

LGBTQ POLICY JOURNAL

AT THE HARVARD KENNEDY SCHOOL

VOLUME 5, 2014–2015

FEATURE ARTICLES

A Survey of the Living Conditions of Transgender Female Sex Workers in Beijing and Shanghai, China

Emerging Needs for Research on Human Services for Low-Income and At-Risk LGBT Populations

“I Decide Who I Am”:
The Right to Self-Determination in Legal Gender Recognition

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School-Based Services for LGBTQ Youth

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LETTER FROM THE EDITOR-IN-CHIEF

Friends,

When this journal published its inaugural issue five years ago, the legal and cultural landscape for LGBTQ people stood vastly different than the one before us today. The ill-conceived "Don't Ask, Don't Tell" policy forced thousands of gay, lesbian, and bisexual service members out of the armed forces based solely on their sexual orientation. LGBTQ men and women around the country lacked the hate crimes protections afforded to other groups regularly subjected to physical violence based on animus. And only a handful of states recognized the freedom to marry for same-sex couples.

Over the course of the past half-decade, however, our movement has made seemingly inexorable progress toward full legal equality. And that progress continues into 2015. Even a cursory reading of the tea leaves reveals the Supreme Court is likely to finally affirm the Constitution's promise of equal rights this June.

Our progress on these and other issues comes as the direct result of challenging commonly held belief systems and ideologies. It requires acknowledging that legal equality does not always mitigate the economic injustices and structural violence that threaten our community. And progress requires exploring the complex interplay and intersectionalities between sexual orientation, gender identity, race, and socioeconomic status.

Still, our work is informed not only by the progress we have made over the past decade, but more importantly, the challenges that remain. While our movement has made significant progress domestically, the number of countries passing barbaric "anti-homosexuality" laws continues to rise, even as the US, the UN, and other allies work to prevent these human rights abuses.

Here at home, social and structural inequities continue to plague LGBT communities across the United States. LGBTQ youth continue to comprise a disproportionate

share of our nation's homeless. LGBTQ families continue to report lower incomes and overall economic security compared to non-LGBT families. And violent crimes against transgender people continue to threaten the physical safety of our friends and loved ones.

In this context, our movement continues its myopic focus on the issue of marriage equality—a critical issue toward full equality for LGBTQ people, no doubt, but one that masks the considerable gaps in equality that remain. Even with a favorable Supreme Court ruling, for example, LGBTQ people can get legally married on Sunday but be legally fired from their job on Monday, legally denied housing on Tuesday, and legally forced out of a restaurant on Wednesday.

It's in this spirit—the spirit of celebrating the progress we've made while recognizing the progress that remains—that the *LGBTQ Policy Journal* presents its 2015 issue.

In these pages, you will find articles that challenge, that inspire, and that question the politics, ideologies, and laws that impact our community. From community policing here at home, to the plight of transgender sex workers in China, the articles in this year's edition serve as a call to action to move beyond our single-mindedness on marriage equality and instead harness our collective energy toward remedying the numerous challenges that remain.

Through solidarity, compassion, and above all, hard work, I'm confident that in the next five years we'll have made similar leaps and bounds as we have in the previous five.

Onward and upward,

Crosby Burns

EDITOR-IN-CHIEF

CAMBRIDGE, MA

Emerging Needs for Research on Human Services for Low-Income and At-Risk LGBT Populations

By Tyler Hatch, Andrew Burwick, Gary Gates, Scott Baumgartner, and Daniel Friend

ABSTRACT

Substantial research gaps impede the ability of policy makers and federal staff to identify human service policies and programs that may address the particular needs of low-income and at-risk LGBT populations.

This article summarizes an assessment of the research base regarding human service needs of LGBT populations and presents recommendations for future research within three human service areas: low-income LGBT individuals and families, LGBT individuals' interaction with the child welfare system, and LGBT runaway and homeless youth populations.

In order to further the mission and goals of the US Department of Health and Human Services (HHS), the Administration for Children and Families contracted with Mathematica Policy Research, and its subcontractor, the Williams Institute, to conduct an assessment of the knowledge base and research needs related to low-income LGBT populations and self-sufficiency programs, LGBT individuals' interactions with the child welfare system, and services to support LGBT youth. Through the creation of an annotated bibliography, consultation with a thirteen member expert panel, consultations with multiple program offices within HHS, conduction of secondary analyses of three published data sets, and conduction of four case studies surrounding runaway and homeless youth and homeless youth programs, the project sought to provide a comprehensive appraisal of what is known and what needs to be learned next related to the human service needs of low-income and at-risk LGBT populations. The project team conducted the analysis of existing research and needs for additional research within these three areas because they correspond with services funded and overseen by the Administration for Children and Families within the US Department of Health and Human Services.

The views expressed in this publication do not necessarily reflect the views or policies of the Office of Planning, Research and Evaluation, the Administration for Children and Families, or the US Department of Health and Human Services.

Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs

The US Department of Health and Human Services (HHS) is tasked with protecting the health of all Americans as well as providing essential human services, particularly for those least able to help themselves.¹ HHS has continued to introduce new initiatives and efforts toward protecting the rights of every American to access quality care, while recognizing that diverse populations have distinctive needs.²

The Obama administration has been a strong advocate for evidence-based social policy.³ Through declarations and directives that call for the use of empirical evaluation to better understand the impacts, limitations, and potential shortcomings of government programs and initiatives, the administration has challenged federal agencies, academic

organizations, and other service administrators to better understand the populations that they serve.

Although the administration has attempted to use data to drive decision making, there is limited data on LGBT disadvantaged populations. This project reviewed existing research and literature in an effort to provide guidance for researchers moving forward to better understand the risks and disparities that LGBT populations may face.

Policy makers and researchers need to address a variety of unique challenges that exist when attempting to collect data that could provide important context for understanding the human service needs of LGBT populations. Included among these challenges are issues concerning the willingness of respondents to answer questions pertaining to sexual orientation or gender identity, whether due to language or cultural differences on the constructs of identity and orientation, fear of being identified or outed as LGBT, and so on. Additional challenges include the

relatively small number of human service–related population-based or administrative surveys that seek to capture this information.

LGBT Populations and Low-Income Support Programs

Risk of Poverty/Economic Insecurity

Emerging scholarship indicates that some LGBT populations are at greater risk of experiencing economic insecurity than their non-LGBT counterparts.⁴ A variety of federal, state, and local programs exist that seek to provide economic security, job training, and financial assistance to individuals facing economic hardship. These programs are of particular importance because LGBT people may face discrimination in employment, housing, or other services depending on the jurisdiction in which they live and therefore find themselves more vulnerable than their non-LGBT peers.⁵

M.V. Lee Badgett, Laura Durso, and Alyssa Schneebaum also found that male and female same-sex couples are more likely to be in poverty than married different-sex couples when controlling for other characteristics.⁶

Additional analysis indicates that poverty rates are similarly varied among LGBT individuals and heterosexual individuals. Andrew Burwick et al. conducted original analyses of the 2006-2010 National Survey of Family Growth and found that bisexual-identified adults had significantly higher poverty rates than heterosexual adults (the analysis did not control for other demographic characteristics).⁷ Multivariate analysis of Gallup Tracking data indicates that LGBT-identified adults are 1.7 times more likely to report being unable to afford shelter, health care, or money for food in the past year when compared to non-LGBT adults.^{8,9}

In order to better understand how poverty and economic insecurity impact LGBT populations and vary among LGBT subpopulations, additional research should be conducted. Potential topics include:

- To what extent does poverty exist among LGBT populations, and what individual factors affect poverty risk? To what extent do poverty rates differ among LGBT subpopulations?
- To what extent do legal protections affect the economic circumstances of LGBT individuals?

Poverty and Risk Factors Within the LGBT Community

As illustrated before, nationally representative population-based data sources that seek respondents' sexual orientation or gender identity are limited. Current analyses of population-based data sources indicate differences in poverty rates between same-sex and different-sex couples, and between subpopulations within the LGBT community.¹⁰ Burwick et al. and Badgett et al. suggest

that the inclusion of questions on sexual orientation and gender identity in key population-based surveys that are representative at the national and/or state level would allow researchers to explore this issue more fully.

In addition to the inclusion of additional questions to population-based data sources, Burwick et al. suggest that little is known regarding how factors such as discrimination, education, personal relationships, social isolation, employment, and health disparities impact poverty risk among LGBT populations.¹¹ By conducting studies on existing data such as that from the National Health Interview Survey, which has included questions on sexual orientation since 2013, researchers could perhaps better understand the factors that contribute to differing poverty rates and economic vulnerability between LGBT and non-LGBT populations.

Legal Protections Against Economic Insecurity

Though an increasing number of states enact legislation have enacted to protect LGBT individuals in the areas of housing discrimination, workplace protections for sexual orientation (and less commonly, gender identity and expression), and legal recognition of same-sex marriage, little research has been conducted to evaluate the extent to which these protections decrease the likelihood of LGBT populations from experiencing economic insecurity and vulnerability.¹² Recent literature does suggest, however, a strong bias against transgender applicants and employees.¹³

Burwick et al. suggest that the development of a national survey of LGBT individuals focusing on workplace experiences could provide the necessary details required to better understand the association between workplace protections for sexual orientation and gender identity and economic vulnerability.¹⁴ Particular focus on LGBT subpopulations, including analyses on age cohorts, racial or ethnic minorities, and specific sexual orientations or gender identities would provide a level of nuance not currently known within the field.

Participation in Services for Low-Income People

Utilizing varied data sets including the 2010 American Community Survey and the 2006-2010 National Survey of Family Growth, Badgett et al. detail that same-sex male and same-sex female couples report receiving higher levels of government support at statistically significant levels than their different-sex couple counterparts.¹⁵ To better understand the participation of LGBT populations in low-income support and self-sufficiency programs, several research areas could be explored. Some topics include:

- Do unique barriers exist for LGBT individuals attempting to access income support services?

