 (N.Y. App. Div. 2003).
- 63 The agency should commit to a multi-year pilot project implementing the recommended policies in a substantial number of BOP facilities. This policy could then serve as a model for other federal, state, and local detention agencies.
- 64 See, e.g., 28 C.F.R. § 115.15(e)-(f) (2012) (restricting searches of transgender people), § 115.15.31 (a)(9) (requiring “professional” and “efficient” communication with LGBTI people).
- 65 See Frequently Asked Questions, PREA Resource Center, <http://www.prearesourcecenter.org/faq>.
- 66 See e.g., Harris County Texas Sheriff, Policy No. 413: Lesbian, Gay, Bisexual, Transgender and Intersex (2013).
- 67 Invasive and degrading genital searches are a source of trauma for many people in prison. In recent years, increasing attention has been paid to the issue, in part because of advocacy efforts in Michigan to stop a routine invasive search at the Michigan Women’s Huron County Correctional Facility. See American Civil Liberties Union, “Invasive Searches,” available at <https://www.aclu.org/invasive-search>. Invasive genital searches are, unfortunately, a common experience for LGBT prisoners, especially trans prisoners who are often searched in this way when corrections staff do “gender checks” of them. The current language in PREA, which prohibits such searches “unless part of a broader medical examination” leaves too much discretion as to what constitutes a “broader medical examination,” given the ongoing problem of harassing and assaultive genital searching of LGBT prisoners and detainees.
- 68 Such reforms have been advocated by many, including the Chairman of the National Prison Rape Elimination Commission, the American Bar Association and the Commission on Safety and Abuse in America’s Prisons. See, American Bar Association, Criminal Justice Section, “Report to the House of Delegates: Recommendation,” approved by the House of Delegates February 12, 2007; Commission on Safety and Abuse in America’s Prisons, “Confronting Confinement,” pp. 86-87; Letter from Reggie B. Walton, chairman, National Prison Rape Elimination Commission, to Representatives Bobby Scott (D-VA) and Randy Forbes (R-VA), January 24, 2008; Human Rights Watch, “No Equal Justice: The Prison Litigation Reform Act in the United States” (2009), available at <http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf>; “Reform the Prison Litigation Reform Act: Top 10 Harmful PRLA Results,” Stop Abuse and Violence Everywhere Coalition, <http://www.savecoalition.org/top10.html>.
- 69 See e.g., The Center for HIV Law and Policy, Teen SENSE model policies and standards for sexual health care, sexual health literacy, and staff training for youth in state custody, available at <http://www.hivlawandpolicy.org/initiatives/teen-sense>.
- 70 Properly used condoms reduce the risk of HIV transmission by as much as 90% and access to condoms has been found not to increase sexual activity or security risks. Alexander McKay, “Sex Research Update,” *Canadian Journal of Human Sexuality* 15 (1) (2006): 47, 49; John P. May & Earnest L. Williams, Jr., “Acceptability of Condom Availability in a U.S. Jail,” *AIDS Education and Prevention* 14 (5) (2002): 90 (“The experience in the Washington, DC jail has found condom access to be unobtrusive to the jail routine, no threat to security or operations, no increase in sexual activity, and accepted by most inmates and correctional officers.”); Mary Sylla, Nina Harawa, and Olga Grinstead Reznick, “The First Condom Machine in a US Jail: The Challenge of Harm Reduction in a Law and Order Environment,” *American Journal of Public Health* 100 (6) (2010). Meeting sexual health and prevention needs supports the health of prisoners and the partners and communities they return to after release.
- 71 Economic and Social Council Res. 663C, Res. 2076, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF/611, annex 1, ESC Res. 663C, (XXIV) (1957), UN ESCOR, Supp. No. 1, at 11, UN Doc. E/3048 (1957), amended by ESC Res. 2076, (LXII) (1977), UN ESCOR, Supp. No. 1, at 35, UN Doc. E/5988 (1977) (Dec. 11, 2013); World Health Organization Europe, “Health in Prisons: A WHO guide to the essentials in prison health” (2007): 21, available at http://www.euro.who.int/_data/assets/pdf_file/0009/99018/E90174.pdf; United Nations Office on Drugs and Crime, “Handbook on Prisoners with Special Needs”; Diane L. Adams and Brenda A. Leath, “Correctional Health Care: Implications for Public Health Policy,” *Journal of the National Medical Association* 94 (5) (2002): 297, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2594357/pdf/jnma00322-0031.pdf>.
- 72 “Methadone Maintenance Treatment and the Criminal Justice System”, April 2006, National Association of State Alcohol and Drug Abuse Directors, http://www.nasadad.org/resource.php?base_id=650; Drug Policy Alliance, “Methadone Maintenance Treatment-A Common Sense and Cost Effective Treatment Option for Bernalillo’s Metropolitan Detention Center,” January 2013; World Health Organization Europe, “Health in Prisons” (listing methadone as an essential medication and advising corrections systems, including prisons, to make methadone maintenance treatment available in order to significantly reduce adverse health and criminogenic consequences); Mark Parrino, “Methadone Treatment in Jail,” *American Jails* 14 (2) (2000): 9-12; Rebecca Boucher, “The Case For Methadone Maintenance Treatment in Prisons,” *Vermont Law Review* 27 (2002-2003), available at https://www.drugpolicy.org/docUploads/boucher_prison_methadone.pdf.
- 73 Clothing, including undergarments, permitted or provided in female facilities should also be permitted and provided in male facilities, and vice versa. Staff should not prevent a prisoner from, or discipline a prisoner for, possessing or wearing an article of clothing because it does not match gender norms. Grooming rules and restrictions, including rules regarding hair, make-up, shaving, jewelry, etc., should be the same in male and female facilities. Staff should not prevent a prisoner from, or discipline a prisoner for, a form of personal grooming because it does not match gender norms. See N.Y. State Office of Children & Family Services, “Lesbian, Gay, Bisexual, Transgender, and Questioning Youth (PPM 3442.00)” (2008): 8, available at http://srhp.org/files/LGBT_Youth_Policy_PPM_3442_00.pdf.

