

# UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS TRANSGENDER PEOPLE

May 2016



Center for American Progress  


**MAP**  
movement advancement project ▶

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### National LGBTQ Task Force

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### Transgender Law Center

Transgender Law Center (TLC) changes law, policy and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression. Founded in 2002, TLC employs an integrated multidisciplinary approach—including impact litigation, policy advocacy, public education, and movement building—to protect and advance the rights of transgender and gender nonconforming people from coast to coast. For more information, visit [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org).

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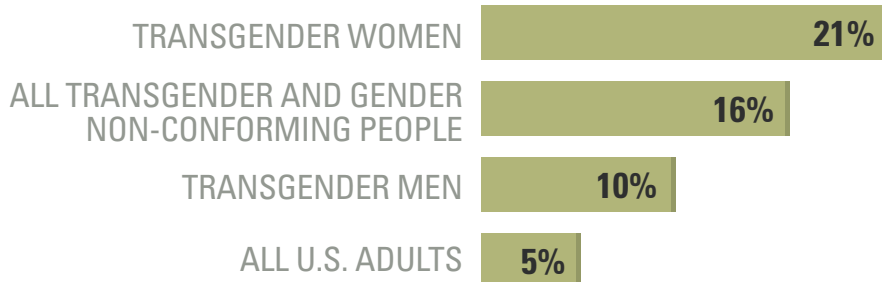
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# HOW THE JUSTICE SYSTEM FAILS TRANSGENDER PEOPLE

PAGE 1

## TRANSGENDER PEOPLE ARE OVERREPRESENTED

PERCENT OF ADULTS REPORTING TIME SPENT IN PRISON OR JAIL



## WHY ARE TRANSGENDER PEOPLE OVERREPRESENTED?

TRANSGENDER PEOPLE ARE MORE VULNERABLE

Family Rejection & Homelessness



Unsafe Schools & Unfair Disciplinary Policies



Pervasive Discrimination in All Areas of Life



Employment



Housing



Identity Documents



Health Care

TRANSGENDER PEOPLE ARE PUSHED INTO THE SYSTEM

Bad Laws



- HIV Criminalization Laws
- Drug Laws
- Criminalization of Sex Work

Policing Strategies



- Profiling
- Collaboration Between Police and Immigration Enforcement
- Misgendering and Inaccurate Identity Documents
- Discrimination and Mistreatment
- Violence When Seeking Assistance

# HOW THE JUSTICE SYSTEM FAILS TRANSGENDER PEOPLE

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## HOW ARE TRANSGENDER PEOPLE TREATED IN THE SYSTEM?

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Difficulty obtaining name changes and accurate identity documents create serious obstacles to success

## WHAT IS THE IMPACT ON TRANSGENDER PEOPLE?

**DISCRIMINATION + CRIMINAL RECORD**

**= SUBSTANTIAL CHALLENGES TO REBUILDING LIVES**



Unemployment



Denied Housing



Lacking Needed Health Care



## INTRODUCTION

This report offers a snapshot of how the U.S. criminal justice system not only fails transgender people, but also targets them. As shown in the graphics on the previous two pages, transgender and gender non-conforming people<sup>a</sup> face high levels of discrimination in many areas of life that put them at risk for economic insecurity, homelessness, and reliance on survival economies. Combined with policing strategies that profile and target transgender people, particularly transgender women of color, the end result is high rates of criminalization of transgender people. Once within the criminal justice system, transgender people are often discriminated against, verbally and sexually assaulted, refused adequate medical care, and treated with disregard for their identity and dignity. And when trying to rebuild their lives with a criminal record, transgender people face added challenges.

Throughout this report, we highlight the unique impact of the criminal justice and immigration systems on documented and undocumented transgender immigrants. This report is not, however, meant to provide a detailed analysis of these added challenges. For a more thorough exploration, please see the resources listed on the bottom of page 15.

This report is a companion to a broader report released in February 2016 entitled *Unjust: How the Broken Criminal Justice System Fails LGBT People*. That report provides more detailed analyses and statistics, examples of innovative programs and personal stories, and detailed recommendations for change. This companion report is designed to be a primer highlighting the key issues that arise for transgender people within the criminal justice system.

## PERVASIVE DISCRIMINATION PUSHES TRANSGENDER PEOPLE INTO THE CRIMINAL JUSTICE SYSTEM

From youth to adulthood, transgender people face high levels of discrimination in many areas of life that put them at risk for economic insecurity, homelessness, and reliance on survival economies. Transgender people are also disproportionately affected by discriminatory laws, and are often victims of hate violence and police profiling. For transgender people, and especially transgender people of color and transgender immigrants, the combined effect of these factors is increased potential interactions with law enforcement and the criminal

justice system. The infographic on the following page demonstrates the ways in which transgender people are pushed into the system.

## Lack of Support at Home, at School, and in Communities

### Family Rejection and Homelessness

Transgender and gender non-conforming youth may experience family rejection and isolation, which can result in homelessness and a lack of support network. In a national survey of transgender adults, 57% experienced family rejection.<sup>1</sup>

**57%** OF TRANSGENDER ADULTS HAVE EXPERIENCED FAMILY REJECTION

Transgender people of color, particularly multiracial, Native American, and Latino respondents, were more likely to report this experience. According to the National Transgender Discrimination Survey, an astounding one in five transgender people report having experienced homelessness at some time in their lives because of discrimination and family rejection.<sup>2</sup> Individuals who reported experiencing family rejection were also at increased risk for incarceration and substance use compared to those who were supported by their families.

**1 IN 5** transgender people report having experienced homelessness at some time in their lives because of discrimination and family rejection

## Unsafe Schools and Unfair Disciplinary Policies

School is a difficult place for many LGBT students, particularly transgender and gender non-conforming students, and some students are pushed out of school as a result of bullying, violence, and disciplinary policies. The 2013 National School Climate Survey found that three-quarters (75%) of transgender middle and high

<sup>a</sup> **Transgender.** The term transgender is independent of sexual orientation and describes individuals whose sex assigned at birth is different from who they know they are on the inside. At some point in their lives, many transgender people decide they must live their lives as the gender they have always known themselves to be, and transition to living as that gender. **Gender non-conforming.** This report uses the term gender non-conforming to describe a person who has, or is perceived to have, gender-related characteristics and/or behaviors that do not conform to traditional or societal expectations. This term is also independent of sexual orientation. For example, gender non-conforming women may or may not also identify as lesbian, gay, or bisexual.

# PERVASIVE DISCRIMINATION

PUSHES TRANSGENDER PEOPLE INTO THE CRIMINAL JUSTICE SYSTEM

## TRANSGENDER YOUTH LACK SUPPORT AT HOME, AT SCHOOL, AND IN COMMUNITIES



Family Rejection & Homelessness



Unsafe Schools & Unfair Disciplinary Policies

## TRANSGENDER ADULTS FACE PERVASIVE DISCRIMINATION IN MANY AREAS OF LIFE



Employment Discrimination



Housing Discrimination



Health Care Discrimination



Challenges Obtaining ID Documents

## BAD LAWS TARGET TRANSGENDER PEOPLE



HIV Criminalization Laws



Drug Laws



Bathroom Laws



Criminalization of Sex Work

## NEGATIVE AND DANGEROUS POLICE INTERACTIONS



- Police Profiling
- Collaboration Between Police and Immigration Enforcement
- Misgendering and Inaccurate IDs
- Discrimination and Mistreatment by Police

**IMPACT:** INCREASED RISK FOR ECONOMIC INSECURITY, HOMELESSNESS, AND RELIANCE ON SEX WORK RESULTING IN POLICE INTERACTIONS AND INCARCERATION

school students felt unsafe at school because of how they expressed their gender.<sup>3</sup> Of adults responding to the National Transgender Discrimination Survey, 78% who expressed a transgender identity or gender non-conformity during primary and secondary school had been harassed.<sup>4</sup> Additionally, school facilities like restrooms and locker rooms present unique challenges for transgender and gender non-conforming students and can increase vulnerability to harassment and violence. Some students' experiences are so negative and dangerous that they skip school or drop out entirely. In the National Transgender Discrimination Survey, 15% of transgender and gender non-conforming adults reported leaving school as a result of the mistreatment they experienced.

Transgender and gender non-conforming youth, particularly transgender youth of color, are among the groups of students who are more likely to be suspended, expelled, or otherwise removed from school settings—often for relatively minor offenses—and pushed into the juvenile justice and broader correctional systems.<sup>5</sup> For example, the 2013 National School Climate Survey revealed that transgender students were more likely to have experienced school disciplinary actions—including detention, suspension, or expulsion—than non-transgender LGB students.<sup>6</sup> In its work in New York State, the New York Civil Liberties Union received many complaints of transgender youth being disciplined for wearing clothes that were consistent with their gender identity or for using the “wrong” restroom.<sup>7</sup> Legislation like that passed in April 2016 in North Carolina places restrictions on how transgender students can use the restroom, increasing the chances that transgender students will be disciplined in schools (for more about laws targeting transgender people, particularly around restroom access, see pages 8-9). In May 2016, the U.S. Departments of Education and Justice sent a joint letter to schools notifying them that prohibiting a transgender student from using a restroom in accordance with their gender identity, along with other discrimination based on gender identity or expression, constitutes a violation of Title IX's prohibition on discrimination based on sex.

What's more, when young people don't complete their educations, they face limited employment opportunities and are more likely to rely on survival or underground economies. In the National Transgender Discrimination Survey, respondents who reported being physically assaulted at school were twice as likely to have extremely low incomes of \$10,000 or less a year, to

have done sex work or other work in the underground economy, and they were 50% more likely to have been incarcerated at some point in their lives.<sup>8</sup>

## Discrimination in Many Areas of Life

Transgender people experience extremely high rates of discrimination in employment, housing, and health care. This is compounded by an inability to update the gender marker on their identity documents, effectively “outing” transgender people whether they are applying for a job or an apartment. Barriers to employment and housing can result in increased economic insecurity and homelessness. The combination of poverty, unemployment, and homelessness contributes to higher rates of incarceration and justice system interactions among transgender people, particularly when transgender people are forced to rely on underground economies to survive, such as trading sex or selling drugs.

### Employment Discrimination

Transgender and gender non-conforming people report shockingly high rates of employment discrimination; 78% of respondents to the National Transgender Discrimination Survey said they'd experienced discrimination in the workplace.<sup>9</sup> In a study conducted by the District of Columbia Office of Human Rights, employers favored less qualified candidates over qualified transgender candidates in nearly half (48%) of cases.<sup>10</sup>

More Qualified Transgender Candidates Rejected  
in Nearly Half of Cases



Employment discrimination and harassment has negative results for transgender people, namely unemployment and poverty. Transgender individuals reported twice the average national unemployment rate at the time the National Transgender Discrimination Survey was conducted; 14% compared to 7% of the general population.<sup>11</sup>





The same survey also found that African American transgender people had substantially higher rates of unemployment than white transgender people (28% compared to 12%). Transgender and gender non-conforming respondents were nearly four times more likely to have a household income under \$10,000 per year than the population as a whole (15% vs. 4%). This is true despite the finding that 87% of those surveyed completed at least some college and 47% have obtained a college or graduate degree—rates that are much higher than those for the general population.

The lack of employment opportunities for transgender people can lead some transgender people to engage in underground economies, like trading sex for money or shelter or selling drugs. For undocumented transgender immigrants in particular, lack of employment opportunities can lead to increased involvement in underground economies. These factors put transgender people, particularly transgender people of color, at heightened risk for engagement with the criminal justice system. And, as discussed on pages 32-33, once an individual has a criminal record, the cycle of unemployment and homelessness becomes even more challenging to break.

### Housing Discrimination

Nearly one in five (19%) transgender people in the National Transgender Discrimination Survey reported they had been refused a home or apartment because of their gender identity/expression, and 11% had been evicted for the same reason.<sup>12</sup> Eviction rates were even higher for African American transgender respondents (37%). When transgender people experience housing discrimination or cannot afford adequate housing, they may become homeless. The National Transgender Discrimination Survey found that nearly one in five people (19%) had been homeless at some point.<sup>13</sup>

One in five transgender people (19%) have been homeless



Transgender people facing homelessness also face discrimination from agencies that should be helping them. A 2010 survey of transgender people found that

29% of individuals who had experienced homelessness had been turned away from a shelter because of their transgender status; 55% had been harassed by shelter staff or residents.<sup>14</sup> Transgender people are frequently unable to stay in a shelter that matches their gender identity as opposed to their birth sex, making them less likely to seek shelter altogether.<sup>15</sup>

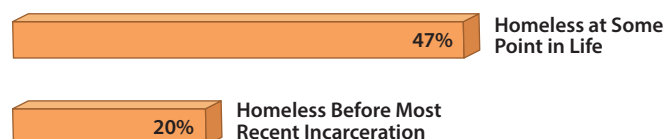
**29%** OF PEOPLE WERE TURNED AWAY FROM A SHELTER

**55%** OF PEOPLE WERE HARASSED BY SHELTER STAFF OR RESIDENTS BECAUSE OF THEIR TRANSGENDER STATUS

When transgender people are on the streets or struggling to make ends meet, they are often put in situations where they may encounter police and enter the criminal justice system.