Barriers to Accessing Income Support Services for LGBT Individuals

Additional research could provide important information regarding experiences of LGBT individuals who seek income support services. There is a substantial need for information about whether eligible LGBT people receive benefits. Data to support these analyses is currently not available. Quantitative studies that rely on population-based data sources could, with proper sample sizes, allow researchers to examine how rates vary between LGBT subpopulations including analyses on age cohorts, race and ethnicity, and other potential cohort classifications.¹⁶

Administrative data providing important insight into the implementation of programs is increasingly viewed as a valuable source of relatively low-cost data.¹⁷ Exploring the feasibility of adding items on LGBT identification to administrative databases is another avenue that researchers and practitioners could explore.

Conducting interviews with staff of public and private organizations that provide services to low-income LGBT populations could help identify potential barriers associated with collecting sensitive client information including individuals' sexual orientation and gender identity. Additionally, conducting focus groups and interviews with LGBT people who participate in low-income support programs (for the focus of this article particularly, the Temporary Assistance for Needy Families program and child support services) could yield valuable insight into the cultural competency of case managers, perceptions regarding potential systematic or imposed barriers of delivery, and individuals' experiences with the application process.

Are Employment Assistance Programs Successfully Serving LGBT Populations?

Targeted outreach to minority populations is a technique often used by federal and state agencies including HHS.¹⁸ Some employment programs target low-income LGBT people in an attempt to improve employment outcomes for this population. For example, the Los Angeles LGBT Center's Transgender Economic Empowerment Program (TEEP) targets transgender job seekers as well as the employers who are prepared to interview, hire, and work with these employees.¹⁹ Additional review of programs that target LGBT populations could include interviews of providers, focus groups with participants, and review of program materials. This review could help indicate successful practices and methods that other programs could model, emulate, and adapt to their unique needs.

LGBT Populations and the Child Welfare System

LGBT Youths' Interactions with the Child Welfare System

Following increased evidence and expert testimony that LGBT youth in foster care may face particular challenges

and possess distinct needs, the Children's Bureau, an agency within Health and Human Services that administers federal programming and policy relating to the child welfare system, issued an information memorandum encouraging providers to support LGBT youth in foster care.²⁰ The memo reiterated that all children, irrespective of the young person's sexual orientation, gender identity, or gender expression, are entitled to a safe, affirming, and loving foster care placement.²¹

Though no data is available to determine the number of LGBT youth in foster care at the national or state level, existing research in local areas indicates that LGBT youth may be overrepresented in the child welfare system.²²

Existing research also indicates that LGBT youth in foster care may experience less permanency within placements than non-LGBT youth.²³ Research also suggests that young people who are LGBT, or whose gender expression is at odds with societal norms, are more likely to face maltreatment by caretakers than their non-LGBT peers.²⁴

To better understand the experiences and participation of LGBT youths' experiences in the child welfare system, several research areas could be explored. Questions for future research to address include:

- Do rates of child maltreatment experienced by LGBT youth in the child welfare system differ by age, race/ethnicity, gender identity, or other discernable characteristics? What family and community characteristics are associated with elevated levels of child maltreatment among LGBT people? In particular, are risks for racial/ethnic minorities and transgender youth unique from their nonracial/nonethnic minority or cisgender LGB peers?
- What proportion of youth in foster care do LGBT youth comprise? What are the characteristics and demographics of LGBT youth in foster care, and how do these traits compare to their non-LGBT counterparts within the same system? What perceptions do LGBT youth in foster care have regarding safety, supportiveness, and appropriateness of services and placements?
- To what extent are public child welfare agencies taking measures to improve services for LGBT youth within the foster care system? What challenges and successes are these agencies experiencing when changes to better serve this population are implemented?

Maltreatment Among LGBT Youth in the Child Welfare System

Representative school-based longitudinal and retrospective studies with purposive samples have been employed by researchers to better understand the rate of maltreatment that LGBT youth face. Additional analyses of sources such

as the Youth Risk Behavioral Survey (a periodic population-based survey of students administered on the state and local level) and the Longitudinal Studies of Child Abuse and Neglect (a consortium of research studies initiated in 1991 through a grant from the National Center on Child Abuse and Neglect) could yield important nuances regarding how individual factors such as age, race/ethnicity, or other discernable or self reported characteristics influence rates of maltreatment.

Family structure and community values can greatly influence and shape the experiences that minority populations have. Conducting a longitudinal or one-time survey including retrospective reports of child maltreatment could allow researchers to examine the influence that family and community structures have on risk of child maltreatment among LGBT youth.

LGBT Youth in Foster Care

Through the Permanency Innovations Initiative (PII), the Administration for Children and Families created and tested potential models to survey LGBT youth in foster care.²⁵ This project, entitled the Los Angeles Foster Youth Survey, could serve as a model for researchers to implement within other localities. Additional surveys through multiple jurisdictions could employ survey instruments and could provide guidance to researchers and child welfare agencies about practices to improve respondent confidentiality, to secure informed consent from minors, to identify methods and questions about soliciting answers regarding sexual orientation and gender identity from respondents, and so on.

There are several methods of placement within the child welfare system with options ranging from adoption, family reunification, permanent relative care, or other arrangements. Research that seeks to understand placement history and outcomes of LGBT participants could inform administrators and providers of areas that need particular attention. A longitudinal study of youth in foster care that included measures of sexual orientation and gender identity or a retrospective survey of youth who have exited the foster care system could identify whether LGBT youth have disparate permanency outcomes across various states and localities.

Recommendations for improving the administration of services to LGBT youth in the foster care system have been implemented in some local areas. Specific measures include introducing sensitivity training for all program staff and prospective foster or adoptive parents, implementing anti-discrimination policies for staff and youth within facilities, and employing specialists with experience in LGBT issues. Future research could identify and evaluate intervention models that seek to address a variety of factors that could impact the quality and effectiveness of services for LGBT youth.

LGBT Adults' Interaction with the Child Welfare System

Legal and social biases and discrimination may prevent or hinder LGBT adults from becoming adoptive or foster parents.²⁶ No data is available to determine the number of LGBT adults that are actively seeking to become foster or adoptive parents, though existing information suggests that LG same-sex couples are more likely than their heterosexual counterparts to be adoptive parents.²⁷

LGBT Prospective Adoptive and Foster Parents

Little is known regarding the experiences of LGBT adults with public child welfare agencies and how these experiences vary by agency location and LGBT subpopulation (such as transgender adults). Qualitative studies that involve interviews and focus groups could yield information on how specific processes of the foster and adoption placement process (such as the home study) are viewed by LGBT adults and could provide information on any perceived barriers or issues that they face within the processes. Surveys of public child welfare agencies could assist researchers in identifying demographics and characteristics of LGBT foster and adoptive parents.

LGBT Youth and Services to Support Them

The Administration for Children and Families oversees many services for vulnerable youth populations.²⁸ While these services encompass many areas, this section will discuss programs funded through the Family and Youth Services Bureau (FYSB) that serve runaway and homeless youth populations. The Runaway and Homeless Youth (RHY) Program provides short-term emergency assistance to youth experiencing homelessness.²⁹

FYSB has taken steps to make the RHY Program accessible to LGBT youth through a variety of mechanisms, such as requiring federal grant recipients to sign forms that require inclusion and nondiscrimination standards and anti-harassment policies within their centers, and an expectation that grantees will ask participants questions surrounding their sexual orientation.

Existing research indicates that LGBT youth may be overrepresented among the homeless youth population. Estimates from local area surveys indicate that LGBT youth comprise 6 percent to 35 percent of the youth homeless population.^{30,31} Research that employed population-based data from Massachusetts found that students who identified as LGB or questioning, or who identified as heterosexual but reported same-sex sexual activity, were four to thirteen times more likely to be homeless after controlling for age, race, and ethnicity.³²

Despite evidence that LGBT youth comprise disproportionate segments of the homeless youth population,

information on LGBT youths' participation in homelessness services is extremely limited as well as any information on potential barriers to accessing services. To better understand the experiences of LGBT homeless youth several research areas could be explored. The topics include:

- What proportion of homeless youth identify as LGBT?

Homeless Youth Identifying as LGBT

Surveys conducted on the local level of homeless youth should adopt promising practices for gathering sensitive information involving sexual orientation and gender identity, such as those identified by YouthCount! (an interagency initiative to develop promising strategies for counting unaccompanied homeless youth up to twenty-four years old).³³ This information may provide additional opportunity for analyses to better understand demographics of this group and opportunity to more precisely estimate the proportion of homeless youth that identify as LGB.

Characteristics and Needs of LGBT Homeless Youth Compared to Those of Non-LGBT Homeless Youth

Local and national surveys that employ purposive sampling methods to generate large samples of homeless youth could gather details on the experiences of both LGBT and non-LGBT homeless youth. Analyses on characteristics such as risk behaviors, housing instability, human trafficking and exploitation, physical and mental health, and other topics could provide practitioners with points of comparison for LGBT and non-LGBT homeless youth. Such information could aid policy makers and service providers with important information about services administration and possible adaptations that may benefit LGBT youth receiving services.

Factors That May Increase or Reduce LGBT Youth Homelessness

More research is needed to better understand the mechanisms of homelessness. Additional research should be conducted to examine what individual, family, and community level factors affect the likelihood that LGBT youth may become homeless. This research should additionally examine risk factors for homelessness among subpopulations of the LGBT youth homeless community.

Perceived Barriers to Services for LGBT Youth

Focus groups and interviews with LGBT youth and professionals that serve them in multiple locations could explore perceived barriers to services, discrimination within service administration, and accessibility of assistance programs. Additional data could be captured through entry and exit interviews of youth seeking and receiving services or a self-administered survey.