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- 76 Glennor Shirley, "Prison Libraries and the Internet," (Chicago: American Library Association's Office for Literacy and Outreach Program, 2004), available at <http://olos.ala.org/columns/?p=117>; Lois M. Davis, Robert Bozick, Jennifer L. Steele, Jessica Saunders, and Jeremy N. V. Miles, "Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults" (Santa Monica: RAND Corporation, 2013), available at http://www.rand.org/pubs/research_reports/RR266.html.
- 77 See, e.g., 28 C.F.R. § 115.15(e)-(f) (2012) (restricting searches of transgender people), § 115.15.31 (a)(9) (requiring "professional" and "efficient" communication with LGBTI people).
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- 80 Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.42(c) (2012).
- 81 Id.; BOP Program Statement 5324.09, Sexually Abusive Behavior Prevention and Intervention Program (2012).
- 82 Gary Gates, "LGBT Adult Immigrants in the United States" (Los Angeles: Williams Institute, 2013) at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/us-lgbt-immigrants-mar-2013/> (This likely is a low estimate as many people do not self-identify and data are not systematically collected.). See also, Crosby Burns, Ann Garcia and Philip E. Wolgin, "Living in Dual Shadows: LGBT Undocumented Immigrants," (Washington: Center for American Progress, 2013), available at <http://www.americanprogress.org/issues/immigration/report/2013/03/08/55674/living-in-dual-shadows/>.
- 83 Personal communication from Keren Zwick, Managing Attorney for LGBT Immigrant Rights Initiative and Adult Detention Program, National Immigrant Justice Center, September 30, 2013; see also website of Immigration Equality at <http://immigrationequality.org/about/> ("Each year, Immigration Equality fields inquiries from over 1,000 LGBT or HIV-positive foreign nationals and their loved ones about their options under U.S. immigration law.").
- 84 LGBT people were inadmissible to the U.S. for much of the 20th century, and excludable from naturalization as persons "afflicted by a psychopathic personality." People living with HIV were banned from visiting and immigrating until 2010. (See, Siobhan Somerville, "Queer Alienage: The Racial and Sexual Logic of the 1952 Immigration and Naturalization Act," Working Papers on Historical Systems, Peoples and Cultures, No. 12, September 2002, p. 4, Department of Ethnic Studies, Bowling Green State University, available at <http://www2.bgsu.edu/downloads/cas/file46880.pdf>.) Until the *Windsor* decision in 2013, LGBT families were denied recognition of marital ties, which represent a key pathway to achieving lawful immigration status. People with HIV were barred from visiting or immigrating until 2010 (See Centers for Disease Control, "Final Rule Removing HIV Infection from US Immigration Screening," available at <http://www.cdc.gov/immigrantrefugeehealth/lawsregs/hiv-ban-removal/final-rule.html>).
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- 86 Padron et. al. v. ICE, February 2013, at http://www.immigrantjustice.org/court_cases/padron-et-al-v-ice-et-al. The National Immigration Forum (NIF) reports that in FY2013, ICE contracted with 244 state and county facilities and seven (7) privately run Contract Detention Facilities, and itself operated six (6) detention facilities, known as Service Processing Centers. (National Immigration Forum, "The Math of Immigration Detention: Runaway Costs For Immigration Detention Do Not Add Up To Sensible Policies" (2013): 4, available at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>.)
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- 95 Government Accountability Office, "Immigration Detention: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse," GAO-14-38, November 2013, available at <http://www.gao.gov/assets/660/659145.pdf> (This report was requested by 28 members of Congress in January 2012. Of the 15 incidents substantiated in the GAO review, three involved transgender detainees; see "Appendix II: Summary of Substantiated Sexual Abuse and Assault Allegations October 2009 Through March 2013," pp. 60-62.).
- 96 These deficiencies included: inconsistent procedures for receiving, investigating and tracking sexual abuse and assault complaints; poor documentation of investigations of complaints; inconsistency in the various standards governing the care of persons in detention with respect to sexual assault and lack of clarity among operators of detention facilities and investigators about which standards apply; and difficulty in the ability of detainees to access hotlines and resources created to facilitate reporting of an assault. Government Accountability Office, "Immigrant Detention."
- 97 Ibid., Appendix IV and V pp. 66-75.
- 98 Department of Homeland Security, "Standards to Prevent, Detect and Respond to Sexual Abuse and Assault in Detention Facilities, Final Rule, 79 FR 13099," March 7, 2014, available at <https://www.federalregister.gov/articles/2014/03/07/2014-04675/standards-to-prevent-detect-and-respond-to-sexual-abuse-and-assault-in-confinement-facilities>. A coalition of LGBT organizations filed detailed comments to the Proposed DHS rules covering, among others, expanding the definition of sexual abuse, insuring time-delimited implementation of regulations, expanding the rules on cross-gender searches to include adult and juvenile males, adding language to ensure investigation of incidents of abuse, providing training for all medical providers, insuring safe shower access, and limiting automatic housing assignments and protective custody based on sexual orientation and gender identity. See NCTE et al., "Protecting Lesbian, Gay, Bisexual, Transgender, Intersex, and Gender Nonconforming People."
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- 101 NCTE, "Our Moment For Reform": 20; Arkles, "Safety and Solidarity Across Gender Lines."
- 102 Alexis Perlmutter and Mike Corradini, "Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigrant Detention" (Chicago: National Immigrant Justice Center, 2012), available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf; Christy Fujio, "Buried Alive: Solitary Confinement in the U.S. Detention System" (Cambridge: Physicians For Human Rights, 2013), available at <http://physiciansforhumanrights.org/library/reports/buried-alive-solitary-confinement-in-the-us-detention-system.html>.