Of transgender people in men's prisons in California, nearly half (47%) reported being homeless at some point in their lives, and 20% reported being homeless just before their most recent incarceration.<sup>16</sup> By comparison, only 9% of the general prison population reported being homeless prior to being incarcerated.<sup>17</sup> In the National Transgender Discrimination Survey, individuals who had experienced homelessness were 2.5 times more likely to have been incarcerated than who had not experienced homelessness.<sup>18</sup>

Transgender people in CA prisons:



### Healthcare Discrimination and Health Disparities

For transgender people, even those with health insurance, needed health care isn't always covered. In a majority of states, insurance companies continue to exclude coverage for transition-related medical care, even when such care is deemed medically-necessary and the same care is covered for non-transgender people.<sup>19</sup> These exclusions deny transgender people coverage for a range of vital services (including hormone

therapy, mental health services, and reconstructive surgeries). In May 2016, the U.S. Department of Health and Human Services released regulations stating that health insurance providers that discriminate based on sex, including gender identity or expression, including excluding services based on transgender status, are in violation of federal law. This rule applies to all health providers and insurers that participate in the state and federal insurance exchanges and those who receive federal funding. Transgender immigrants, particularly those lacking legal authorization to be in the United States, may be unable to access health insurance programs, including expanded health insurance options for low- and middle-income individuals.

To afford this medically necessary care, some transgender people purchase medication or medical services without a prescription or from unlicensed medical providers, putting their health at risk and increasing their chance of being arrested.<sup>20</sup> Some transgender people inject hormones as part of their transition-related medical care, so they may have syringes in their belongings.<sup>b</sup> Transgender people may also be unfairly targeted by police for suspicion of drug use if they are found in possession of syringes. Others turn to survival economies to afford the out-of-pocket costs of transition-related care.

In addition to medical care related to transition, research finds that transgender people may have other unmet health needs, particularly in the area of mental health. More than one quarter (28%) of transgender people in the National Transgender Discrimination Survey postponed medical care when they were sick or injured, because they feared discrimination.<sup>21</sup> Nearly one in five (19%) transgender people had been refused medical care because of their identity, and 28% had been harassed in a medical setting, including 24% in doctor's offices and hospitals and 11% in mental health clinics.

Some transgender people struggle with mental health concerns, which may go untreated because of discrimination or lack of access to health insurance. The National Transgender Discrimination Survey found that 41% of transgender and gender non-conforming respondents reported attempting suicide at some point during their lives.<sup>22</sup> Additional analyses reveal that individuals who had experienced family rejection, discrimination and violence, and those who had experienced homelessness were more likely to report suicide attempts.<sup>23</sup>

Healthcare discrimination combined with unemployment can combine to mean that few transgender people can access competent mental health care.

## Challenge Obtaining Accurate Identity Documents

Transgender people face an ongoing struggle to obtain identity documents that match their lived gender. Many states have requirements that make updating documents difficult or impossible.<sup>24</sup> Some states also limit access to identity documents for undocumented immigrants, putting undocumented immigrants at particular risk. Having official, government-issued identity documents is crucial to many aspects of everyday life, including driving a car, paying with a credit card, applying for a job or school, voting, or boarding a plane.

According to the National Transgender Discrimination Survey, only one-fifth (21%) of transgender people were able to update all of their identification documents and records to match the gender they live as every day, and one-third did not update any of their documents.<sup>25</sup>

One in five transgender people (21%) were able to update all of their identification documents and records to match the gender they live as every day...



... and one-third did not update any of their documents

Without access to accurate identity documents, transgender people face added barriers to finding employment, face challenges accessing social services, and are at increased risk of harassment by law enforcement (see pages 10-12 for more about abuse by law enforcement). When transgender people are stopped or detained, they are often subject to harassment and abuse if the legal name and gender marker on the document they present doesn't match their gender expression or the name they use in daily life. Additionally,

<sup>b</sup> A troubling number of transgender people who lack adequate medical care and/or those who cannot find competent medical care use street hormones and may be at increased risk for blood-borne illnesses, such as HIV, if they share needles.

law enforcement may accuse a transgender person of committing fraud for giving a name that differs from the one on their identification; they may even be arrested on false impersonation charges.

## Targeted by Bad Laws

### HIV Criminalization Laws

Transgender people are among the groups most affected by the HIV epidemic. According to a recent study by the Transgender Law Center, transgender women of color are most likely to be affected, with one in two black transgender women and one in five transgender Latinas living with HIV.<sup>26</sup>

1 in 2 black transgender women and 1 in 5 transgender Latinas live with HIV



People living with HIV, including transgender people, face a patchwork of outdated and reactionary laws that rely on misinformation rather than accurate science about the transmission of HIV.<sup>27</sup> These laws, frequently called “HIV criminalization laws,” penalize behavior by people living with HIV, even if those behaviors carry no risk of transmission or unintentionally expose others to the virus. HIV criminalization laws also further criminalize commercial sexual behavior between consenting adults, regardless of whether they use condoms and/or other forms of protection. For example, the Williams Institute found nearly all individuals (94%) who came into contact with the criminal justice system in California under any HIV-related criminalization statute had contact related to “solicitation while HIV positive.”<sup>28</sup>

In a survey of people living with HIV, 57% of transgender respondents said they feared false accusations of nondisclosure, which could trigger criminal prosecution.<sup>29</sup> Virtually all of the transgender respondents said it would be very difficult to receive a fair chance in court if accused of nondisclosure.

### Drug Laws

Current drug policy in the United States results in the incarceration of tens of thousands of individuals

each year—many of whom were convicted of nonviolent crimes such as possession of marijuana or another illegal substance. The intensity of the so-called “war on drugs” in the United States has disproportionately impacted urban communities, people of color, and those living in poverty.

Some transgender people may engage in selling drugs because of their disconnection from more traditional employment opportunities as a result of discrimination. Other transgender people may themselves use illegal drugs as a way to cope with the high rates of discrimination, violence, and harassment they experience in daily life. For example, transgender respondents to the National Transgender Discrimination Survey who reported losing a job due to bias were 70% more likely to drink or misuse drugs to cope with mistreatment.<sup>30</sup> Transgender respondents who experienced family rejection, who had been verbally harassed, physically or sexually assaulted, or expelled from school were also more likely to report using drugs or alcohol as a coping strategy. Given higher rates of drug use for LGBT people,<sup>31</sup> homelessness and police stereotyping, it is likely that LGBT people, including transgender people, face significantly higher risks of drug-related arrest. For example, in the Black and Pink survey of currently incarcerated LGBTQ people, 55% had sold drugs prior to being incarcerated.<sup>32</sup>

### Bathroom Laws

As noted above, transgender people face discrimination and harassment in many areas of life—when looking for housing or employment, when accessing medical care, or when walking down the street.

For some transgender people, the simple act of using a public restroom can result in harassment and even violence. In a study of transgender and gender non-conforming people living in the District of Columbia, for example, 70% reported being denied access to the restroom or being verbally harassed or physically assaulted.<sup>33</sup> More than two-thirds of respondents (68%) had been told they were in the wrong facility, were told to leave, were questioned about their gender, stared at or given strange looks, ridiculed or made fun of, or otherwise verbally harassed.

While transgender people have long been at risk for harassment—even having the police called on them for using a restroom in accordance with their gender identity—over the past year, cities and states have debated, and in some cases passed, laws that criminalize

transgender people for using the restroom that matches the gender they live every day. In some instances, legislation requires individuals to use a restroom that matches their “biological sex” or the sex listed on their birth certificate. For example, in North Carolina all multi-occupancy restrooms in schools and public agencies may only be used by individuals in accordance with their “biological sex,” defined by the state as the sex listed on one’s birth certificate.<sup>34</sup> But many transgender people live in states that make it extraordinarily difficult, if not impossible, to update identity documents such as birth certificates. North Carolina requires proof of sex reassignment surgery to change the gender marker on a birth certificate, which means undergoing medical procedures not all transgender people want or can afford.<sup>35</sup> And for transgender people who are unable to update their birth certificates, these new bathroom laws make it impossible for them to safely use the restroom. For example, a transgender man who was assigned female at birth but has lived his adult life as a man (and who looks like a man, including full facial hair) would certainly risk violence and police involvement if he entered the women’s room—but if he enters the men’s room, he’s breaking the law. In the 2015-2016 legislative session, at least 20 states proposed this type of “no-win” legislation restricting restroom access for transgender people.<sup>36</sup>

Despite claims made by some legislators in support of these laws, there is no evidence that transgender people using the restroom in accordance with their gender identity decreases safety for anyone.<sup>37</sup> In 2014, advocates contacted law enforcement officials, government employees, and victims’ rights advocates in 12 states that prohibit discrimination in places of public accommodation.<sup>38</sup> Not one state reported that the law had led to an increase in public safety incidents in restrooms.

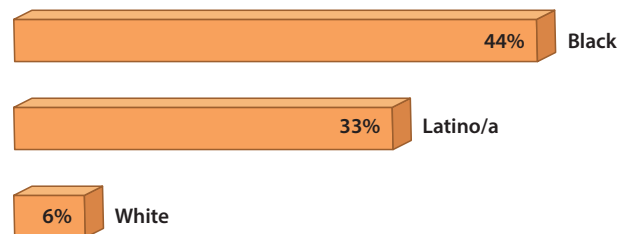
In fact, these ordinances and laws restricting restroom access actually contribute to a concerted effort to criminalize transgender people. Indiana lawmakers considered legislation that would have made it a misdemeanor crime for anyone above the age of 10 to use a restroom that did not match their sex assigned at birth.

### The Criminalization of Sex Work

Faced with discrimination at school and work, high rates of homelessness, and limited access to meager safety net supports, some transgender people engage in sex work to earn income or trade for housing. For example:

- According to the National Transgender Discrimination Survey, 11% of transgender respondents had engaged in sex work in order to survive.<sup>39</sup> Black respondents had the highest rate of sex trade participation overall (44%), followed by those who identified as Latino/a (33%). Those who identified as “White only” had the lowest rate of participation at 6%.

Participation in sex trade by transgender people, by race



Nearly half (48%) of transgender people who engaged in sex work also reported experiencing homelessness, further compounding their likelihood of interaction with police.

- In a survey of transgender people in state prisons for men in California (the survey presumably reached mostly transgender women who were placed in men’s prisons), over 40% reported having participated in sex work.<sup>40</sup>

Because transgender people, particularly transgender women of color, and undocumented transgender immigrants may be disproportionately represented among individuals engaged in sex work, they are frequent targets of laws criminalizing prostitution and related offenses. Police generally have wide discretion under these ordinances, and they often arrest individuals for vague violations such as “loitering with intent to solicit.”<sup>41</sup>

A newly released report entitled *Meaningful Work: Transgender Experiences in the Sex Trade* details these laws further.<sup>42</sup> The report finds that police may classify an individual as a “known prostitute” or issue “stay away orders” which associate a physical location with a presumption of criminal activity, regardless of the legitimate, non-criminal reasons a person might have for being in an area. Profiling in this manner, particularly of transgender women of color, is commonly referred to as “walking while trans.”



In a number of cities and counties, police take these laws to an even greater extreme, considering possession or presence of condoms as evidence of prostitution.<sup>43</sup> Not only does this practice infringe on basic rights, but it also discourages individuals from carrying condoms, undermining efforts to reduce transmission of HIV and other sexually transmitted infections.

Particularly for transgender women, who are at increased risk for HIV,<sup>44</sup> this leaves them in a difficult situation—risking arrest for carrying condoms or endangering their health by not using protection. Among LGBTQ youth in New York City engaged in survival sex surveyed by the Urban Institute and Streetwise and Safe, 15% reported that condoms found during a stop, question, or frisk were used by police to justify lengthy questioning or arrests for prostitution-related offenses.

## Negative and Dangerous Police Interactions

When law enforcement agencies, including city and state police, enforce laws and ordinances, they frequently do so in ways that disproportionately impact low-income people and people of color, including transgender people. For transgender people specifically, especially transgender women of color, interactions with police are not only negative but they are frequently dangerous. Transgender people experience profiling by police, frequently under the assumption they are engaged in sex work; they are treated with disrespect and are misgendered<sup>c</sup> by police, and the lack of an accurate identity document can put an individual at increased risk for this; and they are subject to invasive searches and too often physical and sexual violence at the hands of law enforcement. Transgender immigrants are at constant risk of being pushed into immigration enforcement custody as law enforcement may profile or target them because of their real or perceived immigration status, their gender identity or expression, their race or ethnicity, or all three. Additionally, when transgender people seek assistance from police, they all too often are themselves arrested.