Research Themes

Five broad themes exist in research needs related to understanding the human service needs of low-income and at-risk LGBT populations that could drastically expand the potential for research in the human service needs of LGBT populations if they were to be adopted and implemented by federal, state, and local agencies. These general themes include:

1. Develop additional sources of administrative and survey data to better capture the number of LGBT people who experience economic hardship and the degree to which they participate in human service programs.
2. Explore in greater detail the variance of economic outcomes and potential reasons for health disparities between subpopulations of the LGBT community with specific emphasis on transgender youth and young LGB people.
3. Understand potential barriers to service access and the extent to which barriers vary across location, agencies, services, and subpopulations within the LGBT community.
4. Identify and document approaches and practices to tailor human services to LGBT populations, particularly how extensively agencies have adopted recommended practices and their experiences implementing them.
5. Evaluate the effectiveness of human service intervention models that specifically target potential LGBT participants. Though several programs have conducted such outreach, research is needed to evaluate whether these targeted interventions were more successful in engaging LGBT participants than programs without the tailored outreach.

These five general research recommendations provide a framework for researchers, policy makers, and practitioners to explore potential areas of interest involving LGBT individuals' interactions with human services. These research themes would provide important statistical and administrative data that could serve as the basis for new policies, practices, and approaches to serving low income and at-risk LGBT populations.

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ANDREW BURWICK is a senior researcher at Mathematica Policy Research. His research focuses on the implementation, quality, and costs of human services. In addition to directing the assessment of the knowledge base and research needs related to low-income and at-risk LGBT populations, he has led studies of employment assistance programs, early childhood education programs, services for runaway and homeless youth, and interventions for families at risk of child welfare involvement. Burwick earned a master's degree in public affairs from the Woodrow Wilson School of Public and International Affairs at Princeton University.

GARY GATES is a recognized expert on the demography of the LGBT population. He coauthored *The Gay and Lesbian Atlas* and publishes extensively on the demographic, geographic, and economic characteristics of the LGBT population. Many national and international media outlets

regularly feature his work. He holds a PhD in public policy from the Heinz College of Public Policy and Management at Carnegie Mellon University, along with a master of divinity degree from St. Vincent College and a BS in computer science from the University of Pittsburgh at Johnstown.

SCOTT BAUMGARTNER is a research analyst at Mathematica Policy Research. His research has focused on programs for low-income families and youth. In addition to contributing to the assessment of the knowledge base and research needs related to low-income and at-risk LGBT populations, Baumgartner has conducted an implementation study of four federal responsible fatherhood grantees. He earned a master's degree in public policy from Georgetown University, with a focus on social policy.

DANIEL FRIEND is a survey researcher at Mathematica Policy Research, where he has served in various roles on research projects related to runaway and homeless youth, teen pregnancy and sexually transmitted disease prevention programs, and healthy marriage and responsible fatherhood programs. He received his master's degree from the University of Oregon in clinical psychology, specializing in family violence. Prior to joining Mathematica, Friend was the project director at the Relationship Research Institute managing an ACF-funded randomized clinical trial of a psychoeducational workshop aimed at the prevention and treatment of intimate partner violence among low-income couples. His work at the Institute also included clinical experience with LGBT couples.

ENDNOTES

- 1 US Department of Health and Human Services website, "About HHS."
- 2 US Department of Health and Human Services website, "LGBT Health and Well-Being: US Department of Health and Human Services Recommended Actions to Improve the Health and Well-Being of Lesbian, Gay, Bisexual, and Transgender communities," January 2012.
- 3 Ron Haskins and Jon Baron, "The Obama Administration's Evidence-Based Social Policy Initiatives: An Overview," *Evidence for Social Policy and Practice*, April 2011.
- 4 M.V. Lee Badgett, Laura E. Durso, and Alyssa Schneebaum, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, Williams Institute, 2013.
- 5 Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, Williams Institute, 2013.
- 6 Badgett, Durso, and Schneebaum, *New Patterns of Poverty*.
- 7 Andrew Burwick et al., *Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs*, Office of Planning, Research and Evaluation, Administration for Children and Families, US Department of Health and Human Services, 2014, 25 (29 percent of bisexuals compared to 18 percent of heterosexuals. Significant at the .05 level).
- 8 Gary J. Gates, *Food Insecurity and SNAP (Food Stamps) Participation in LGBT Communities*, Williams Institute, 2014, 2.
- 9 Burwick et al., *Human Services for Low-Income and At-Risk LGBT Populations*. For additional gradation and data surrounding the differences in take up rates of human service programs between LGBT and non-LGBT people, please visit Chapter 3.
- 10 Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, Williams Institute, 2014, 1.
- 11 Burwick et al., *Human Services for Low-Income and At-Risk LGBT Populations*, 27.
- 12 Pew Research Center, *A Survey of LGBT Americans: Attitudes, Experiences, and Values in Changing Times*, Pew Research Social and Demographic Trends, June 2013.
- 13 Make the Road New York, *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination*, May 2010.
- 14 Burwick et al., *Human Services for Low-Income and At-Risk LGBT Populations*, 27-28.
- 15 Badgett, Durso, and Schneebaum, *New Patterns of Poverty*, 22.
- 16 Burwick et al., *Human Services for Low-Income and At-Risk LGBT Populations*, 3-4.
- 17 House of Representatives, Committee on the Budget website, "Murray and Ryan Propose Commission to Promote Evidence-Based Policymaking," 20 November 2014.
- 18 Howard K. Koh, Garth Graham, and Sherry A. Glied, "Reducing Racial and Ethnic Disparities: The Action Plan From the Department of Health and Human Services," *Health Affairs* 30, no. 10 (2011): 1822-1829.
- 19 Los Angeles LGBT Center website, "Transgender Legal Assistance."
- 20 Child Welfare Information Gateway, *Working with Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption*, Children's Bureau, US Department of Health and Human Services, 2011.
- 21 Ibid.
- 22 Robin Dion et al., *Advancing the Self-Sufficiency and Well-Being of At-Risk Youth: A Conception Framework*, Office of Planning, Research and Evaluation, Administration for Children and Families, US Department of Health and Human Services, 2013.
- 23 Jill Jacobs and Madelyn Freundlich, "Achieving Permanency for LGBTQ Youth," *Child Welfare* 85, no. 2 (2006): 299-316.
- 24 Elise D. Berlan et al., "Sexual Orientation and Bullying Among Adolescents in the Growing Up Today Study," *Journal of Adolescent Health* 46, no. 4 (2010): 366-371.
- 25 *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionately and Disparities in Los Angeles*, Children's Bureau, Administration on Children, Youth and Families, US Department of Health and Human Services, 2014.
- 26 Ellen C. Perrin and Benjamin S. Siegel, "Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian," *Pediatrics* 131, no. 4 (April 2013).
- 27 Gary J. Gates, *LGBT Parenting in the United States*, Williams Institute, 2013.
- 28 Dion et al., *Advancing the Self-Sufficiency and Well-Being of At-Risk Youth*, 1.
- 29 Family and Youth Services Bureau, Administration for Children and Families, US Department of Health and Human Services website, "About the Runaway and Homeless Youth Program."
- 30 Andrew Cray, Katie Miller, and Laura E. Durso, *Seeking Shelter: The Experiences and Unmet Needs of LGBT Homeless Youth*, Center for American Progress, 2013.
- 31 Paul Toro, Amy Dworsky, and Patrick Fowler, "Homeless Youth in the United States: Recent Research Findings and Intervention Approaches,"

in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research*, eds. Deborah Dennis, Gretchen Locke, and Jill Khadduri, US Department of Housing and Urban Development, US Department of Health and Human Services, 2007, 234.

- 32 Heather L. Corliss et al., “High Burden of Homelessness Among Sexual-Minority Adolescents: Findings from a Representative Massachusetts High School Sample,” *American Journal of Public Health* 101, no. 9 (2011): 1683-1689.
- 33 Michael Pergamit et al., *Youth Count! Process Study*, Urban Institute, 2013.

A Survey of the Living Conditions of Transgender Female Sex Workers in Beijing and Shanghai, China

By Charmain Mohamed and Tingting Shen

ABSTRACT

Based on field research conducted in China throughout 2014, this article highlights findings from a detailed study on the daily realities for transgender female and female-presenting sex workers in Beijing and Shanghai. The research focused on the legal frameworks, working conditions, and access to services for transgender female sex workers in China. Although there are no outright legal penalties for being a transgender person in China, the absence of nondiscrimination laws, lack of professional medical services for gender change, and a lack of targeted HIV programming and services means there is no effective protection.

Introduction

Transgender female sex workers in China face a wide spectrum of discrimination in society and government policies, preventing this highly marginalized group from accessing a range of services and legal protections. Transgender female sex workers often experience amplified stigma due to both their gender identity and their profession. When seeking public services, and particularly health care, they experience isolation and often humiliation, leading many transgender women to self-medicate and engage in dangerous transition practices, such as self-administered hormone therapy.

Fear of exposure causes this diverse group of women to live increasingly hidden lives, away from family, employers, and community members who may subject them to verbal abuse or punitive action such as tenant eviction, job dismissal, or police abuse. Restrictive legal frameworks compound this discrimination by effectively denying many transgender women the right to a legal identity and/or personal autonomy.

Within this environment, evidence indicates that transgender women and transgender female sex workers are among the populations most heavily affected by, and at risk of contracting, HIV. Globally, transgender women are forty-nine times more likely to acquire HIV than other adults of reproductive age, and the rate of HIV infection among transgender female sex workers is 27.3 percent, or nine times, higher than the rate among female sex workers and three times higher than male sex workers.¹ Despite this

data, very little is known about this population, and data collection and/or programming targeted for transgender sex workers is almost nonexistent.