- 103 Laurel Anderson, "Punishing The Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment Under the Fifth Amendment," *Berkeley Journal of Gender, Law and Justice* 25 (1) (2010).
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- 105 National Immigrant Justice Center, "NIJC Welcomes New ICE Directive To Improve Oversight of Solitary Confinement in Immigrant Detention," September 5, 2013, available at http://www.immigrantjustice.org/press_releases/ice-directive-solitary-confinement#.UjjEWhbWOS1 ("We are concerned that the new directive does not eliminate the use of extended solitary confinement, and that the reporting period exceeds the 15 days which the United Nations Special Rapporteur on Torture has observed can have detrimental and irreversible effects on individuals' mental health," McCarthy said. "We will continue to work with the administration and Congress to reduce the use of solitary confinement, and eliminate the use of extended solitary confinement.").
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A Congressional Hearing on Immigrant Detainee Health Care in 2007 surfaced a wide range of problems and challenges associated with the provision of health care to immigrant detainees. ("Detention and Removal: Immigration Detainee Medical Care," Testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and

International Law, 2007). These problems included the fact that there was no law requiring health care in immigrant detention facilities, multiple standards that were not uniformly enforced, and poor enforcement of existing standards. (See also, Brianna M. Mooty, "Solving The Medical Crisis for Immigration Detainees: Is the Proposed Detainee Basic Medical Care Act Of 2008 The Answer?" *Law & Inequality* 28 (1) (2010): 223.)

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

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APPENDIX A

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