### Police Profiling

Law enforcement officers frequently make judgment calls about when to question or interact with someone. In these situations, underlying biases and explicit prejudice can influence officers' decisions. "Profiling" refers to the practice by law enforcement of relying on an individual's

characteristics to make conclusions about whether or not that individual is participating in criminal activity.<sup>45</sup> When law enforcement officials profile, they are not focusing on evidence of wrongdoing, but are instead relying on stereotypes and bias.

An Amnesty International report found that transgender people in particular, as well as LGBT individuals generally, are subject to increased policing because they are perceived to transgress gender norms.<sup>46</sup> For example, police frequently assume that transgender women, particularly transgender women of color, are sex workers based on their perceived transgender status and their race, as well the fact that they are standing, walking, or driving in a particular area. As noted above, some LGBT people do engage in sex work or selling drugs, but the assumption by police is too frequently that any LGBT person, particularly a transgender woman of color, must be doing so. In New Orleans, for example, as part of the U.S. Department of Justice investigation and resulting consent decree, transgender women reported that officers frequently targeted and arrested them.<sup>47</sup>

Surveys also show the disproportionate impact of stop-and-frisk policies on transgender people, particularly people of color and transgender women. Transgender women in New York City reported high levels of interactions with the police, which often included unnecessary and aggressive searches.<sup>48</sup>

## Collaboration Between Police and Immigration Enforcement

LGBT immigrants, particularly those who are also people of color, are at heightened risk of profiling by police because of their presumed undocumented immigration status or their religious or ethnic background. Even an arrest for a minor offense can result in detention and ultimately deportation for immigrants, in some cases regardless of immigration status. Under programs such as the Priority Enforcement Program, law enforcement checks fingerprints of those arrested against immigration databases, which can result in Immigration and Customs Enforcement (ICE) taking custody of individuals, regardless of whether they committed a crime. Other programs, such as the Criminal

<sup>c</sup> The term "misgender" refers to when a transgender person is not recognized as the gender with which they identify but rather is referred to as and treated in accordance with their sex assigned at birth. For example, a transgender woman is misgendered when she is referred to as "he" or put into an all-male setting.



## Story: Walking While Trans



### #1: Bianca's Story

In 2011, 18-year-old Bianca Feliciano was walking with a friend in Cicero, a western suburb of Chicago. They were stopped by police under suspicion of prostitution. The police ordered them into a police car and proceeded to search Bianca's purse. The police officers refused to accept her ID, which had her legal name and gender marker. They then verbally harassed Bianca, saying, "You are not female, you have a dick between your legs." She was threatened with physical violence by the police, and they told her she could be accused of fraud. In 2012, she settled a lawsuit with the police, which included a stipulation that the police department would develop guidelines for respectful interactions with transgender people.

Adapted from "Transgender Woman Sues Cicero Police, Alleging Harassment," The Tran's Women's Healing Justice Project; Clifford Ward, "Transgender woman settles suit with Cicero, attorneys say," The Chicago Tribune, August 7, 2012.



### #2: Antonia's Story

Antonia is a transgender Latina woman from Jackson Heights in Queens, NY. She has been stopped, frisked, profiled, and arrested multiple times for allegedly being engaged in prostitution. One day, Antonia was walking in her neighborhood with two other transgender women. While outside of one of their homes, two police officers pulled up in a police car, stopped them, and told them to go home. The officers then drove around the block and saw Antonia and her friends again. This time they did not ask; they just stopped and frisked them. Police told them they were looking for condoms; they said they stopped Antonia and her friends for prostitution. No condoms were found, but Antonia was arrested and taken to the detention center, where she was strip searched to the point that she was nearly naked as officers reportedly laughed at her. As a result, Antonia feels falsely accused, violated, and humiliated.

Adapted from Make the Road New York, "Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights," October 2012.

Alien Program and the 287(g) program, intertwine law enforcement and immigration enforcement by allowing law enforcement to act as immigration officials and to increase immigration enforcement activities within prisons and jails.

Under the Obama administration, deportation has reached a record high. In 2013, the United States deported 240,000 people without criminal records and 198,000 people with criminal records.<sup>49</sup>

### Misgendering and Inaccurate Identity Documents

Being asked to present identity documents in interactions with police is a very vulnerable moment for transgender people. If one's identity document does not match an individual's gender expression or the officer's perception of what the person's gender is, this may result in increased scrutiny by law enforcement. Additionally, if an individual's name differs from the name on their identity documents, a simple traffic stop or stop on a street corner may escalate quickly. For transgender

immigrants, who may lack legal identity documents, these interactions can be particularly dangerous—both increasing the risk of harassment and interactions with immigration systems. Particularly troubling, officers may then conduct searches to try to ascertain "who someone really is," violating a transgender person's physical safety and subjecting them to humiliating treatment, and increasing the risk of physical and sexual assault. As noted above, there are numerous requirements and high costs associated with name change and gender marker changes in many states—and the impossibility in others—and, as a result, many transgender people have incongruent documents that can put them at increased risk of harassment, violence, and even arrest and possible deportation.

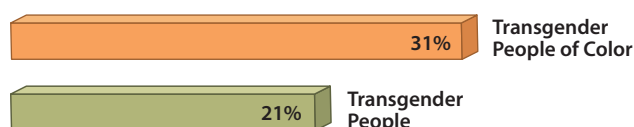
### Discrimination and Mistreatment by Police

Transgender people, including many transgender people of color, have long suffered from discrimination, harassment, and violence at the hands of police.

Recent surveys have quantified these experiences, and they highlight some of the ways in which law enforcement not only targets transgender people, but also abuse their power and treat transgender people in deplorable ways.

In the National Transgender Discrimination Survey, 22% of respondents who had interacted with police experienced harassment.<sup>50</sup> The 2015 LGBT Health and Human Services Needs Assessment conducted in New York State found one in five transgender respondents (21%) had been unfairly arrested, harassed, or physically harmed with higher rates for transgender people of color (31%).<sup>51</sup>

Rate of Mistreatment by Police



Harassment and discrimination by law enforcement is higher among transgender people of color. The National Transgender Discrimination Survey revealed that transgender people of color, particularly black and multiracial transgender and gender non-conforming people reported even higher rates (38% and 36%, respectively), while 8% of Latino/a transgender and gender non-conforming people who interacted with police reported sexual assault compared to 2% of all respondents. Among transgender Latinas in Los Angeles County, for example, two-thirds report that they have been verbally harassed by law enforcement, 21% report being physically assaulted by law enforcement, and an astounding 24% report being sexually assaulted by law enforcement.<sup>52</sup>

**When Seeking Assistance From Police.** The lack of a competent response from law enforcement when transgender people seek assistance can unfairly push some transgender people into the criminal justice system or immigration enforcement system. When transgender people seek assistance from the police, particularly in instances of intimate partner violence or a hate crime, they are often met with a lack of understanding. Sometimes they are even arrested alongside, or instead of, the perpetrator.

According to a 2014 study by the National Coalition of Anti-Violence Projects (NCAVP), transgender women and transgender people in general, are among the most at risk for severe violence.<sup>53</sup> Further, transgender women and transgender people of color were each

1.6 times more likely to experience physical violence than other LGBT people and people living with HIV.

Transgender women and transgender people of color are

**1.6x**

more likely to experience physical violence

Even with the high levels of violence they experience, NCAVP's report found that transgender women were less likely to report hate violence incidents to the police than were other survivors—probably because of poor treatment by police.<sup>54</sup> The National Transgender Discrimination Survey, for example, found that 46% of respondents reported being uncomfortable seeking assistance from police, likely resulting from high rates of experienced harassment or disrespect by police described above.<sup>55</sup>

When transgender people do seek out assistance from law enforcement, they often do not have their complaint taken seriously or are not responded to quickly. Police may blame the transgender survivor for crimes against them, particularly in cases involving transgender people whom police officers may see as engaging in “gender fraud.”<sup>56</sup> In addition, there have been documented cases where a transgender person involved in a hate incident was charged with a crime for defending themselves against a perpetrator, while the perpetrator was not charged.<sup>57</sup>

## Story: Transgender Man Imprisoned for Fighting Off Rapist



Ky Peterson, a black transgender man, is serving a 20-year sentence for involuntary manslaughter in the Pulaski State Prison in Georgia. His crime? He defended himself when he was being raped by a stranger.

On October 2011, Ky was walking home from a gas station. He was frequently harassed by strangers and had been raped before, so he kept a gun in his bag for protection. After ignoring the advances of a man drinking outside the gas station, Ky passed some abandoned buildings. There the man, Samuel Chavez, hit Ky over the head and raped him while screaming homophobic slurs. Ky's brothers heard his screams and helped pull Chavez off of Ky. As Chavez came charging toward him again, Ky shot the man.

Immediately, Ky wondered what to do. Would the police see him as a rape survivor who defended himself with the help of his brothers? Or would police see the young black men as thugs?

A rape kit came back positive and confirmed what Ky had told the police—he had been raped and had defended himself. Nevertheless, he was arrested for possession of a firearm and for shooting his rapist. Ky spent 366 days in the county jail awaiting formal charges. He wasn't given an opportunity to meet with a public defender.

Once he was formally charged, Ky met with a public defender who advised him to plead guilty to involuntary manslaughter. Ky's public defender had more than 200 active cases at the time and wasn't able to devote much time to the case. Ky's attorney told *The Advocate* he thought Ky had two strikes against him. "Number 1, you're African-American," the attorney recounted saying to Ky. "And these little old white ladies in South Georgia think that if [they] see an African-American outside their own neighborhoods, [they] need to be careful." The second strike, the attorney said, was that Ky looked "stereotypically gay." "The fact you're gay will be an issue that I have to address early on," the attorney recalled telling Ky. "That's two strikes that are against us from the get-go. And that factored extensively into my and my investigator's discussions about the case." Ky never told his public defender that he was transgender.

Ky was placed in a women's prison and is frequently harassed. "My identity [as a trans man] has not been respected at all. The officers still address me as 'ma'am,' which I don't like at all. But I have to go by it, because that's their rules that I have to go by," Ky told a reporter for *The Advocate*. "Here the staff's like 'girl' this and 'girl' that, and I have to catch myself sometimes like, 'You must be talking to someone behind me.' It's just not what I'm used to, even at home. Once I make it known to them [that I'm a trans man], it's always something extra like, 'No, you're just gay.'" Ky struggles with depression, and has yet to receive follow-up care or counseling related to the rape. There are also substantial delays in receiving routine medical care, including asthma medication, which took seven months for Ky to receive. In January 2016, Ky was finally approved to begin testosterone.

Adapted from Sunnive Brydum and Mitch Kellaway, "This Black Trans Man Is in Prison for Killing His Rapist," *The Advocate*, April 8, 2015.

### Story: Transgender Man in Georgia Assaulted by Police



In East Point, Georgia, on October 23, 2014, Juan Evans was pulled over by police for speeding. An African American transgender man, he provided extensive information in response to the officers' questions. Since he didn't have his wallet with him, he offered his birth name, birthdate, social security number, and address. He disclosed to police that he was transgender after one of the officers accused him of lying.

The officer responded by demanding to search Juan and examine his genitals to determine whether he was a man or a woman. When Juan refused, he was arrested and taken to the police station where he was harassed by staff and outed, including being threatened with additional genital searches.

Adapted from Mitch Kellaway, "WATCH: Georgia Trans Man Called 'It' by Police Pushes for End to Harassment," *The Advocate*, November 2, 2014.

### Story: Chicago Woman Charged with Attempted Murder For Defending Herself During Hate Crime

Photo permission from Windy City Times



On March 28, 2012, Eisha Love and Tiffany Gooden parked near a gas station in the Austin neighborhood of Chicago, Illinois. Eisha wanted to pick up a birthday present for her mom. Two men approached the women, including one who was verbally assaulting Eisha. As black transgender women in Austin, this wasn't surprising to her and Tiffany. Eisha says she was frequently harassed, but she learned to keep her head down and ignore her harassers.

The men continued bothering Eisha and Tiffany, and then one of the men punched Eisha in the face. When she heard one of the men calling friends for some support, Eisha realized they were in real danger, so Eisha and Tiffany ran for their car and drove away.

After the men gave chase both on foot and by car, Eisha lost control of her car, swerving and hitting one of the men. The man limped away and was later treated for a broken leg. Certain that the men were going to kill them, Eisha and Tiffany left their car and ran, finding a hiding spot from which she called her mother.

Later, Eisha and her mother returned with police to the location where the car had been left and explained what happened. Some of the men who had been involved were there, too. As Eisha arrived, several of the men pointed to Eisha and said, "There's the faggot that did it," and "We're going to get you."