Between January and September 2014, Asia Catalyst and two community-based organizations (CBOs) in China—Beijing Zuoyou Information Center and Shanghai Commercial Sex Worker (CSW) & Men Who Have Sex with Men (MSM) Center—interviewed seventy female-presenting sex workers, half in Beijing and half in Shanghai. All of the interviewees were assigned male at birth, but thirty identified as women during the time of the interview, twenty-four identified as male, and sixteen identified as a third gender. Regardless of gender identity, all interviewees presented as female when engaging in sex work. Supplemented by interviews with other CBOs providing services to transgender communities across China, as well as extensive legal and policy research, the findings indicate that transgender female sex workers are among the most marginalized and vulnerable populations in China today.

Legal Frameworks

Although Chinese law permits transgender people to change their gender marker on official documents, the individual must have already completed sex reassignment surgery (SRS), as well as meet other requirements. Transgender people who do not wish to undergo SRS or cannot afford it are left with identity documents that do not match their lived gender, resulting in frequent public

humiliation, vulnerability to discrimination, and great difficulty finding or maintaining employment. Without the ability to change gender markers on official documents, these obstacles will last a lifetime.

Sex Reassignment Surgery

Transitioning in China requires not only a lengthy series of medical procedures, but also bureaucratic requirements that can take years before all conditions imposed by Chinese law for SRS are met. In 2009, the Ministry of Health of the People's Republic of China issued "(Trial) Management Standards for Gender Reassignment Surgery," which supports transgender people's right to seek and undergo SRS. The "Standards" strictly designate the qualifications required for hospitals and medical personnel to carry out SRS. However, they also place strict requirements on patient eligibility for SRS. For example, a patient pursuing SRS must provide a permit from a Public Security Bureau (PSB) that verifies the patient does not have a criminal record, as well as a certificate from a psychiatrist, a notarized report from the patient pursuing SRS, and a certificate showing that the next of kin have been notified of the SRS. The psychiatrist's certificate must verify that the individual possessed the intent to change gender for at least five years and that the individual received psychiatric treatment for at least a year. Last, the patient must be unmarried.²

All of these conditions are problematic and raise issues of the right to privacy and family life, while also containing several practical implementation issues. Scholars in China have already argued that requiring married individuals to divorce before the procedure violates the rights of the parties concerned.³ There have also been reported cases in which patients could not obtain the consent of family members and were then rejected for SRS.⁴

In China, SRS is also a relatively expensive procedure, and it's not included under universal health coverage. Given the amount of trouble involved in undergoing SRS in China, many people choose to travel to Thailand and complete the operation there.

Changing Gender Marker on Documents

Chinese law permits transgender people to change their gender marker on household registration (*hukou*) and identity cards, but this can only be completed after undergoing SRS. In China, the alteration and approval of any change to the gender marker on identity cards and household registration documents are under the jurisdiction of local public security organs.

In 2008, the Ministry of Public Security issued an official reply⁵ to a request for information by the Shandong Province Public Security Bureau titled "Instructions Requested on How Citizens Can Change the Gender on Hukou Registration Documents After Undergoing SRS

Abroad." Because the reply was from the Ministry of Public Security, it can be considered a national regulation. The regulation details requirements for implementing the bureaucratic process of gender change on household registration documents. Part of the process includes provision of a gender authentication certificate issued by a tier-three hospital,⁶ a certified copy of the identity document being changed from the Public Notary Office of the Ministry of Justice, and/or a certificate from a judicial department agreeing to the gender marker change on the document.⁷

Some provinces have additional requirements. In Guangdong Province, for example, in addition to the PSB's requirements, the provincial authorities also require a certificate showing that the human resources department of the individual's workplace, organization, school, enterprise, or other work unit has approved the transition.⁸ This necessitates that the person must notify his or her place of employment and obtain the employer's consent and approval before being authorized to legally change the gender marker on identity documents.

Although at the provincial level there are policies for changing the gender marker on *hukou* and identity cards, there are no unified regulations for doing the same on school rolls or academic records. If a student decides to change the gender marker on academic records after graduation, it is almost impossible to do this retroactively. The Ministry of Education issues academic certifications, but currently there are no policies regarding how to change gender on education certificates, which impacts an individual's ability to acquire employment or other pursuits that require educational documentation.

Marital Rights

Currently, Chinese law does not contain any explicit provisions regarding the ability of transgender people to marry.⁹ However, China has not legalized same-sex marriage and defines marriage as a union between a man and a woman,¹⁰ thereby requiring transgender individuals to conform to legal stipulations in order to register for marriage. This includes completing SRS and altering the gender marker on both the *hukou* and identity card.¹¹

In practice, there have been instances of transgender individuals marrying in China. In 2008, a Sichuan native named Zhang Lin married her boyfriend, Yang Qicheng, after completing SRS.¹² A survey among one surgeon's SRS patients showed that, among 108 patients who underwent SRS, 54 had since married.¹³

Discrimination

During the course of this research, many individuals in the study described a broad spectrum of abuse and discrimination. These factors result in increased isolation; limited options for employment, education, and social activities;

and a general reluctance to engage in public life.

For transgender women who have not completed SRS but who identify and live as women, the gender and photograph on their identity cards is male, causing significant obstacles in their daily lives. Among the seventy interviewees, only two had undergone SRS, but thirty had breast implants. All reported humiliating experiences when seeking public services, such as seeing a doctor, renting an apartment, boarding flights, or staying in a hotel.

Interviewees noted they typically went out only at night to avoid being seen by neighbors.¹⁴ Yanyan told us that on three different occasions a landlord was ready to sign a lease with her, but then refused after seeing her gender is male on her identity card.¹⁵ Other interviewees asked friends to help them get an apartment or rented through an agent in order to avoid trouble.¹⁶ Another interviewee, Haima, was evicted by her landlord after neighbors discovered she is transgender and complained.¹⁷

Interviewees also reported discrimination and difficult concentrating in school, where biased and weak sex education emphasizes abstinence and premarital chastity, rather than sexual diversity or sexual health. Xiaomei reported that her struggles with understanding her gender identity, compounded by criticism and ridicule from classmates and staff, caused her to leave high school early, which then limited her education and, as a result, job opportunities.¹⁸ For Weila, the discrimination she experienced at school extended to the workplace. She was forced to change her job many times because of discrimination from employers and eventually entered the sex trade industry.¹⁹

Globally, discrimination in the workplace is a major factor driving transgender women from low-income backgrounds into sex work. Evidence suggests that due to social exclusion, economic vulnerability, and difficulty in finding employment, a significant proportion of young transgender women engage in selling sex.²⁰

Engagement in Sex Work

All of the seventy interviewees engaged in some sort of sex work and presented as female while doing so. All were independent sex workers, without a boss or "market facilitator." Seven also performed in bars or clubs.

Of the seventy interviewees, fifty-three (76 percent) started engaging in sex work as male-presenting and provided services to MSM. After changing to female-presenting, the client base also changed; the vast majority of clients are now heterosexual men. All of the interviewees believe that their clients think they are engaging a female sex worker.

For this reason, concealing transgender identity while working was very important. Interviewees shared experiences of clients becoming abusive or refusing to pay upon realizing that the sex worker was transgender;²¹ or

in some instances, clients even robbed the transgender sex worker.²² Because sex work is illegal, these types of incidents are rarely reported to the police out of fear of arrest.²³

Since sex work is against the law in China, law enforcement agencies are one of the greatest challenges that transgender sex workers face. Entrapment or "fishing" is a commonly used method by police, while verbal and physical violence and/or extortion is not uncommon. While this is also true for female and male sex workers, the transgender female sex workers interviewed spoke of abuse directed at their gender identity. Xiao Qiang said a police officer sat on her back and crushed her breasts.²⁴ Xiao Tong described being taken to a police station: "Once you went in, they pulled on your wig, really hard, and hit you. They asked me if I was a man, and I said I wasn't. Then they carried out a body search and flipped my bra up and groped me. They asked really perverted questions, like, how do you have sex? I turned around and asked, do you want to try? Then he kicked me—really, he really kicked me."²⁵

Transgender sex workers whose identity cards designate them as male are usually jailed together with men, where they are also routinely subjected to abuse and insults.²⁶

Health: Sex Work and HIV

By 2020, transgender individuals and MSM will most likely constitute the majority of all new HIV infections in the Asia-Pacific region.²⁷

Despite this prediction, transgender specific data collection, HIV programming, and outreach is almost nonexistent, and most services for transgender populations are only included as part of MSM programming. This is not only fundamentally at odds with the gender identity of transgender women, but also lacks the attention and resources for the unique HIV-related needs of transgender people. It has also prevented the development of effective public health interventions for this population.

Sex workers and their clients are at heightened risk of HIV, in large measure because the risk of unsafe sexual encounters increases due to a high number of sex partners.²⁸ While many sex workers interviewed for this report were aware of the importance of using condoms, they did not always use them during sex work.

Research has shown that the power asymmetry between clients and sex workers has a pronounced effect on condom use negotiation.²⁹ Globally, where sex work is illegal and sex workers face barriers to negotiating consistent condom use, vulnerability to HIV and other sexually transmitted infection (STI) increases.³⁰ Interviewees reported the decision to use condoms often rests with the client.³¹ In places like Beijing, where regular crackdowns on sex work makes clients scarce, dire economic circumstances mean sex workers may also compromise the use of condoms in order to keep clients.³²

Use of Stimulants and Drugs

By the end of 2012, the number of government registered synthetic drug users in China was 798,000, a 35.9 percent increase from 2011.³³ Sex workers in China are a niche group of drug users, and surveys show that male sex workers are more likely to use drugs than the average MSM.³⁴

During the course of this research, findings highlighted that stimulants were the most commonly used type of drug among the interviewees. For sex workers engaging in anal sex, using “Rush” (Alkyl Nitrite) reduces discomfort and can also enhance pleasure during sexual intercourse. Clients would also occasionally request the use of Rush.³⁵ Although Rush is not linked to chemical addiction, it can bring about psychological dependency and presents a number of physical risks.³⁶

Interviewees also mentioned “Foxy Methoxy.” The main ingredient of Foxy Methoxy is a mind-altering substance called 5-Methoxy-diisopropyltryptamine (5-MeO-DIPT).³⁷ This substance is classified as an illegal drug in many countries. Apart from its hallucinogenic qualities, it can cause serious consequences, including renal failure and death.³⁸ There have been cases of fatal overdose in Taiwan,³⁹ and 5-MeO-DIPT is now a Class Four Controlled Substance there.⁴⁰ However, there are no controls on 5-MeO-DIPT in China at this time,⁴¹ and Foxy Methoxy can easily be purchased on the Internet. Some sellers particularly promote Foxy Methoxy as a safe and pleasure-enhancing drug.⁴² Interviewee Xiao Huli reported: “My clients use Foxy, but when they do, you can’t stand it, because it makes the client especially demanding. It makes him go on forever. All you can do is wait for him, and he just keeps wanting more. It’s incredible. There are many kinds of Foxy, some better than others. It was originally an aphrodisiac, and it can be bought online.”⁴³

The use of crystal methamphetamine, known as “Ice,” was also prevalent among interviewees and their clients. Interviewees reported that using Ice caused extended periods of sexual activity, often involving multiple sexual partners.⁴⁴ Some interviewees mentioned that taking Ice might lead to erectile dysfunction, making condom use a problem.⁴⁵ The use of stimulants and drugs can also lead to unprotected sex and thus increase the risk of HIV and STI transmission.⁴⁶

Gender Affirming Health Services

Transgender people have unique health needs, including gender-affirming health services for diagnosis, hormone treatment, and SRS. However, across the board, general health service providers commonly underserve transgender people or fail to meet their needs.⁴⁷ Transgender women may choose to use hormones to bring about physiological changes. For individuals with gender dysphoria, many

doctors also see hormone replacement therapy as an essential treatment method.⁴⁸ Of the women interviewed for this research, 26 (37 percent) had experience with hormone use.

Throughout China there are fewer than ten medical establishments that can provide specialized instructions on hormone use for transgender people.⁴⁹ Public hospitals lack professional knowledge regarding SRS and are unable to provide professional transition advice to transgender people. Furthermore, our interviewees said they are often met with discriminatory attitudes at public hospitals.

Due to the relative low cost and easy accessibility of contraceptives, many interviewees purchased contraceptives at pharmacies to be used for hormone replacement medication. Only a small minority had consulted a doctor while taking medication, and most interviewees obtained information from friends. Lacking the advice and oversight of medical professionals, many interviewees suffered side effects due to misuse from nonprescribed dosages. Some were compelled to stop taking hormones because the side effects were too severe. Wang Litao took soy isoflavones and contraceptives. She reported, “Aiya, I felt like I was going crazy! I had heart palpitations, dizzy spells, blurred vision, nausea, and fatigue.”⁵⁰

Without access to appropriate medical supervision, transgender women may take hormones incorrectly—for example, using the wrong kind of medicine or taking the wrong dosage.⁵¹ Furthermore, taking hormones without adequate general health monitoring can result in health problems such as liver damage, glucose or lipid metabolic imbalances, or heart disease.⁵² Hormones used for transitioning can also result in erectile dysfunction and interfere with correct condom use.⁵³ As a consequence, an individual once taking a penetrative role may now take the (more risky) receptive role. Although information is scarce, studies have concluded that transgender women are, in any case, more likely to take a receptive sexual role, as well as delegate decision making to the client about whether or not to use protection during sex.⁵⁴

Conclusions and Recommendations

In China, transgender people are not criminalized under the law, but the absence of nondiscrimination laws, professional medical services for gender-affirming health services, and targeted HIV programming and services means they are left without effective protection.

Not only does China lack a legal and policy framework to address these issues, but an ultra-conservative and potentially damaging philosophy of “not encouraging, not discouraging, and not promoting” compounds the situation for transgender people.⁵⁵ China has also paid little attention to transgender people in its HIV-prevention work, and the 12th Five Year Action Plan for China’s HIV/

AIDS Control, Prevention, and Treatment strategy does not include programming for the transgender community.

The research for the report illuminates that the female-presenting sex worker community is very complex and includes women, MSM, and transgender women. Their vulnerabilities to HIV and varied health needs must be carefully assessed, strategically targeted, and addressed. As China is in the process of drafting a new HIV/AIDS action plan for 2016-2020, now is a good opportunity to develop specific strategies for HIV prevention and care for the transgender community.

In many respects, transgender female sex workers face similar challenges to other sex workers. However, these challenges are often magnified by the double stigma and discrimination associated with sex work and transgender identity. In places where sex work is criminalized, sex workers are at significant risk of experiencing violence, often as a result of punitive law enforcement practices.

Numerous international agencies have concluded that decriminalization of sex work as well as sex worker involvement in policy formation on issues that affect them directly is the best way to address human rights violations against sex workers and to increase the access and effectiveness of HIV services.⁵⁶

Finally, China should enact legislation that explicitly prohibits discrimination on the grounds of gender expression, gender identity, and sexual orientation. In line with advancing treaty body commentary,⁵⁷ China should also develop transparent and efficient procedures, based on international human rights standards, to allow citizens to change their gender marker on legal documents. China should amend current policies so that transgender people can apply to have the gender marker on identity documents changed without having to satisfy any medical conditions, in particular the current requirement of sex reassignment surgery.

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ENDNOTES

- 1 UNAIDS, *The Gap Report*, September 2014.
- 2 Ministry of Health of the People's Republic of China, "(Trial) Management Standards for Gender Reassignment Surgery," 13 November 2009.
- 3 Guoping Wu, "An Exploratory Analysis of the Right for Transsexuals to Change Sex After Marriage and Problems in Their Marital and Family Relations," *Journal of the Southwest University of Political Science and Law* 13, no. 3 (June 2011): 59-68.
- 4 Interview with Yanyan, Shanghai, 24 June 2014.
- 5 Ministry of Public Security of the People's Republic of China, "Reply to Questions Regarding the Alteration of Gender on Hukou Certificates for Citizens Who Have Undergone Surgical Sex Change," 23 October 2008.
- 6 Hospitals in China are organized according to a three-tier system that recognizes a hospital's ability to provide medical care, medical education, and conduct medical research. Based on this, hospitals are designated as first, second, or third tier, with tier-three providing the highest standard of care.
- 7 Ministry of Public Security, "Reply to Questions."
- 8 Guangdong Provincial Public Security Bureau, "The Alteration of Gender on Hukou Certificates for Citizens Who Have Undergone Surgical Sex Change," 22 August 2011.
- 9 Guangdong Provincial Public Security Bureau, "The Alteration of Gender."
- 10 Yingxiu Zhang, *Research on the Marriage System* (Shandong, China: Shandong University Press, 2009), 54.
- 11 Ibid.
- 12 Linfeng Song, "The Atypical Four-Year Marriage of China's First Transsexual to Register for Marriage," *Chengdu Evening News*, 30 April 2008.
- 13 Wu, "An Exploratory Analysis," 59-68.
- 14 Interview with Xiao Bai, Beijing, 25 March 2014.
- 15 Interview with Yanyan, Shanghai (16 June 2014).
- 16 Ibid.; interview with Xiao Shao, Beijing, 20 April 2014; interview with Feifei, Beijing, 20 April 2014; interview with Tian Yuyao, Beijing, 12 April 2014; interview with Mingming, Shanghai, 25 April 2014.
- 17 Interview with Haima, Beijing, 21 March 2014.
- 18 Interview with Xiaomei, Shanghai, 4 June 2014.
- 19 Interview with Weila, Shanghai, 15 August 2014.
- 20 UNAIDS, *Gap Report*.
- 21 Interview with Xiao Qiang, Beijing, 20 March 2014; interview with Xiao Bai, Beijing, 25 March 2014; interview with Binbin, Beijing, 12 April 2014.
- 22 Interview with Xiao Jiao, Beijing, 1 June 2014.
- 23 Interview with Xiao Huli, Shanghai, 27 May 2014.
- 24 Interview with Xiao Qiang, Beijing, 20 March 2014.
- 25 Interview with Xiao Tong, Beijing, 15 May 2014.
- 26 Interview with Haima, Shanghai, 21 March 2014; interview with Yanyan, Shanghai, 16 June 2014.
- 27 Sam Winter, *Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region*, Asia Pacific Transgender Network and United Nations Development Program, May 2012.
- 28 UNAIDS, *UNAIDS Guidance Note on HIV and Sex Work*, April 2012.
- 29 Susanne Y.P. Choi and Eleanor Holroyd, "The Influence of Power, Poverty, and Agency in the Negotiation of Condom Use for Female Sex Workers in Mainland China," *Culture, Health & Sexuality* 9, no. 5 (2007): 489-503.
- 30 World Health Organization, UNFPA, UNAIDS, and Global Network of Sex Work Projects (NSWP), *Prevention and Treatment of HIV and Other Sexually Transmitted Infections for Sex Workers in Low- and Middle-Income Countries*, December 2012.
- 31 Interview with Lili, Shanghai, 28 July 2014.
- 32 Interview with Xiao Zhou, Beijing, 29 April 2014; interview with Yangyang, Shanghai, 24 March 2014.
- 33 National Narcotics Control Commission of China within the Ministry of Public Security Narcotics Bureau, *China Narcotics Report 2013*, 7 June 2013.
- 34 Eric J. Nehl et al., "Substance Use and Sexual Risks Among General MSM and Money Boys in Shanghai, China," *Journal of Drug Issues* 42, no. 3 (July 2012): 263-278.
- 35 Interview with Haima, Shanghai, 21 March 2014.
- 36 Beichuan Zhang, "To the Parents of Young Homosexuals and to Young Homosexuals," *Zhang Beichuan Blog*, 6 August 2014.
- 37 Damien Lu, "Foxy Methoxy and Other Anal Dilatation Sex Products for Internal Use," *Aibai Advice Pages*, 14 October 2014.
- 38 Ibid.
- 39 Ministry of Health and Welfare of Taiwan, Food and Drug Administration Presentation, "How Much Do You Know About Drug Abuse?"
- 40 Ministry of Health and Welfare of Taiwan, Food and Drug Administration Announcement, "Advanced Notification of Amendment of Controlled Substance Classification and Items (Adding 5-MeO-DIPT and Thiamylal as Class Four Controlled Substances)" (18 November 2010).
- 41 Personal correspondence with the Narcotics Laboratory of the Ministry of Public Security Narcotics Bureau, 9 October 2014.
- 42 Zhang, "To the Parents of Young Homosexuals."
- 43 Interview with Xiao Huli, Shanghai, 27 May 2014.
- 44 Interview with Zhou Xinyu, Shanghai, 4 March 2014;