Eisha was told to go to the police station. She thought the police would investigate her attack, but instead she was booked and ultimately indicted on charges of attempted first-degree murder and aggravated battery. Eisha spent three years and nine months in jail without a trial before being released in December 2015 after accepting a plea of guilty for aggravated battery. While in a maximum security men's jail, Eisha was verbally harassed and attacked by a correctional officer.

Several months after the incident, Tiffany Gooden was found dead in an abandoned building. She'd been stabbed. Her mother told a *Windy City Times* reporter that a friend of Tiffany's told her that someone was looking for Tiffany. "They were saying they was going to kill her. They were saying they were going to 'get his' ass because 'he' was riding in the car." Another transgender woman, Paige Clay, was murdered just a few blocks from where Tiffany's body was found a few weeks earlier.

Adapted from Gretchen Rachel Blickensderfer, "Trans\* Woman Claims Self-Defense in Case," *Windy City Times*, September 17, 2014; Gretchen Rachel Blickensderfer, "A Tale of Two Murders: Connected or Not?," *Windy City Times*, September 24, 2014; Gretchen Rachel Hammond, "Transgender Woman Released from Jail after Nearly 4 Years without Trial," *Windy City Times*, December 17, 2015.



## Transgender People Caught at the Intersections of the Immigration and Criminal Justice Systems

There are an estimated 267,000 LGBT-identified undocumented individuals in the United States.<sup>58</sup> And there are an additional 637,000 LGBT-identified documented immigrants, including those with green cards.<sup>59</sup> According to the National Transgender Discrimination Survey, of all transgender and gender non-conforming respondents, 4% in total were non-citizens, including 2% who reported they were undocumented.<sup>60</sup>

Transgender immigrants are frequently caught at the intersections of the immigration and criminal justice systems with troubling outcomes both in terms of their ability to stay in the United States and for how they are treated by the system.

**Background on immigration system.** While it is not part of the criminal justice system, the immigration system in the United States functions as a justice system in many ways, relying on immigration enforcement officers and even law enforcement officers, immigration courts and attorneys, and immigration detention facilities. Programs such as the Priority Enforcement Program rely on local law enforcement to transfer certain immigrants over to immigration enforcement officials. Some of the more than 250 ICE detention facilities are even comprised of space rented from city or county jails and prisons.<sup>61</sup>

Individuals can enter federal immigration custody if they are apprehended at the border or at a port of entry, through immigration raids, being stopped by law enforcement, or after being convicted of certain crimes. For example, undocumented immigrants who are arrested by police or detained by immigration officials may be held in an immigration detention while awaiting deportation proceedings, asylum applications or other judgments. Documented immigrants, including those with a green card, can be detained and have deportation proceedings commenced for convictions of certain categories of crimes. ICE has broad authority to detain individuals without legal status to be in the United States, including those who are awaiting a determination of whether they should be deported and those awaiting deportation.<sup>62</sup>

**Transgender immigrants may be at increased risk of interaction with law enforcement.** As noted above, heightened policing and profiling by police of immigrants, people of color, and LGBT people mean that LGBT people of color, particularly transgender women of color, may be more likely to be targets of law enforcement. Several immigration enforcement programs encourage collaboration between law enforcement and immigration enforcement. These programs can result in the detention and deportation of transgender immigrants, many of whom are returned to countries where they can face discrimination, persecution, and even death.

**Transgender immigrants are frequently detained.** It is likely that LGBT people are overrepresented in immigration detention facilities because of the number of LGBT people, particularly transgender women, who come to the United States to seek asylum based on persecution in their home countries based on sexual orientation, gender identity, and/or HIV status.

Many immigrants, particularly those who are detained or surrender at a border seeking asylum, are placed in immigration detention facilities. Some immigrants are subject to statutory mandatory detention, such as individuals with certain criminal convictions. However, ICE policies state that individuals who are found to have “credible fear” of persecution or torture if deported to their home country and who pose no flight risk or are no danger to the community should be eligible for release to await future immigration hearings.<sup>63</sup>

NOTE: This section is designed to be a broad overview of the intersection of the criminal justice and immigration systems and how transgender people are treated within immigration detention facilities. For a deeper discussion and more information, see these resources from the [Movement Advancement Project](#) and the [Center for American Progress](#) (2016); [Human Rights Watch](#) (2016); and the [Center for American Progress](#) (2013).





Despite this, research shows that LGBT undocumented immigrants, including asylum seekers, are more likely to be detained, compared to the general population of asylum seekers, putting them at increased risk for harassment, sexual assault, and lack of adequate medical care. A 2015 report by the Center for American Progress found that 68% of LGBT asylum seekers were detained, despite the fact that 70% of all cases were to be considered for release.<sup>64</sup> In a 2016 report by Human Rights Watch, nearly half of the transgender women held in immigration detention indicated they were detained because of low-level criminal convictions, such as sex work, false identification, or minor drug possession.<sup>65</sup> According to another investigation by the Center for American Progress, ICE documents showed that between October 2013 and October 2014, 104 immigrants told ICE they were afraid of being put in detention because of their sexual orientation and/or gender identity.<sup>66</sup> Of these, 81 were placed in detention anyway. Even when bond is available, since the ability of an individual to pay is not taken into account bond amounts are often set far too high for detainees to afford, resulting in transgender people remaining in detention for months, even years, simply because they are too poor to post bail.

**Transgender people lack adequate counsel while in detention and challenges upon release.** While criminal defendants, particularly those facing a potential prison or jail sentence, are generally entitled to legal representation even if they cannot afford it, individuals in immigration proceedings are not guaranteed counsel. Lacking counsel has serious consequences, particularly in complicated situations, like asylum cases or other instances where deportation could put an individual at grave risk, such as a transgender people from a country where she may be treated harshly. Research finds that a key factor in whether a person going through removal proceedings was ultimately deported was access to counsel.<sup>67</sup>

During immigration court hearings, judges must make decisions about whether individuals should be able to remain in the United States or be deported. In asylum cases, in particular, there are numerous examples of judges showing a basic lack of understanding of the challenges facing transgender people in other countries. Immigration attorneys frequently hear judges refer to transgender asylum seekers using the wrong pronoun or using an applicant's legal name even after they have been told that an individual uses a name in accordance with their gender identity.

When a transgender person enters the United States seeking asylum from persecution, they have to complete an application within a year. Asylum seekers are not eligible for many public assistance programs and cannot work legally for at least 180 days after filing their application. As a result, they often struggle to make ends meet. Some rely on informal support networks, while others may work in survival economies, increasing their chances of arrest and prosecution. There are very few services available to asylum seekers in general upon release, and particularly for transgender individuals, there are even fewer culturally competent organizations providing direct relief. And when an individual has been convicted of drug offenses, crimes of moral turpitude, and other crimes, they can become ineligible for asylum.

**Transgender immigrants are frequently mistreated in immigration detention facilities.** Much like the inhumane and unsafe conditions described later in U.S. prisons and jails for transgender people, transgender people face extraordinary difficulties in immigration detention facilities.

*Unsafe placement.* In immigration detention facilities, LGBT detainees, particularly transgender detainees, are frequently placed in isolation or in segregated units. In some cases, this placement happens immediately when an individual identifies as LGBT or is identified by staff as LGBT; it also happens in response to a safety concern.<sup>68</sup> Complaints about the treatment of LGBT detainees prompted ICE to create a specialized facility to house LGBT immigrants at the Santa Ana City Jail in California.<sup>69</sup> Staff in this facility have received specialized training, but the number of beds is limited and individuals are transferred there only when space permits and it has been determined that the unit is the only safe option for a particular detainee.<sup>70</sup> Even at this facility, there continue to be complaints by transgender detainees about mistreatment, including strip searches, failure to provide medical attention, and lack of access to necessary medical care related to gender dysphoria.<sup>71</sup> For LGBT detainees housed at the other hundreds of ICE facilities around the country, including many contract facilities in county or city jails or state prisons, being placed in isolation or in units that do not correspond with one's gender identity is a frequent occurrence.



Despite PREA regulations, which are binding on the federal government, transgender detainees in immigration detention facilities are frequently housed in units according to the sex on their birth certificate rather than their gender identity, putting their physical safety at risk.<sup>72</sup> According to the Government Accountability Office, 20% of substantiated assaults in immigration facilities involved transgender detainees.<sup>73</sup> When transgender detainees are placed in units that do not reflect their lived gender, it can present challenges in seeking asylum. For example, if a transgender woman detainee is unable to wear clothing in accordance with her gender identity, it can make her asylum case less persuasive to judges, many of whom conduct hearings via videoconference.

In June 2015, ICE released guidance on the treatment of transgender detainees.<sup>74</sup> Specifically, the guidance requires officials to explicitly ask detainees if they identify as transgender. If the answer is yes, officials are advised to consider placing transgender detainees in facilities that have capacity to provide medical care and appropriate placement for transgender people. Recent evidence continues to show, however, that transgender detainees are continuing to be put at risk for inappropriate placement, sexual violence and harassment, and lack of medical care.

*High rates of physical and sexual assault.* Transgender women, in particular, face safety concerns within immigration detention facilities. In a U.S. Government Accountability Office study of substantiated sexual abuse and assault allegations in Immigration and Customs Enforcement detention facilities between October 2009 and March 2013, 20% of cases involved transgender detainees.<sup>75</sup> This is despite the fact that transgender detainees comprise a small percentage of individuals detained overall (less than 10%).<sup>76</sup>

Transgender people, in particular, are extremely vulnerable within immigration detention facilities. Many are seeking asylum from their home countries where they are persecuted for who they are, and yet they are placed in detention facilities with individuals from those same countries and who may carry the same hatred toward them. According to a study by the Center for American Progress, more than half of the complaints by LGBT detainees to the Department of Homeland Security's Office of Inspector General over a five-year period included reports of sexual or physical abuse.<sup>77</sup> A 2013 analysis found that transgender people comprise one out of every 500 individuals in immigration detention, but one out of every five confirmed sexual assault incidents involved a transgender person.<sup>78</sup>

*Lack of necessary medical care.* In immigration detention facilities, medical care for all detainees, including LGBT people, has been consistently considered substandard, even for basic care. In July 2015, several organizations filed a complaint with the Department of Homeland Security about the lack of adequate medical care provided to individuals detained in facilities in Texas and Pennsylvania.<sup>79</sup> Included in the complaint were examples of individuals waiting up to 14 hours for medical care, never receiving follow-up care, and not receiving prescribed medications.

Individuals with HIV have reported difficulties continuing their medical regime while held in immigration detention facilities. For example, Bamby Salcedo, a transgender Latina immigrant from Mexico, was placed in the San Pedro Detention Center in California for 45 days. She'd been taking an HIV antiretroviral drug, which she needed to take twice a day. Even after notifying authorities upon arrival of her medication needs, she did not receive the drug for two weeks.<sup>80</sup>

In some instances, transgender detainees in immigration detention facilities are required to prove they had been receiving medical care related to gender dysphoria, such as hormone therapy, before entering ICE custody. But, particularly for individuals seeking asylum from home countries where they face persecution for being transgender, this is frequently an impossible standard. Additionally, because of the geographic and physical isolation of immigrants in detention facilities, it can be very difficult to obtain medical records, if they even exist.<sup>81</sup> For individuals who cannot demonstrate that they were receiving hormone therapy prior to being taken into ICE custody, ICE requires an assessment to determine whether treatment is medically necessary. Reports from detainees suggest that even after medical assessment, requests for medical care related to gender dysphoria have been denied.

Advocates argue that LGBT people, particularly transgender women, cannot be detained safely by ICE and should therefore be released to await hearings or deportation proceedings. This would not be unusual; many undocumented immigrants, including those seeking asylum, are released while awaiting immigration hearings.

# TRANSGENDER PEOPLE EXPERIENCE DISCRIMINATION, DISRESPECT, AND VIOLENCE IN THE CRIMINAL JUSTICE SYSTEM

## DISCRIMINATION IN LEGAL PROCEEDINGS



Court staff, judges, and attorneys lack basic transgender competency



Stigma and stereotypes hinder transgender people's ability to get a fair trial

**RESULT:** INCREASED RATES OF INCARCERATION AND LONGER SENTENCES

## UNFAIR AND INHUMANE TREATMENT IN JAILS & PRISONS



### UNSAFE PLACEMENTS

**Result:** Transgender people are frequently placed in facilities that do not reflect their gender identity, putting them at risk for harassment and violence



### HARASSMENT & VIOLENCE

**Result:** Transgender people report high rates of harassment and physical and sexual assault by staff and other inmates



### LACK OF COMPETENT HEALTH CARE

**Result:** Transgender people are refused medically necessary health care



### DISCRIMINATION IN DAILY LIFE

**Result:** Transgender people are unable to express their gender in daily life, including clothing, names, and grooming

## EXPERIENCES OF TRANSGENDER PEOPLE IN THE CRIMINAL JUSTICE SYSTEM

The U.S. criminal justice system is actually a complicated patchwork of systems—federal, state, and local law enforcement agencies, federal and state courts, and federal prisons, state prisons, and local city and county jails as well as juvenile courts and facilities and immigration courts and detention facilities. At all points of contact with the system, transgender people may experience discrimination, disrespect, and all too often violence and inhumane treatment, as shown in the infographic on the previous page.