The EU's "Lack of Consensus": Uneven Demands for LGBT Rights in Eastern Europe

By James A.G. Evans

ABSTRACT

Europe's unique political arena has enabled the deliberation, negotiation, and installation of human and LGBT rights at the transnational level. While these rights lay a theoretical framework by which to promote integration through "European values," however, LGBT rights standards are neither uniformly upheld nor enforced across the European Union (EU). A lack of consensus toward LGBT rights among EU member states is apparent in Brussels' fluctuating demands for adherence to LGBT rights, both from EU member states and in negotiations with external partners. With a focus on Europe's former Eastern Bloc, this article examines the EU's inability to enforce adherence to LGBT rights in Hungary, a member state since 2004, and the subsequent lack of consistent demand for LGBT rights in Brussels' negotiations with external states such as Serbia and Ukraine. Variation in demands for LGBT rights indicate that LGBT rights are considered by Brussels as a political bargaining chip rather than a fundamental human right, which consequently undermines the EU's own ideology of integration through adherence to human rights.

On 9 October 2014, the Estonian Parliament passed the Civil Partnership Act by a vote of 40 to 38, becoming the first former-Soviet state to legally recognize relationships between two people of the same sex. When introducing the bill to parliament, Estonian President Toomas Hendrik Ilves declared his support for gender-neutral civil partnerships, saying, "Estonia must be a tolerant and liberal country in which there is respect for basic rights and the equality of all before the law."² Drawing on an established European-level discourse on human rights—rooted in a liberal, humanist framework of intrinsic individual rights³—President Ilves was able to incorporate nondiscrimination standards into domestic legislation and advance domestic LGBT legal protections.⁴

Europe's unique transnational political arena has enabled the deliberation, installation, and negotiation of human rights—and therefore LGBT rights⁵—to serve as an element in the promotion of European integration. Historic attempts by the European Union (EU) to solidify a cohesive "European" identity have employed human rights as a binding framework that champions common goals of individual freedom and autonomy. Indeed, after the collapse of Cold War—era political and economic structures in Europe's former Eastern Bloc, the European Union has used human and LGBT rights standards set by EU treaties as a precondition to EU membership. Prior to membership in 2007, for example, Romania decriminalized "public manifestations of homosexuality" under pressure from

the European Council. Indeed, since 2004, eleven former Communist states have fulfilled the Brussels-determined threshold of adequate support for human rights and joined the EU.⁶ Consequently, EU-wide legal rights (understood as nondiscriminatory protection against infringement from individuals, groups, or the state⁷) can be conceptualized as a form of European citizenship that promotes an integrated European identity. From the perspective of European institutions, adherence to LGBT rights as part of a broader human rights discourse is therefore vital to the ideological cohesion and integration of the European project.⁸

EU human rights standards are not, however, uniformly upheld or enforced throughout the organization's member states. Although limited formal LGBT anti-discrimination laws exist in all EU member states and the European Court of Human Rights (ECtHR) has banned legal differences "based solely on considerations of sexual orientation,"⁹ there is not always legal enforcement.¹⁰ Moreover, there is a continuing gap between the legal status and social acceptance of LGBT individuals,¹¹ as highlighted by the 47 percent of LGBT respondents to a 2014 Fundamental Rights Agency survey that reported continuing discrimination and harassment.¹² In addition, there is a stark divide between states that provide more LGBT-oriented legal protections and those that do not. Some member states lack provisions for LGBT citizens that other European states consider basic legal protections; for example, LGBT citizens are not protected from hate speech in Italy, there

gender identity and emphasizes that States parties must solve the problems of bias, vulnerability, or marginalization experienced by groups of children, including those who are lesbian, gay, transgender, or transsexual (UN Doc. CRC/C/GC/13 (2011)). The Committee Against Torture in its General Comment No. 2 requires "each State party to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it," and that these laws must apply to all people, regardless of their personal characteristics, including "sexual orientation" or "transgender identity" (UN Doc. CAT/C/GC/2 (2008)).

- interview with Wang Long, Shanghai, 29 April 2014.
- 45 Interview with Keyi, Beijing, 4 April 2014.
- 46 Michael W. Plankey et al., "The Relationship Between Methamphetamine and Popper Use and Risk of HIV Seroconversion in the Multicenter AIDS Cohort Study," *Journal of Acquired Immune Deficiency Syndromes* 45, no. 1 (2007): 85-92.
- 47 Winter, *Lost in Transition*.
- 48 World Professional Association for Transgender Health (WPATH), *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, 7th version, 2012.
- 49 Jingxi Xu, "Qian Jinfan: The 84-Year-Old Transgender Person's 'Best Part of Life' Has Just Begun," *People's Daily*, 20 June 2012.
- 50 Interview with Wang Litao, Beijing, 4 June 2014.
- 51 Wujisuan and Yanan Guo, *Hormone Use Recommendations for Safe Transformation of Sexual Characteristics*, July 2012.
- 52 Ibid.
- 53 Winter, *Lost in Transition*.
- 54 Ibid.
- 55 Tom Mountford, *The Legal Position and Status of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China*, International Gay and Lesbian Human Rights Commission, March 2010, 3.
- 56 UNAIDS Reference Group on HIV and Human Rights, *HIV, Sex Work and Human Rights*, Fifteenth Meeting, Issue Paper for the Session, December 2013.
- 57 For example, the Committee on Economic, Social, and Cultural Rights, General Comment No. 20 states: ". . . gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace" (UN Doc. E/C.12/GC/20 (2009)); the Committee on the Elimination of Discrimination Against Women, General Recommendation No. 27: "The discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds" (UN Doc. CEDAW/C/201047/GC.1 (2010)). The Committee emphasizes in General Recommendation No. 28: ". . . the core obligation of States parties to the Convention" is to legally prohibit discrimination, including that based on "sexual orientation and gender identity" (UN Doc. CEDAW/C/GC/28 (2010)); The Committee on the Rights of the Child has interpreted Article 2 of the International Convention on the Rights of the Child to include

are no specific transgender protections in Bulgaria, and there are no protections for the equal provision of goods and services to LGBT people in Poland.¹³ Notably, such diverging attitudes among EU member states concerning LGBT rights provisions are subsequently translated into disparate policies at the transnational European level, such as the European Parliament's inability to agree on a nondiscrimination directive.¹⁴ As this article argues, a lack of consensus among EU member states about the need to protect LGBT rights allows those rights to become political bargaining chips—both at the member state and EU-wide levels—rather than fundamental human rights. Using examples of differing LGBT protection across the EU, particularly regarding same-sex unions, this article will examine the EU's inability to enforce compliance with LGBT rights standards in Hungary and, subsequently, the EU's hypocritical and contradictory foreign policy that both demands and ignores LGBT rights in Serbia and Ukraine, respectively. I contend that this political bartering of LGBT rights erodes the value of human rights as Europe's ideological unifier, undermines the EU's ability to demand rights adherence from candidate states, and threatens necessary European integration at a time of increasing economic and political challenges.

Europe's "Lack of Consensus" on LGBT Rights: The Case of Same-Sex Unions

Divergent policies on LGBT issues between European states are clearly visible in the case of same-sex unions, legalized as either gender-neutral marriage or civil unions. Currently, ten Western European states legally recognize same-sex marriages,¹⁵ with a further nine states across Europe recognizing civil unions or partnerships,¹⁶ and seven Eastern European states introducing constitutional amendments that ban same-sex marriage.¹⁷ This uneven and apparently regionally specific legalization of same-sex unions fuels stereotypes of a divided Europe, with Eastern Europe falsely understood as uniformly homophobic¹⁸ and Western European imagined as the pro-LGBT bastion of modernity.¹⁹ As the scattered legalization of submarriage civil unions indicates, however, legislation for same-sex unions is not region-specific, and to defer to such preconceptions masks nationally specific discourses about LGBT issues.²⁰ Rather than there being a uniform discourse on LGBT rights across Europe, debates on such issues take a minority rights approach in Romania, a citizenship and sexology approach in the Czech Republic,²¹ and a tolerance approach in Poland.²² Furthermore, laws decided at the national level can obscure the range of attitudes toward LGBT rights within a given state. For instance, public backing for same-sex partnerships in Estonia remains at a low 34 percent, despite legalization by the Estonian legislature.²³ Same-sex unions, therefore, should not be used

as the sole indicator when evaluating the state of LGBT affairs in a given nation, as it ignores these nationally specific discourses and reinforces generalizations of states as entirely homophobic or nonhomophobic depending solely on partnership laws.