### Data about Transgender People in Jails, Prisons, and Juvenile Facilities

- Sixteen percent of transgender and gender non-conforming respondents to the National Transgender Discrimination Survey indicated they had spent time in jail or prison, with higher rates for transgender women (21%) and lower rates for transgender men (10%).<sup>82</sup>
- The National Inmate Survey also found that in 2011-2012 there were approximately 5,000 transgender adults currently serving time in adult prisons and jails in the United States.<sup>83</sup>
- In a survey of youth in six juvenile justice jurisdictions across the United States, 15% identified as LGBT or gender non-conforming, and the proportion held fairly steady by race.<sup>84</sup> The rates of detention varied greatly by sex, however; 11% of males identified as LGBT or gender non-conforming compared to 27% of females.
- Statistics about transgender people in immigration detention facilities are difficult to obtain. However, an investigation by the Center for American Progress found that between October 2013 and October 2014, 104 immigrants told ICE they were afraid of being put in detention because of their sexual orientation and gender identity.<sup>85</sup> Of these, 81 were placed in detention anyway.

## Discrimination in Legal Proceedings

Transgender people are frequently mistreated by the justice system. Court and legal staff, including their own attorneys, may be unfamiliar with the issues facing transgender people, at best, and at worst may treat transgender people with disdain and hostility.

For example, judges and court staff may refuse to use a transgender person's correct pronoun or name, setting a dehumanizing tone for what should be a fair process. Of respondents to the National Transgender Discrimination Survey, 12% of transgender and gender non-conforming people indicated they'd been harassed or disrespected by a judge or court official, with transgender women reporting consistently higher rates of mistreatment by judges, courts, and legal service clinics than transgender men.<sup>86</sup> In a survey by Lambda Legal, of transgender and gender non-conforming respondents who had been in court anytime during the past five years, 33% heard a judge, attorney, or other court employee make negative remarks about a person's sexual orientation, gender identity, or gender expression.<sup>87</sup> Transgender and gender non-conforming people of color in the survey reported even higher rates; 53% had heard discriminatory comments in the courts.

In the immigration system, immigration judges must make decisions about whether individuals are to be deported or permitted to stay in the United States. Immigration attorneys frequently hear judges refer to transgender asylum seekers using the wrong pronoun or using an applicant's legal name even when they have been told that an individual uses a name in accordance with their gender identity.

Prosecutors and judges may also use misinformation and stereotypes during trials to persuade judges and juries of the guilt of transgender people, playing on many people's unfamiliarity with the transgender community. For example, an Oklahoma judge cited his belief that transgender people were "fraudulent" for seeking to change their names, and he quoted Bible passages in his opinions.<sup>88</sup> An appellate court later overturned the judge's rulings prohibiting transgender people from changing their names.<sup>89</sup> In Lambda Legal's survey, one quarter (26%) of transgender and gender non-conforming respondents who had been in court in the past five years indicated their gender identity had been raised

## Story: Discrimination in the Justice System—Harmful Comments from Her Own Attorney



Destiny, a 16-year-old African American transgender girl, became involved with the juvenile court system at age 12. Over the course of the next four years, she repeatedly re-entered the system for shoplifting women's clothing and jewelry and fighting back against abuse at school. Even though Destiny had not committed any violent or sexual offenses, the court ordered that she be housed in the state's highest-security juvenile facility for boys because no other placement would accept a transgender girl.

During the year she was incarcerated, Destiny was regularly sexually assaulted and physically threatened by other youth, harassed by staff, and punished for her gender expression. Destiny's court-appointed attorney never advocated for programs to meet her needs and never challenged the abusive conditions of her confinement. Despite his refusal to advocate on her behalf, the court denied Destiny's requests for a new attorney.

The National Center for Lesbian Rights (NCLR) subsequently agreed to represent Destiny. When NCLR submitted a report with local co-counsel about the sexual assaults perpetrated against Destiny, her court-appointed attorney remarkably suggested to the judge that Destiny was exaggerating. He told the judge, "I think this young man has a lot of things—and I use the word man—to think about so I would just ask the court to be cautious in any decision that it makes."

Not only had the court-appointed attorney demonstrated a complete disrespect for Destiny's gender identity and failed to act when he became aware of Destiny's abuse, he argued in favor of continued commitment in the facility where she was clearly unsafe. As a result, the court continued Destiny's commitment at the facility until she completed the program.

Excerpted from Katayoon Majd, Jody Marksamer, and Carolyn Reyes, "Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts," Legal Services for Children, National Juvenile Defender Center, and National Center for Lesbian Rights, October 16, 2009.

as an issue in court when it was not appropriate, and 21% had been "outed" against their will in court.<sup>90</sup>

In short, transgender and gender non-conforming people may not receive adequate, fair representation and that increases the likelihood that they will spend time in a detention facility and eventually be convicted of a crime.

## Unfair and Inhumane Treatment in Jails and Prisons

The harassment, abuse, and discrimination that many transgender people experience in their communities—which puts them at increased risk for involvement with the criminal justice system—is heightened in confinement settings, like prisons, jails, and immigration detention facilities. Many correctional professionals receive no or only minimal training in how to work with transgender people, despite clear guidance from the federal government through the Prison Rape Elimination Act (see sidebar) identifying transgender people as particularly vulnerable in confinement settings. There are several key issues that

arise for transgender people in prisons and jails: unsafe placement, harassment and assault by facility staff and other incarcerated people, lack of health care, and general disrespect for transgender people in daily life. For transgender and gender non-conforming people placed in immigration detention facilities, many of these issues are similar. For more about these facilities specifically, see pages 15-17 and the resources listed at the bottom of page 15.

## Unsafe Placement

Transgender people are almost exclusively placed in facilities based on their external anatomy or the sex recorded on their birth certificates. In other words, transgender women are almost always placed in men's facilities and transgender men are frequently housed in women's facilities. According to a study of California Department of Corrections facilities, over three-quarters (77%) of transgender people in men's prisons identified as women and lived their lives as women outside of prison.<sup>91</sup> Despite PREA regulations, which are binding on the federal government and its confinement facilities,



transgender detainees in immigration detention facilities are frequently housed units according to their external anatomy, not their gender identity, putting their physical safety at increased risk, as discussed below.

**77%** of transgender people in men's prisons identified as women and lived their lives as women outside of prison

Placing transgender women in a men's prison not only ignores how these women understand themselves and live their lives, it also greatly increases the risk of harassment and violence by other incarcerated people and staff.

Unsafe placements also make it more difficult—if not impossible—for transgender people to receive appropriate services, including access to gender-specific clothing, personal care products, and medical care such as hormone therapy. When placed in facilities that are incongruent with their gender identity, every interaction with correctional officers too often results in a transgender person's gender identity being ignored.<sup>92</sup>

Some prisons and jails frequently place incarcerated transgender people in isolation or segregation using the rationale of "safety."<sup>93</sup> However, segregating or isolating incarcerated people for long periods of time not only has serious mental health consequences, it also limits their ability to access programs and services available to the general prison population. Segregation also further stigmatizes transgender people—highlighting their status and increasing hostility.<sup>94</sup> Additionally, when prisoners are placed in protective custody or isolated, they can be at increased risk for harassment and abuse

by correctional officers because of reduced visibility and oversight. Placement in solitary confinement has documented negative outcomes for incarcerated people, including physical and mental health risks, such as higher risk of suicide attempt. For this reason, the U.S. Department of Justice released a report in late 2015 calling for limited use of restrictive housing.<sup>95</sup>

In Black and Pink's 2015 survey of 1,100 LGBTQ prisoners currently incarcerated, nearly all respondents (85%) had been placed in solitary confinement during their time in prison or jail. The survey also found that transgender women are put into solitary confinement against their will at the highest rates.<sup>96</sup>

### Harassment and Assault by Facility Staff

Incarcerated transgender people report high levels of unnecessary searches, including strip searches, which are demeaning and can increase the risk of harassment and violence by other incarcerated people and correctional staff.<sup>97</sup> Additionally, because transgender people are frequently placed in facilities that do not reflect their gender identity, they may be subject to cross-gender searches and monitoring, making them particularly vulnerable to sexual assault. A Bureau of Justice Statistics survey conducted in 2011-2012 found that 16.7% of transgender people in prisons and jails reported being sexually assaulted by facility staff in the previous 12 months compared to 2.4% of all incarcerated adults.<sup>98</sup> This mirrors findings from a survey of transgender women in men's prisons in California in which 14% reported being sexual assaulted by a correctional staff member.<sup>99</sup>

#### SPOTLIGHT



### New Transgender Unit on New York City's Rikers Island

In November 2014, Rikers Island, which houses nearly 11,400 individuals held by the New York City Department of Corrections, opened a 30-bed facility specifically for transgender women. As deputy commissioner for the city's Department of Corrections, Erik Berliner, explained, "We are finding ways to keep people safe, giving them a place where they don't have to worry about being themselves. This is a place that can be sensitive to them. It is the right time for it. We are reassessing everything about safety and security."<sup>100</sup>

Several LGBT advocacy and legal organizations, including the ACLU and the Sylvia Rivera Law Project, provided input and advice in the design of the facility. Placement in the facility is voluntary. Staff have been trained on transgender issues, and the facility is designed to provide supportive and social services to the transgender women housed there.

Adapted from from Andy Humm, "Exclusive: Rikers Ready With Housing Unit for Some Trans Inmates," *Gay City News*, November 18, 2014.

## The Prison Rape Elimination Act (PREA) and Protections for Transgender and Gender Non-Conforming People

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The 2003 Prison Rape Elimination Act is an important federal law that seeks to reduce sexual assault in confinement facilities across the United States. PREA is groundbreaking in establishing comprehensive standards for federal, state, and local detention facilities. At its core, this law seeks to enforce basic regulations that reduce and eliminate sexual assault within all facilities where individuals are held—both by other incarcerated people and by staff.

### GOALS

TO PROTECT INDIVIDUALS FROM PRISON SEXUAL ASSAULT AND TO UNDERSTAND  
THE INCIDENCE AND EFFECTS OF SEXUAL ASSAULT IN PRISONS

### NATIONAL STANDARDS

**PREA** CREATED A NATIONAL COMMISSION THAT DEVELOPED NATIONAL STANDARDS FOR THE  
DETECTION, PREVENTION, REDUCTION, AND PUNISHMENT OF SEXUAL ASSAULT IN PRISONS.

**PREA** CREATES NATIONAL STANDARDS FOR:

#### STAFFING

- Training and Education
- PREA Coordinators
- Supervision and Monitoring
- Minimum Staffing Levels

#### STAFF-INMATE INTERACTIONS

- Searches and Privacy
- Reporting and Investigations
- Discipline

#### REDUCING RISK

- Risk Assessments and Screenings
- Added protections for youth
- Educating inmates about protections and complaint processes

#### DATA COLLECTION

- Audits
- Annual review and analysis of incidence and effects by Bureau of Justice Statistics

### HOW



#### LEGAL

Federal facilities are bound by PREA, and other jurisdictions may be legally bound



#### STICK

Facilities that don't comply risk losing Department of Justice funding



#### CARROT

States and local governments can apply for additional funding for implementation



#### ACCREDITATION

Accrediting organizations must include standards or risk losing funding



#### TRAINING

PREA Resource Center and others provide technical assistance and trainings



#### DATA

Analyses examine differences in reports of sexual assault by facility and jurisdiction

PREA includes standards for the placement of LGBT and intersex people, how they should be treated by staff and other incarcerated people, and standards for ensuring their safety. Specifically for transgender people, PREA sets the following standards:

- **PLACEMENT.** Placement decisions in all settings should be individualized and should take into consideration an individual's safety as well as the overall safety and day-to-day operations of the facility. All adult prisons and jails must conduct an intake screening within 72 hours of arrival to assess risk for sexual victimization and abuse, including whether an individual is, or is perceived to be, LGBT or gender non-conforming. This is based on the fact that LGBT people in prisons and jails are at increased risk for sexual assault. Additionally:
  - LGBT and intersex people may not be placed in "facilities, units, or wings solely on the basis of such identification or status";

## The Prison Rape Elimination Act (PREA) and Protections for Transgender and Gender Non-Conforming People

(continued)

- Individualized decisions must be made in the placement of transgender and intersex people in men's and women's facilities, taking into consideration an individual's health and safety and overall facility management and safety;
- Transgender people must have opportunities to shower separately;
- Placement decisions must be assessed at least twice a year for transgender and intersex people;
- Staff may not search or examine a transgender or intersex person with the sole purpose of determining genital status.

In March 2016, the National PREA Resource Center released guidance clearly stating that any written policy or actual practice that assigns transgender people to gender-specific facilities solely because of their external anatomy is in violation of PREA.<sup>101</sup> Rather, placement decisions are to be "truly individualized, case-by-case assessments." Unfortunately, few prison or jail systems have complied with this standard to date.

PREA is significant for LGBT people, and transgender people in particular, given the high rates of violence against transgender people in confinement facilities. The law explicitly identifies LGBT people as a vulnerable population and provides specific guidance and regulations as to how LGBT people should be treated and protected. The law applies to both facilities housing adults and those housing young people, though it applies a little differently across different levels of government.

- **Federal facilities.** The law is mandatory for all federal facilities, including prisons, immigration detention facilities, and other confinement facilities with a contract with the federal government, such as state prisons or county jails, to house federal prisoners or detainees.
- **State facilities.** PREA's standards are binding on state prisons, but the federal government has a limited ability to enforce these requirements. States that do not certify that they have adopted the standards and are in compliance across all their facilities—or at least working to be in compliance—risk losing federal funding, but would not face other consequences from the federal government.<sup>102</sup>
- **Local facilities.** Although PREA states that all confinement facilities are required to follow PREA standards, compliance of local jails is difficult to ensure, especially since state agencies do not generally regulate local jails.<sup>103</sup> Local county and city jails that do not contract with federal or state governments will not face financial penalties for noncompliance. However, local jails that house state detainees or that do contract with the federal government (including Immigration and Customs Enforcement) must comply with PREA standards or face financial penalties, including the loss of such contracts.
- **Immigration detention facilities.** Because immigration detention facilities are operated by the federal government, they are bound by PREA standards.<sup>104</sup> U.S. Immigration and Customs Enforcement, a division of the Department of Homeland Security, also sets forth its own detention standards through the Office of Detention Policy and Planning.<sup>105</sup> Many immigrants in detention are not held in facilities owned by ICE but operated under contract with ICE, such as private facilities or local jails. These facilities are technically bound by PREA standards, but the Department of Homeland Security has taken a more relaxed approach to requiring them to meet standards. Some are only required to meet PREA or department standards when contracts are renegotiated or there are "substantial contract modifications."
- **Accrediting agencies.** Agencies that accredit correctional facilities risk losing their federal grant funding if they do not incorporate PREA standards into their accreditation. In other words, if an agency accredits an institution that does not adhere to PREA standards, it risks losing federal funding.

## The Prison Rape Elimination Act (PREA) and Protections for Transgender and Gender Non-Conforming People

(continued)

As of May 15, 2015, the deadline by which states had to submit certifications or assurances of compliance with PREA, 11 states were fully in compliance; 34 states and the District of Columbia submitted assurances they were working toward compliance.<sup>106</sup> Four states—Alaska, Arkansas, Idaho, and Utah—declined to submit such certifications or assurances and were subject to the 5% decrease in federal grant funding as a result.<sup>107</sup>

Despite the majority of states certifying they are either fully PREA compliant or working toward PREA compliance, there is little evidence to suggest that conditions for transgender people in these facilities have changed and meet the requirements set forth by PREA.<sup>108</sup> For example, the majority of facilities continue to house transgender people in facilities based on their external anatomy. In some cases, the reality on the ground for transgender people in these facilities may differ from the official policy in that state and in other instances, the state has certified it is compliant but has done little to update policies or practices within their facilities. Advocates, including the Transgender Law Center, continue to receive complaints from transgender people in prison who have experienced sexual and physical assault, including those who have been raped multiple times. Yet, to date, no facility has failed a PREA audit.

Although there are no financial penalties for noncompliance with PREA at the local level, many county and city jails have worked to incorporate PREA standards into their facilities, including in states that have not certified compliance with PREA standards for their state facilities.

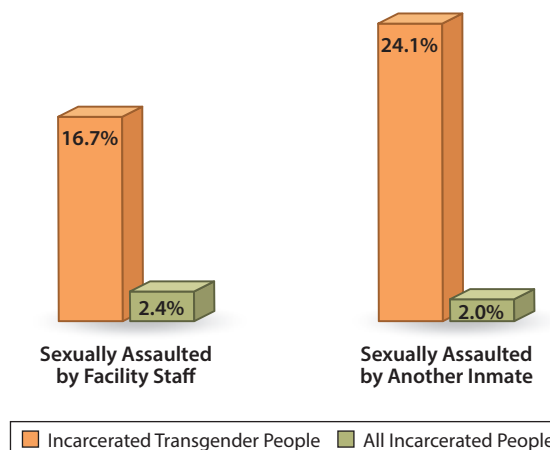
### Harassment and Assault by Other Incarcerated People

Transgender people in prisons are also at increased risk for violence and sexual assault by other incarcerated people. For example:

- The 2011-2012 National Inmate Survey found that 24.1% of transgender people in prisons and jails reported being sexually assaulted by another inmate, compared to 2.0% for all people.<sup>109</sup>
- Of those transgender women in the National Transgender Discrimination Survey who reported being incarcerated at some point during their lives, nearly half (47%) reported being harassed or assaulted in prison or jail; black, Latina, and mixed-race transgender women were more likely to be victimized than white transgender women.<sup>110</sup>
- In a survey of transgender women placed in men's prisons in California, more than half (59%) had been sexually assaulted compared to 4.4% of all male respondents—meaning that transgender people were 13 times more likely to be assaulted than incarcerated men.<sup>111</sup> Officers and guards were less likely to be aware of the incidents involving transgender people (29% compared to 61% of incidents involving all incarcerated people in the same facilities).<sup>112</sup> In a follow-up study two years later, researchers found that

the same percentage of transgender people reported sexual victimization (59%).

- According to the Government Accountability Office, 20% of substantiated assaults in immigration detention facilities involved transgender detainees.<sup>113</sup>



## Story: Passion Star's Fight For Safety in a Texas Prison



Self portrait printed with permission from Lambda Legal

Passion Star, a black transgender woman, has been in Texas Department of Criminal Justice prisons since 2003, when she pleaded guilty to a felony and was sentenced to 20 years in prison. Since that time, Passion has been in at least six male facilities, where she has endured sexual assault with little response from correctional staff.

For example, a gang member threatened to hurt her if she didn't perform sexual acts or pay him with commissary items. Passion complained to prison staff, telling them she feared for her safety. They did nothing, but instead disciplined her for refusing to leave her cell out of fear. In another incident, Passion was harassed by her cellmate. Guards did nothing, and a few days later, she was raped. She was moved to solitary confinement for two weeks after reporting the incident. In another facility, after telling

staff about her fear for her safety, a guard told her, "You can't rape someone who's gay." Multiple sexual assaults have followed, and she once was violently attacked with a razor blade, requiring 36 sutures to her face.

Passion wrote to prison officials in November 2013: "I am gay and have been taken advantage of in the past. ... TDCJ does not control the gang-influenced general population enough to ensure ... homosexual offenders' safety from being assaulted, threatened or extorted." In July 2014, she wrote again to officials: "I have been told that I will be killed if I remain in population." A prison official responded to her fears by telling a committee, "It's a man's prison. You can't expect to walk around acting like that and not have problems."

After meeting with an attorney for Lambda Legal about her experiences in the prison in July 2014, Passion was placed in solitary confinement and remained there for more than 80 days. She was unable to attend church or work, or to speak with her family.

In November 2014, Passion was transferred to a different prison and again placed in the general population. In March 2015, after legal advocacy by Lambda Legal, Passion was finally placed in safekeeping, a status that increases attention paid to her safety but is not solitary confinement.

Adapted from "Complaint: Star v. Livingston," Lambda Legal, October 23, 2014.

### Lack of Access to Health Care

Health care in prisons, jails, and immigration detention facilities varies greatly, but transgender people in these settings face difficulty accessing competent, appropriate transition-related health care. For example, even when hormone therapy or surgery is deemed medically necessary, some officials may delay or deny this care. As noted on page 17, for transgender immigrants held in immigration detention facilities, it can be extremely difficult to prove that one was receiving medical care related to gender dysphoria and evaluations by facility medical staff are frequently used to deny such care. Given the incomplete or inadequate medical care that confinement facilities often offer to transgender prisoners, some have turned to courts to seek the care they need. An article published in the *Journal of Correctional Health Care* examined letters written by transgender people in state and federal

facilities to the *TIP Journal* (Trans in Prison).<sup>114</sup> Of 129 letters examined, 55% addressed transgender health issues and 42% reported abuse (23% involving physical abuse or harassment and 19% involving sexual abuse by other incarcerated people, corrections officers, or both).

### Disrespect in Daily Life

In addition to denying transgender people access to medically-necessary health care, failing to ensure their physical safety, and placing them in facilities that do not reflect their gender identity, many facilities do not allow transgender people the ability to express their gender.<sup>115</sup>

For example, some states prohibit incarcerated people from changing their names or having access to cosmetics and gender-appropriate clothing, such as bras for transgender women housed in men's facilities, even if such items are available to incarcerated women.<sup>116</sup> If



## Access to Transgender-Related Health Care Across the Country

Individuals in state prisons and local jails have varied access to transgender-related care. For example:



California is home to the only two prisons in the country that have a physician dedicated to providing competent care for transgender people, including hormone therapy.<sup>117</sup> They are: the California Medical Facility, a California Department of Corrections facility located in Vacaville that provides medical and psychiatric health care for male prisoners in California prisons; and the California Men's Colony in San Luis Obispo.

In August 2015, the California Department of Corrections and Rehabilitation and the Transgender Law Center reached a settlement in the case of Shiloh Quine, a transgender woman held in a male prison (see page 27 for more about Shiloh's case). As part of the settlement, the state agreed to revise its policies regarding transgender people's access to medically necessary health care, including hormones and surgery. Incarcerated individuals' requests for transition-related surgery are now reviewed by a committee, and requests can be reviewed annually.<sup>118</sup>



Until recently, Wisconsin had a ban on providing hormone therapy to incarcerated individuals who were biologically male at birth but identify as female. In 2010, however, a federal judge found this state law was unconstitutional because it violated the equal protection clause and constituted cruel and unusual punishment by not taking into consideration an individual's medical needs or the judgment of their physicians.<sup>119</sup> This decision was upheld by the Seventh Circuit Court of Appeals.<sup>120</sup>



In 2013, the Illinois Department of Corrections issued an administrative directive regarding the evaluation and treatment of people with Gender Identity Disorder (GID).<sup>121</sup> It states that individuals who self-identify as transgender or who may have GID should undergo a detailed medical and mental health examination within 24 hours of arriving at a facility. Based on these examinations, the Gender Identity Disorder Committee makes decisions about placement, hormone therapy, clothing, showers, and searches. However, any surgery for the purpose of gender confirmation is prohibited unless "in extraordinary circumstances"; and hormone therapy is to be offered only with prior approval from the medical director.

prisoners have prohibited items, they can be punished if they are discovered. As part of a survey of transgender, gender non-conforming, and intersex prisoners by Sylvia Rivera Law Project, a transgender woman reported she'd received a 30-day sentence of solitary confinement for possessing a bra.<sup>122</sup>

Adding to the challenges for transgender people, prisons and other confinement facilities often have grooming standards by which incarcerated people must abide. Incarcerated transgender people placed in facilities in accordance with the sex on their birth certificate rather than their lived gender can face constant struggles. For example, in many prisons there are limitations on hair length for individuals in men's prisons, which may force a transgender woman to cut her hair. Also, they are not permitted access to grooming products listed in the catalog available in the women's prison. Some prisons and jails have begun to develop

more expansive commissary listings. For example in March 2016, the Pennsylvania Department of Corrections released updated general commissary directories, which allow individuals in both male and female facilities to purchase items such as undergarments and make up.<sup>123</sup>

## SPOTLIGHT



## Incarcerated Transgender People Fight in the Courts for Medical Care



Individuals in prison who are diagnosed with gender dysphoria frequently seek medical care to affirm their gender. In some cases, that care includes hormones; for others, it may include surgeries, frequently called “sex reassignment surgeries” or “gender-affirming surgeries.” For transgender people in prison, such medical care can be incredibly difficult to obtain. Several recent legal cases highlight the challenges for transgender people.

In California, the Transgender Law Center represented Michelle Norsworthy, a transgender woman serving in Mule Creek State Prison in California. In 2000, Michelle was diagnosed with gender identity disorder, now referred to as gender dysphoria. Shortly after being diagnosed, she began hormone treatment, which has continued to the present. The prison allows Michelle to shower out of sight from other prisoners, let her hair grow long, purchase and wear brassieres, and use her name Michelle, rather than her legal name.