Furthermore, a lack of standard legal definition for same-sex unions renegades the use of same-sex partnership laws as a measurement of relative protection for LGBT individuals. In Hungary, for example, civil unions prevent same-sex couples from second-parent adoption and assisted reproductive rights.²⁴ Likewise, registered partnerships in the Czech Republic prohibit same-sex couples from sharing or inheriting property, using a common surname, or accessing assisted reproduction.²⁵ State-specific legal definitions therefore allow certain states to appear supportive of LGBT rights, when in reality same-sex couples are only granted limited legal protections, further betraying an unwillingness by national governments and lawmakers to diverge too greatly from traditionally defined roles of gender and sexuality. The lack of uniform rights granted to same-sex partners by state-specific laws therefore hinders the use of same-sex partnerships in comparisons between states' relative progress on LGBT rights.

Lack of coherency in Europe's transnational courts—the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR)²⁶—exemplifies Europe's disparate recognition of same-sex relationships. To date, both courts have refused to recognize same-sex marriage as a fundamental right, despite previously playing key roles to establish LGBT anti-discrimination precedent.²⁷ ECtHR rulings in *Schalk and Kopf v. Austria* (2010) and *Hämäläinen v. Finland* (2014), for example, upheld Article 12 of the European Convention on Human Rights (ECHR), which states that the concept of marriage should be determined "according to the national laws governing the exercise of this right."²⁸ In both cases, the ECtHR specifically mentioned the lack of "European consensus on allowing same-sex marriages,"²⁹ highlighting an unwillingness by the Court to prescribe same-sex marriages to member states who might ignore the ruling. Consequently, the ECtHR has eliminated the possibility of Europe-wide recognition for same-sex marriage until a consensus can be reached. The impact of the ECtHR's refusal to rule on the issue results in disparate legal statuses and protections for LGBT depending on their state of residence, which ultimately undermines the EU's fundamental right to freedom of movement.³⁰

The absence of EU demands for uniform implementation of LGBT rights protection among member states exhibits Europe's lack of consensus on LGBT issues. Attempts by the European Parliament Intergroup on LGBT Rights to support a European Commission directive that would allow sexual orientation discrimination to enjoy the same protections as racial discrimination have stalled

since 2008.³¹ Indeed, although the EU explicitly promotes gender equality, it only vows to "combat discrimination"³² on the basis of sexual orientation, effectively creating a hierarchy of discriminations that places discrimination based on sexual orientation low on the list and mostly only protects against discrimination in employment.³³ Similarly, European Parliament resolutions for the recognition of legal partnerships across the EU on the basis of gender equality, free movement of labor across borders, and anti-discrimination have yet to manifest.³⁴ Consequently, although all EU member states have introduced sexual orientation anti-discrimination laws, the lack of consensus over LGBT rights in Europe affects the ability of transnational institutions to promote legal protections and to advance social acceptance of LGBT individuals among individual member states. Inconsistent LGBT rights enforcement among EU member states therefore impairs the use of human rights as a form of European citizenship, diminishing the EU's integrative momentum.

Politicizing LGBT Rights: Examples of Hypocrisy, Conditionality, and Denial

The lack of standardized LGBT rights across EU member states is an indicator of the EU's inability to effectively discipline member states that fail to comply with EU human rights directives and refuse to prioritize LGBT issues. The politicization of LGBT rights, demonstrated in the examples below of Hungary, Serbia, and Ukraine, exemplify not only the EU's inability to enforce its own policies on the issues that stem from the EU treaties, but also these policies' mutable place as a fundamental component of the European project, particularly when confronted with crises such as intensifying Russian aggression or financial troubles. The lack of enforcement of LGBT rights within member states exposes demands for adherence to LGBT rights by external parties as hypocritical. A European Parliament report on cooperation with the African, Caribbean, and Pacific Group of States, for example, called for nondiscrimination on the basis of sexual orientation and gender identity,³⁵ while at the same time the European Parliament failed to enforce such demands on its own member states. This hypocrisy not only undermines the EU's credibility in foreign policy, but also threatens to undo the ideological cohesion that human rights rhetoric is intended to maintain.

LGBT Rights Regression in an EU Member State: Authoritarianism in Hungary

After a landslide election victory in 2010, Hungary's conservative Prime Minister Viktor Orbán has faced increasing accusations of authoritarianism by Hungarian opposition groups, civil activists, and international

nongovernmental organizations (NGOs).³⁶ In direct opposition to the EU's ideological progress, Orbán has appointed a media-monitoring body to "regulate content," accused NGOs of being "foreign agents," and shown general disregard for liberal, democratic principles.³⁷ Although the EU is able to push for anti-discrimination legislation in member states by demanding compliance with Article 21 of the Charter of Fundamental Rights, there exist relatively weak mechanisms to enforce penalties for noncompliance with anti-discrimination measures or failure to implement pro-LGBT legislation. Although the EU established a post-accession "special cooperation and verification mechanism" in Bulgaria and Romania in an attempt to ensure compliance with EU demands for civil matters and criminal law, the mechanism is weak and the EU still lacks an effective method to ensure member state compliance with EU directives. Consequently, this inability to force compliance, as well as a lack of member state consensus on LGBT rights, has allowed the Hungarian government to implement and maintain anti-LGBT policies without fear of EU-level political or financial repercussions.

Notably, Orbán has gone to great lengths to create an image of himself as the bearer of "traditional Hungarian values"; supporter of the heteronormative, nuclear family;³⁸ and a proponent of intolerant and homophobic rhetoric.³⁹ This effort culminated in his enactment of a new Hungarian constitution that defines marriage as a "conjugal union of a man and a woman," which "protects the institution of the family"⁴⁰ and notably lacks any protections on the basis of sexual orientation. Support for Orbán's homophobic policies by his Fidesz party stands in stark contrast to the previous Hungarian parliament's legalization of civil unions in 2007, by the left-wing coalition of the Hungarian Socialist Party and the Alliance of Free Democrats. Orbán's current parliamentary supermajority has even introduced a constitutional amendment that diminishes the authority of the Constitutional Court to review laws or refer to the Court's past decisions in future judgments.⁴¹ Attempts by EU leaders—such as the European Commission, the Brussels-based executive body of the EU—to curtail the prime minister's authoritarian moves against LGBT groups have also yielded few results. Notably, the EU Commission President, Jean-Claude Juncker, has remained silent on Hungary's internal politics, and the EU even reaffirmed its intent to provide Hungary with €25.4 billion (US \$29.4 billion) in structural and investment funds from 2014 to 2020,⁴² ignoring opposition from Norway, a non-EU state.

It is in this way that Orbán has utilized homophobic demands for a strong "nuclear family" and encroachment on LGBT rights to consolidate his dominance over Hungarian politics. Hungary's backsliding on LGBT rights and democratic principles also highlights Brussels' inability to effectively enforce member state compliance with EU standards. Despite anti-discriminatory protections for

LGBT individuals at the European level, EU membership status does not therefore equate to the enforcement of these legal protections for LGBT citizens nor sustained positive legal reforms, let alone progressive attitudes toward LGBT groups.⁴³

LGBT Rights and Conditionality: Serbia's Bid for "Europeanization"

In comparison to Brussels' weak response to Hungary's disregard for LGBT rights, the EU maintains a strong negotiating position in its (arguably hypocritical) demand for LGBT rights in EU candidate states. Notably, with an increasing number of member state "veto points" in EU accession bids⁴⁴—where states can demand political reforms or concessions from the candidate state in order to influence or stop the accession process—there has been an increased scrutiny of human rights standards, and displays of government support for public LGBT events now appear to be an unofficial requirement of EU candidacy.⁴⁵ As part of Serbia's EU candidacy, the EU has demanded demonstrable acceptance by Serbia's elites of domestic and international LGBT groups, with minority protections and acceptance of human rights considered by many in Brussels as fundamental to the acceptance of a post-Balkan War "Serbia after democratic changes."⁴⁶

In 2014, the Serbian government's permission to host an LGBT pride march in its capital, Belgrade—an event that was cancelled the previous three years, citing "safety concerns"—was considered by elites in both Brussels and Belgrade as a sign of the Serbian government's support for LGBT rights and a positive step forward in its candidacy for EU membership. Indeed, attendance by a number of ambassadors from the EU and the United States, as well as Serbian elites such as the mayor of Belgrade, highlights international support for the pride event and support for the "Europeanization" of human rights in Serbia. The head of Serbia's EU negotiations team, Tanja Miscevic, told reporters that "this drastically changes the image of Serbia in relations with its European partners and shows that Serbia is prepared to endorse the same values as the countries of the EU."⁴⁷ Despite the inconsistent adherence to LGBT rights among member states, the EU is still capable of effecting displays of support for LGBT rights in candidate states. Although it is questionable to what extent the attitudes of individual political leaders in Belgrade have improved toward LGBT rights, the example of Belgrade Pride does emphasize the "carrot" of EU membership as an incentive for the state to tolerate LGBT groups.

The supposed carrot of EU membership yields uncertain benefits for LGBT individuals in Serbia, however, as elites manipulate LGBT groups by allowing "acceptable" organizations international visibility in order to better negotiate the terms of their membership.⁴⁸ While

introducing pro-LGBT measures in order to appease Brussels is not a new initiative by a candidate state,⁴⁹ elite-driven acceptance of Brussels-approved LGBT initiatives (such as Belgrade Pride) has been accused of promoting "European standards" at the expense of other needs, such as improved legal protection for LGBT individuals in Serbia.⁵⁰ Indeed, persisting institutionalized homophobia, as well as increasing social conservatism and clericalism (a consistent trend relating to increasing church attendance in post-Communist Europe⁵¹), continue to render the Serbian public sphere a challenging place for LGBT groups.⁵² Although pride festivals do provide visibility to LGBT groups, they do not necessarily respond to the individual needs of the LGBT community.