In 2012, her psychologist concluded that Michelle was still suffering from debilitating symptoms related to her gender dysphoria, including anxiety, sleeplessness, cold sweats, panic attacks, and mood swings. The psychologist affirmed the necessity of a “sex change medical operation before normal mental health can be achieved for this female patient.” Despite these recommendations, the Department of Corrections has refused to authorize treatment for Michelle.

On April 2, 2015, a federal judge ruled that the prison’s denial of medical care violated Michelle’s right to adequate medical care under the Eighth Amendment’s prohibition of cruel and unusual punishment. In its groundbreaking decision, court ordered the state to provide her with medical care, including surgery. However, just a day before a federal court was scheduled to consider the state’s appeal, Michelle was released on parole. She served 28 years and was released to a halfway house.

Just prior to Michelle’s release from prison, the California Department of Corrections and Rehabilitation settled a case with another transgender woman held in a men’s prison, Shiloh Quine. The Transgender Law Center also represented Shiloh. As part of the settlement, Shiloh will be moved to a women’s prison and will receive medically necessary transition-related care, including surgery. The state also agreed to improve conditions for transgender people across its system, including allowing them to purchase clothing and commissary items consistent with their gender identity and to have access to medical treatment for gender dysphoria.

Upon hearing the news of the settlement, Shiloh told the Transgender Law Center, “After so many years of almost giving up on myself, I will finally be liberated from the prison within a prison I felt trapped in, and feel whole, both as a woman and as a human being. I’m just overwhelmed, especially knowing that this will help so many other people. I know I can never truly make amends for what I’ve done in the past, but I am committed to making myself a better person, and to helping others so they don’t have to struggle the way I have.” In October 2015, the California Department of Corrections and Rehabilitation became the first state in the country to adopt a policy for transgender people in prison to access gender affirming surgery.

Prior to these cases in California, in 2014, the First Circuit Court of Appeals reached a 3-2 decision reversing a prior ruling that Michelle Kosilek, an incarcerated transgender woman in Massachusetts, should receive medically necessary gender reassignment surgery.

Adapted from Norsworthy v. Beard et al (N.D. Cal. 2005); “State of CA and Transgender Law Center Reach Historic Settlement over Trans Prisoner Health Care,” Transgender Law Center, August 7, 2015; Kosilek v. Spencer (1st Circuit 2014); “Kosilek v. Spencer,” Gay & Lesbian Advocates & Defenders, May 4, 2015.

## Story: Ashley Diamond's Fight for Safety and Adequate Medical Care

Courtesy: Southern Poverty Law Center/Robin Henson



Ashley Diamond, a black transgender woman from Georgia, was sentenced to 12 years for violating probation for a previous conviction related to a nonviolent offense.

Ashley notified the staff that she was transgender and was receiving hormone therapy upon admission. But despite PREA standards and the Georgia Department of Corrections' own guidelines, she was not evaluated for gender dysphoria, referred for adequate medical care, or given an appropriate placement. Instead, Ashley was placed in a series of facilities designated for violent and dangerous male felons.

Less than a month after her incarceration began, Ashley was sexually assaulted by six inmates and knocked unconscious. She was subsequently moved to prisons considered equally if not more dangerous. At one facility, she was told to guard her "booty" and be prepared to fight. She suffered repeated physical and sexual assaults while in prison—eight sexual assaults in all. Each time she reported the incidents to the staff, but correctional staff did not take steps to ensure her safety. After one sexual assault in early 2014, even after she reported the incident, Ashley continued to be housed with her assailant.

In addition to denying Ashley safekeeping, Georgia corrections officials refused to provide Ashley with transition-related care, despite the fact that she started receiving hormone therapy at age 17 and medical staff recommended that she receive hormone therapy. Correction officials acknowledged Ashley's gender dysphoria and that hormone therapy was necessary treatment, but staff refused to provide her with proper medical care. She was also forced to shave her head. One prison official told Ashley that she had "forfeited the right to receive hormone therapy when she became a prisoner." As a result, Ashley's body underwent extreme hormonal and biological changes, and Ashley experienced mental stress. She attempted suicide and self-castration several times. Ashley explained while incarcerated, "I continue to feel trapped in the wrong body and look more 'male' than I have in my entire life."

Ashley has been harassed and punished for her female gender identity, including being thrown into solitary confinement for "pretending to be a woman." She was frequently told to look and act like a man, and she had her female clothing and undergarments confiscated. One prison official called her a "he-she-thing" in front of other staff and inmates. Another told her, "I am not going to refer to you as Inmate Diamond, you ain't no miss, you're an it."

Even after she filed legal complaints against the State of Georgia with the assistance of the Southern Poverty Law Center, Ashley was sexually assaulted by a cellmate. After reporting the incident, she was threatened and was afraid to leave her dormitory, including for meals.

Under widespread media scrutiny and attention following the lawsuit's filing, Ashley was released from prison in August. In September 2015, a court denied the state's motion to dismiss, finding that Ashley's case seeking safety and healthcare can move forward. And in February 2016, Ashley and her attorneys reached a settlement with the Georgia Department of Corrections.

Adapted from case materials available at *Diamond v. Owens*, et al., available at Southern Poverty Law Center, <https://www.splcenter.org/seeking-justice/case-docket/ashley-diamond-v-brian-owens-et-al>.

# TRANSGENDER PEOPLE FACE EXTRAORDINARY OBSTACLES TO SUCCESSFUL RE-ENTRY

## LACK OF SUPPORT UPON RELEASE LEAVES TRANSGENDER PEOPLE UNPREPARED



### RESTRICTIVE PROBATION AND PAROLE POLICIES

Penalize or even reincarcerate transgender people for their gender expression



### INADEQUATE RE-ENTRY PROGRAMS

Don't provide assistance to address unique challenges for transgender people



### DIFFICULTY OBTAINING NAME CHANGES & ACCURATE ID DOCUMENTS

Make it more difficult to access benefits and find employment

## IMPACT OF A CRIMINAL RECORD COMBINED WITH DISCRIMINATION MAKE RE-ENTRY DIFFICULT



High Rates of  
Unemployment



Increased Risk of  
Homelessness



Lack of Competent  
Medical Care



## BOTTOM LINE:

TRANSGENDER PEOPLE ARE LEFT WITHOUT THE RESOURCES AND SUPPORT NEEDED TO SUCCESSFULLY REBUILD THEIR LIVES. THEY CAN BE TRAPPED IN A CYCLE OF POVERTY, HOMELESSNESS, AND INCARCERATION

## LACK OF SUPPORT UPON RELEASE FOR TRANSGENDER PEOPLE

Rebuilding one's life after being incarcerated is very difficult. For transgender people, there are additional challenges related to a lack of support, lack of legal protection from discrimination, strict probation and parole requirements, and difficulty obtaining accurate identity documents that make rebuilding one's life more challenging, as shown on the infographic on the previous page.

### Restrictive Probation and Parole Policies

When incarcerated transgender individuals may be considered for parole, discrimination by parole board members may result in longer time served. Immigrants, even those in the United States legally, may be deported upon conviction of certain crimes and can be deemed permanently inadmissible to the United States, meaning there are additional penalties if they are found to reenter the country.

Once released from prison and placed on parole or probation, individuals often are required to adhere to strict requirements and regularly meet with a parole or probation officer. Lack of support for transgender people and the rigorous requirements placed on people on probation or parole can contribute in high levels of recidivism among parolees and recently released individuals. For example, there have been cases in which a transgender person's dressing in accordance with their gender identity has resulted in a violation of parole terms.<sup>124</sup> Recently, a transgender woman was released from prison and forced to stay in a men's shelter and faced parole conditions that explicitly prohibited her from dressing as a woman in public.<sup>125</sup>

Some parole conditions include restrictions on travel by individuals. For example, in California, individuals on parole generally must receive permission to travel more than 50 miles from home, leave their "home" county for more than two days, or leave the state.<sup>126</sup> These limitations can be particularly onerous for transgender people and people living with HIV, particularly those living in rural areas. These individuals may not be able to access competent, respectful medical care without traveling. And if a parole officer is not supportive of an individual's gender transition—which is not an unlikely turn of events, given the lack of competency training for law enforcement generally—the officer may not approve a request to travel

or may consider an individual in violation of parole if he or she travels for medical care.

### Inadequate Re-Entry Programs

Federal, state, and local governments frequently contract with private agencies to provide re-entry services to recently released individuals, including job training, re-entry counseling, and residential re-entry centers. Some people who are nearing release are placed in residential re-entry programs, such as halfway houses, where they live for a period of time before being released into the community. As a condition of placement in a residential re-entry program, individuals in these facilities have many aspects of their lives controlled by the facility but are able to go out into the community to find work, to complete job training, or to visit family.

Transgender people placed in residential settings like these report violence and harassment by fellow residents and by staff. In addition, transgender people have been housed in residential re-entry programs that do not match their gender identity, and have had their clothing taken away for violating house policies. Denying transgender people the ability to live their lives authentically makes it all the more challenging for them to focus on addressing the difficulties of having a criminal record, such as finding employment, completing their education, and receiving substance abuse counseling.

Prisons frequently provide assistance to individuals who will be released to help them obtain identity documents, such as a driver's license. For transgender people in prison, it may be nearly impossible to obtain an accurate identity document, which can make accessing services and finding employment and housing more difficult upon release.

### Difficulty Obtaining Name Changes and Accurate Identity Documents

Frequently transgender people seek a legal name change. It is an important step in living their lives and bringing their legal identities in line with how they live every day. As discussed on pages 7-8, there are substantial barriers for transgender people to changing their gender markers, names, and identity documents, which leave them vulnerable to harassment, violence, and discrimination.

For transgender people with criminal records, a criminal record creates hurdles to rebuilding one's life.



## Story: Life as a Transgender Woman in a Halfway House



Printed with permission from Lambda Legal

I am a transgender woman. I first realized that I felt more like a girl than a boy when I was four years old, but it wasn't until 1999 that I started hormone therapy. For the past 15 years, I have lived openly in the world as a woman.

In August of 2010, I was sentenced to two years in federal prison. I began three years of supervised release in April of 2012, but was sent back because I tested positive for drug use. That was a real wake up call for me, and I started attending Narcotics Anonymous (NA) meetings. With hard work and prayer, I have been drug free since April 15, 2013.

In October 2013, I was paroled to The H Group, a halfway house in Marion, Illinois, to complete my sentence and begin a drug rehabilitation program. At the halfway house, I was able to enroll in college, and attend counseling and substance abuse treatment. I was excited about the opportunity to focus on my rehabilitation and to set myself up to succeed once I was released. I was sorry about the actions that had landed me in jail and truly believed that I was capable of more, but the way I was treated at The H Group made it nearly impossible for me to think about the future.

Almost as soon as I started living at The H Group, I was told by the staff members that I was a man, which is not true, and that if I didn't stop acting like a woman, I would be sent back to jail. The staff members addressed me with male pronouns and titles, I was forced to sleep in a room with four men, even though I didn't feel safe, and the staff at The H Group periodically raided my belongings and confiscated anything they viewed as remotely feminine. They took my makeup, clothing, pedicure kit, magazines, and curlers. They even took my pink shower cap. I tried to "take the high road," "turn the other cheek," and "let go and let God," but I was hurt, and I knew this treatment was wrong. Instead of focusing on improving myself to build a new life, I was just focused on surviving each day.

Being the first transgender resident at this facility, I realized that I had the opportunity and responsibility to speak out, not only to protect myself, but to make sure that other transgender individuals aren't discriminated [against] in the same way. After some investigation, I reached out to Lambda Legal, a national LGBT advocacy group. They agreed to advocate for me, but I had to do my part.

On April 21, I filed a formal grievance with The H Group about the way I was being treated. I wasn't convinced that the grievance would cause The H Group to change, but I had learned that if I didn't exhaust The H Group's internal grievance procedure, I could be barred from filing a lawsuit in federal court. There was a tight deadline to file a grievance, but I was able to file the grievance within 20 days of the last raid of my room. In the grievance, I demanded four things: 1) that my personal possessions be returned; 2) that I be allowed to live and present as the woman I am; 3) that staff address and refer to me with feminine pronouns and titles; and 4) that I be removed from the male dormitory. On May 1, Lambda Legal sent a demand letter to the CEO of The H Group with copies forwarded to my probation officer, my U.S. Senator, the regional director of the Bureau of Prisons, and the U.S. Attorney General.

On May 5, I was summoned by the facility director. She extended a formal apology on behalf of the facility. She informed me that all of my personal belongings would be returned, staff would refer to me using appropriate pronouns and treat me with respect, I would start eating meals with the other female residents, and I would be reassigned to a single room. Talk about a grand slam!

I felt proud and grateful. I felt that I had spoken up not only for myself but for transgender women everywhere. When The H Group was refusing to respect me, I felt as though they were forcing me to take a step backward. After my personal items were returned and The H Group staff started treating me as a woman, I found for the first time that I was able to concentrate on the real reason I was at The H Group – treating my substance abuse and preparing myself for my release.

I have since found a job and nice apartment in the area. I have a growing support network in the community, and I love the progress that I'm making with my therapist. I feel like my trust in God allowed me to trust the process and myself.

I hope that my story can help to further transgender rights in correctional institutions. What happened to me should never happen to anyone just because of who they are. I'm thankful I stood up for myself and thankful that Lambda Legal was able to help me.

- Donisha McShan

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For individuals on probation or parole, for example, a judge may require written consent from a probation or parole officer before an individual may change their name. Adding to the challenges, name changes are granted by individual judges. Given a judge's own biases and lack of understanding, they may be unwilling or more hostile toward a transgender individual seeking a name change particularly if the individual has a criminal record. Additionally, 57% of LGBT population lives in states with additional restrictions and/or requirements for name changes specifically for individuals with a criminal record.<sup>127</sup> These laws were created to prevent name changes meant to evade law enforcement, but also create additional barriers for transgender people rebuilding their lives.

**57%** of LGBT population lives in states with additional restrictions and/or requirements for name changes specifically for individuals with a criminal record

## IMPACT OF HAVING A CRIMINAL RECORD ON TRANSGENDER PEOPLE

Individuals exiting prisons and jails with a criminal record, and those who didn't serve time, but who have a criminal record, face substantial challenges in rebuilding their lives. Finding employment and housing, accessing benefits and health care, and reestablishing family connections are all important parts of successful reentry and avoiding the cycle of incarceration. For transgender people, the challenges to successfully rebuilding their lives are substantial—not only do they have a criminal record, but they also face high levels of discrimination because of their gender identity. For immigrants, both undocumented and documented, they may be deported as a result of having a criminal conviction.

### Employment and Housing

Employment and housing discrimination is already particularly problematic for transgender people, and it can become almost insurmountable for transgender people with a criminal record. Not only does the difficulty of finding employment create financial challenges for individuals and their families, but a lack of stable employment is the single greatest predictor of recidivism among individuals with criminal records.<sup>128</sup> Thus, the inability to obtain a job due to a criminal record contributes to the cycle of incarceration.

Formerly incarcerated individuals also struggle to find private housing even if they can afford it. It is estimated that 80% of landlords use background checks to assess prospective tenants, and this unfairly disadvantages individuals with criminal records who pose no safety risk to other tenants.<sup>129</sup> This discrimination is compounded by the high levels of housing discrimination reported by transgender people in general.<sup>130</sup> No federal law explicitly prohibits discrimination in housing based on gender identity, and only 20 states and the District of Columbia have laws outlawing housing discrimination. In federally funded housing programs, however, discrimination based on sexual orientation, gender identity, and family status is prohibited. In early 2016, the U.S. Department of Housing and Urban Development (HUD) released updated guidance indicating that it is illegal to deny housing opportunities based on a criminal record if doing so results in a discriminatory effect under the law, such as a disparate impact on individuals based race or national origin.<sup>131</sup>

Formerly incarcerated people may also face harsh consequences after their release if they are labeled as a "sex offender." Laws labeling people as sex offenders are overly broad and are often applied in a discriminatory fashion to target LGBT people. For example, in Louisiana some transgender women of color report being arrested, charged, and convicted of soliciting "crimes against nature." This is a separate and more serious charge than general solicitation, and multiple convictions for "crimes against nature" require registration as a sex offender. According to a report from the Department of Justice, people convicted of crimes against nature comprise 40% of the Orleans Parish sex registry.<sup>132</sup> Of those convicted, 80% were African American.<sup>133</sup> Labeling individuals convicted of certain crimes as "sex offenders" places serious limitations on individuals convicted of these offenses even after they serve their sentence. These often include limitations on where someone can or cannot live, whether they have to receive ongoing supervision, and whether they must register or be tracked using electronic monitoring, all of which restricts access to employment and housing.<sup>134</sup>

### Health Care

Many formerly incarcerated individuals qualify for government assistance in obtaining health care, such as through Medicaid. However, they may not be aware that they qualify—especially because they were ineligible

while in detention. Adding to the challenge, most states terminate an individual's enrollment in Medicaid following a period of incarceration (typically if the period is longer than 30 days), requiring them to reapply upon release.<sup>135</sup> This application process can take several weeks (or months), causing a gap in coverage and care.

Continuity of coverage and care is particularly important for transgender individuals who are taking hormones and receiving other transgender-related health care. Medicaid exclusions for transgender-related care in many states mean that individuals may have received care while in prison (although as discussed earlier, the availability of this care should not be overstated), but are unable to access appropriate health care upon release.

Research finds that formerly incarcerated transgender people face health issues as a result of incarceration, further underscoring the need for access to health care. A study of transgender veterans who had involvement with the criminal justice system found significant physical and mental health disparities compared to formerly incarcerated veterans who were not transgender. The study suggests there are persistent effects of incarceration on later health outcomes in the transgender population.<sup>136</sup>

## CONCLUSION

The U.S. criminal justice system is severely flawed. Millions of Americans spend time in prisons and jails for non-violent offenses and these facilities do very little to improve their chances for success on the outside.

For transgender people in the United States, the criminal justice system not only fails them but targets them. Pervasive discrimination in virtually all areas of life pushes transgender youth and adults into situations where they are more likely to interact with law enforcement. Bad laws, such as HIV criminalization laws, drug laws, and harsh laws criminalizing sex work, combined with profiling and brutality by law enforcement increase the likelihood that transgender people, particularly transgender women of color, enter the system.

Within the criminal justice system, transgender people experience discrimination by court staff, judges, and juries and violence, inadequate health care, and daily indignities simply because they are transgender. Despite being recognized as a particularly vulnerable population within jails and prisons and federal legislation designed to reduce sexual assault, transgender people in these facilities—and those who have left—continue to report high rates of sexual and physical assault, deplorable lack of healthcare access, and more.

When transgender people exit the system, they face further challenges in rebuilding their lives. Restrictive parole and probation policies may limit their ability to dress in accordance with their gender, to access health care, or even to visit friends. Laws limiting access to accurate identity documents for transgender people, particularly those with a criminal record, mean that simply cashing a check or purchasing groceries can put transgender people at risk for further discrimination and harassment. Finally, the discrimination experienced by transgender people combined with the substantial collateral damage resulting from having a criminal record can make rebuilding one's life extremely difficult. From finding a job to housing to accessing government benefits, transgender people with criminal records find many doors closed to them entirely. The end result is a cycle of law enforcement involvement and incarceration that can be difficult to break.

## More In-Depth Content is Available

This overview about transgender people and the criminal justice system is designed to a primer. For more detailed policy analyses, statistics, stories from youth, spotlights on innovative programs and initiatives around the country, please visit [www.lgbtmap.org/criminal-justice](http://www.lgbtmap.org/criminal-justice).

For example, the following can be found in the broader report, *Unjust: How the Broken Criminal Justice System Fails LGBT People*:

- Detailed recommendations focused on three key areas: reducing the number of LGBT people who interact with the criminal justice system; improving the conditions of confinement for LGBT people; and improving systems to ensure that LGBT people with criminal records can rebuild their lives and avoid the cycle of incarceration.
- Innovative programs from around the country working to address the needs of transgender people who are at risk for involvement in the criminal justice system, such as job training programs for transgender people; LGBT-focused shelters and service providers for individuals experiencing homelessness; programs connecting incarcerated LGBT people with community; and more.
- Key reports, practice guides, and resources.

## RECOMMENDATIONS

Much work is needed to ensure safety, security, and justice for transgender people. The recommendations below are purposefully high-level and broad, but they are key to reducing the drivers of criminal justice involvement for transgender people; to ensuring fair treatment within the justice system and safety, dignity, and healthcare within the confinement facilities; and improving the supports for transgender people with criminal records to improve opportunities and reduce recidivism.

**Work to eliminate discrimination against transgender people across many areas of life, including in families and schools, when seeking employment, housing, healthcare, and public accommodations, and improving access to accurate identity documents.**

- Federal and state lawmakers should pass nondiscrimination laws prohibiting discrimination in employment, education, housing, healthcare, and public accommodations.
- Federal and state laws and school district policies should ensure nondiscrimination in education and prohibit bullying in schools. These laws should, however, also work to reduce the school-to-prison pipeline.
- Federal and state regulators and insurance companies should remove insurance exclusions for transition-related care for transgender people.
- State lawmakers should pass laws allowing transgender people to obtain accurate identity documents; states and localities should issue guidance easing the processes for updating documents.

**Reform and modernize HIV criminalization laws, laws criminalizing consensual sex, and drug laws.**

- States should repeal all laws that criminalize the transmission of HIV and other diseases.
- State and local law enforcement should not criminalize consensual sex between adults ensuring access to condoms without fear that their possession or presence will be used as evidence to justify stops, arrest or prosecution for any prostitution-related offense or lewd conduct-related offense.
- Law enforcement should deprioritize enforcement of laws criminalizing prostitution. Efforts should be made to provide supportive services requested by people in the sex trades, including drug treatment and housing, rather than focusing on arrests.

- Congress and the states should pass sentencing reforms to allow for judicial and prosecutorial discretion to take into account the circumstances surrounding a crime. Another priority: exploring and implementing alternatives to criminal charges, such as substance abuse assistance, alternative justice methods, and restorative justice programs.

**Reduce Profiling and Discrimination by Law Enforcement**

- Congress should pass a law to end profiling by law enforcement on the basis of actual or perceived race, color, ethnicity, immigration status, language, disability (including HIV status), sexual orientation, and gender identity, among other characteristics, such as the End Racial Profiling Act. Local and state legislatures should pass their own LGBT-inclusive anti-profiling laws.
- All law enforcement agencies that receive federal funding should implement guidance from the U.S. Department of Justice regarding profiling, which states that federal law enforcement officers cannot use “race, ethnicity, gender, national origin, religion, sexual orientation or gender identity to any degrees, except that officers can rely on the listed characteristics in a specific suspect description.”<sup>137</sup> This guidance should be applied to all federal government agencies. Cities and counties should adopt similar guidance.
- Government at all levels should build strong boundaries between immigration enforcement and law enforcement to prioritize community safety and to encourage immigrants, regardless of legal status, to report violence and other concerns to police without fear of deportation.

**Reduce the number of people held in confinement facilities—including adults in prisons and jails, youth in juvenile justice facilities, and undocumented immigrants in detention centers.**

- Federal and state legislators should revisit mandatory sentencing guidelines, mandatory minimums, and increased penalties, especially for non-violent offenses, including non-violent drug crimes.
- Federal and local jurisdictions and judges should reduce reliance on bail and increase the ability of individuals to be released pre-trial and those awaiting immigration proceedings.



- Federal, state, and local agencies should use risk assessment instruments to determine whether individuals should be released while awaiting trial and to determine the least burdensome bail amount, including nonmonetary pre-trial release options.
- Federal, state, and local legislators should increase funding for the expansion of community-based alternatives to incarceration, including drug treatment programs and mental health programs.

**Improve conditions of confinement for transgender people.**

- Implement PREA requirements for individualized placement of LGBT people, including transgender people, based on an individual's concerns about safety.
- For all instances when mandatory detention does not apply, immigration enforcement officials should release detainees, particularly transgender detainees given the lack of safety within facilities for this vulnerable population. Facilities should ensure the physical safety and medical needs of transgender detainees.
- Develop and implement nondiscrimination policies with education and ongoing training for staff. Training should specifically address working with transgender people, including procedures for searches and prohibitions on harassment, violence, abuse, and discrimination.
- Improve health care in prisons. Medical personnel in confinement facilities should provide consistent, research-based medical care according to approved standards of care, including prompt access to HIV medication and transition-related health care for transgender people.
- Provide access to appropriate clothing and grooming products for transgender people. Agencies should give all inmates the ability to choose available clothing and grooming items so they can express their gender identity through clothing, hairstyle, and other means of gender expression.

**Include nondiscrimination provisions in all government-funded re-entry programs.**

- Federal, state, and local governments should require all organizations receiving government funding for re-entry programs to include nondiscrimination

provisions that enumerate race, sex, sexual orientation, and gender identity, among other characteristics.

- Legislators should pass nondiscrimination legislation that explicitly prohibits discrimination based on gender identity and sexual orientation at the federal, state, and local levels in employment, housing, and public accommodations to ensure equal access to all programs and services.

**Ensure that prison and jail re-entry programs provide a holistic assessment of an individual's needs.**

- Parole and probation officers and staff in prisons and re-entry facilities should assess needs including access to safe, affordable needs; competent, affordable health care; educational resources; employment; and more with a focus on the needs of transgender people.
- As part of re-entry planning, agencies should assist transgender people in obtaining accurate identity documents necessary to access public benefits, find housing and employment, and more.

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