Broader examination of the EU's "inclusive exclusion"⁵³ of the Western Balkans—the promise of EU membership conditioned on mutable demands for reform—indicates that Brussels may be requiring strict displays of support for LGBT rights in order to delay accession by those states. Enlargement fatigue within the EU, in particular regarding candidate countries in the Western Balkans such as Serbia, decreases the willingness of both member states and the European Commission to admit new members states that are either currently deemed unsuitable for membership (with European Commission President Jean-Claude Juncker extending EU enlargement timelines by at least five more years), or in a weaker negotiating position than the EU. LGBT rights, therefore, are becoming a bargaining chip in the EU accession process rather than fundamental rights that should be equally enforced in all EU member states.

Ignoring LGBT Rights: The Brussels-Moscow Frontier in Ukraine

In contrast to EU demands for LGBT rights in Serbia, rising geopolitical tensions over Russia's annexation of Crimea and support for separatist movements in Eastern Ukraine have resulted in the EU shelving the question of LGBT rights in favor of accelerating Ukraine's political integration. For example, the 2014 EU negotiations, concerning Ukraine's progress from phase I to phase II of visa-free access to the EU, failed to include an anti-discrimination bill that protects the rights of sexual minorities.⁵⁴ This is indicative of the EU's prioritization of incentivizing Ukraine toward Brussels (and therefore away from Moscow) at the "risk of undermining its key human rights principles."⁵⁵

Apparently unaware of the EU's wavering support for LGBT rights, anti-EU platforms in Ukraine frequently highlight the EU's support for anti-discrimination measures in defense of Ukraine's relationship with Russia.⁵⁶ Attacking Brussels' platform of anti-discrimination is not a novelty—periodicals in pre-EU Poland referred to the

"gender and sexuality obsessed" EU as "effeminate" versus traditional "masculine" values⁵⁷—and LGBT rights have increasingly become a topic of polarization between pro- and anti-EU factions. Far-right ultranationalist groups in Ukraine, such as the Right Sector and the All-Ukrainian Union (also called Freedom), promote a nationalist, traditionalist platform that defines itself against "pro-LGBT" reformers.⁵⁸ The pro-Moscow lobbying group Ukrainian Choice—whose chairman Viktor Medvedchuk was informally appointed as a negotiator on behalf of Eastern Ukrainian separatists and whose daughter is Vladimir Putin's goddaughter⁵⁹—similarly employs anti-LGBT rhetoric as part of its advocacy against Ukraine's integration with the EU.⁶⁰ In the Ukrainian context, the debate over LGBT rights is frequently articulated in terms of a Moscow-Brussels dichotomy, in which LGBT subjects represent the embodiment of a Western European—and, by implication, anti-Russian—polity, and homophobic, heteronormative rhetoric upholds a traditional model of Russian-backed masculinity. The Ukrainian parliament's removal of a Russian-inspired "gay propaganda" bill from its 2015 legislative agenda (with parliamentary deputies instead voting to name Russia an "aggressor state"⁶¹) further emphasizes the close association in Ukraine between the EU and LGBT rights, despite the EU's lack of coherent, pan-EU LGBT advocacy.

Brussels' unease concerning Russia's increasing aggression therefore appears to override demands for LGBT rights in Ukraine that are otherwise required of Serbia and other EU candidate states. LGBT rights seem to be ignored when perceived as a hindrance to larger EU objectives—in this case, preventing further Russian absorption of Ukrainian territory—but demanded when they are of no consequence to delay a state's accession process, as in the case of the Western Balkans. If human rights, and therefore LGBT rights, are considered vital to the ideological cohesion of the European project, then inconsistent demands for the legal protection of LGBT rights within the EU are counterproductive, particularly in the face of Russian hostility that necessitates ever-greater EU cohesion.

Correcting LGBT Rights Inconsistencies in the EU

This article endeavors to show that the mutable status of LGBT rights in the EU stems from a lack of consensus among EU member states. Persisting differences between national policies toward LGBT rights are maintained by Brussels' inability to enforce rights adherence within member states, highlighted by Hungarian Prime Minister Orbán's introduction of homophobic legislation. Furthermore, the EU's variation in demands for LGBT rights in its foreign policy negotiations with Serbia and Ukraine indicate that this fluctuation in the enforcement of LGBT rights may flow from Brussels' consideration of LGBT rights as a political

bargaining chip rather than a fundamental human right. The exploitation of these divergent member state attitudes to LGBT rights undermines the use of human rights as an ideological adhesive between otherwise dissimilar European citizens, and threatens European integration at a time when financial crises, increasing internal nationalism, and external militaristic aggression demand greater unity. Consequently, LGBT rights must be reconsidered as a priority for both Brussels' and existing EU member states. Indeed, Brussels' failure to demand EU-wide LGBT equality is a reminder of how far LGBT rights have yet to go in Europe before they can be considered indivisible from human rights and the European project.

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ENDNOTES

- 1 With special thanks to Christopher Healy, Andy McGuffie, Tomasz Dudek, and Kyle Shernuk.
- 2 Estonian Human Rights Center, Press Release, 3 October 2014.
- 3 Judith Butler, *Gender Trouble, Feminism and the Subversion of Identity* (New York: Routledge, 1990).
- 4 Ana Cristina Santos, *Social Movements and Sexual Citizenship in Southern Europe* (Basingstoke, UK: Palgrave Macmillan, 2013); and Kelly Kollman, *Same-Sex Unions Revolution in Western Democracies: International Norms and Domestic Policy Change* (Manchester, UK: Manchester University Press, 2013).
- 5 “Secretary Clinton’s Historic Speech on LGBT Human Rights—‘Gay Rights Are Human Rights,’” YouTube video, 6 December 2011.
- 6 Former Eastern Bloc EU member states (year of accession): Poland, Lithuania, Latvia, Estonia, Hungary, Slovakia, Czech Republic, and Slovenia (2004), Romania and Bulgaria (2007), Croatia (2013).
- 7 Nico J. Beger, *Tensions in the Struggle for Sexual Minority Rights in Europe* (Manchester, UK: Manchester University Press, 2004), 101.
- 8 Jürgen Habermas, “Citizenship and National Identity: Some Reflections on the Future of Europe,” *Praxis International* 12, no. 1 (1992) : 7.
- 9 ECtHR ruling in *X v Austria* (n.19010/07, 13 February 2013), quoted in Aidan O’Neill, “A Glorious Revolution? UK Courts and Same-Sex Couples,” in *Same-Sex Couples Before National, Supranational and International Jurisdictions*, eds. Daniele Gallo, Luca Paladini, and Pietro Pustorino (Berlin: Springer-Verlag, 2014), 195.
- 10 Andrea Krizsan, “From Formal Adoption to Enforcement. Post-Accession Shifts in EU Impact on Hungary in the Equality Policy Field,” *European Integration Online Papers*, suppl. Special Issue 2, vol. 13 (2009): 1-18.
- 11 Carl F. Stychin, “Queer/Euro Visions,” in *What’s Queer About Europe*, eds. Mireille Rosello and Sudeep Dasgupta (New York: Fordham University Press, 2013), 171.
- 12 Human Rights Watch, *World Report 2014: European Union*.
- 13 ILGA-Europe, ILGA Europe Rainbow Map (Index), May 2013.
- 14 Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation {SEC(2008) 2180} {SEC(2008) 2181}.
- 15 Civil marriages are open to same-sex couples in Belgium, Denmark, Finland, France, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom (excluding Northern Ireland).
- 16 Civil partnerships are open to same-sex couples (where marriage is not also available) in Austria, Croatia, Czech Republic, Estonia, Germany, Hungary, Ireland, Malta, and Slovenia.
- 17 Constitutional amendments are in Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, and Slovakia.
- 18 Eurovicious, “Queer as Turbofolk (Part I): ‘Eastern Europe Is Homophobic,’” *Balkanist*, 4 September 2014.
- 19 Robert Kulpa and Joanna Mizieleńska, eds., *De-Centering Western Sexualities: Central and Eastern European Perspectives* (Farnham, UK: Ashgate, 2011), 2.
- 20 Thomas Spijkerboer, ed., *Fleeing Homophobia: Sexual Orientation, Gender Identity, and Asylum* (London: Routledge, 2013), 2.
- 21 Kateřina Nedbálková, “Community at the Backstage: Gays and Lesbians in the Czech Republic,” in *Queer Presences and Absences*, eds. Yvette Taylor and Michelle Addison (Basingstoke, UK: Palgrave Macmillan, 2013), 31.
- 22 Beger, *Tensions in the Struggle for Sexual Minority Rights*, 49.
- 23 Alexander Laurence Corkhill, “Estonia Passes Gender-Neutral Civil Partnership Law,” *Baltic Times*, 5 November 2014.
- 24 Adam Bodnar and Anna Śledzińska-Simon, “Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe,” in *Same-Sex Couples Before National, Supranational and International Jurisdictions*, eds. Danielle Gallo, Luca Paladini, and Pietro Pustorino (Berlin: Springer-Verlag, 2014), 211.
- 25 *Ibid.*, 212.
- 26 ECtHR established in 1959 on the basis of Article 19 of the European Convention on Human Rights, a convention adopted by the 47 members of the Council of Europe and separate to the EU.
- 27 Such as decriminalizing homosexuality (*Dudgeon v. UK* 1981) and banning distinctions based solely on sexual orientation (*Salgueiro Da Silva Mouta C. v. Portugal* 1999).
- 28 European Convention on Human Rights, Article 12, “Right to Marry.”
- 29 ECtHR ruling from *Hämäläinen v. Finland* (2014), Application no. 37359/09.
- 30 European Parliament and Council Directive 2004/38/EC of 29 April 2004.
- 31 Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or

- Sexual Orientation [SEC(2008) 2180] [SEC(2008) 2181].
- 32 Treaty of the European Union, Article 3 (3).
- 33 Dagmar Schiek and Anna Lawson, eds., *European Union Non-Discrimination Law and Intersectionality* (Farnham, UK: Ashgate, 2011), 15.
- 34 Draft European Parliament Legislative Resolution: On the Proposal for a Directive of the European Parliament and of the Council on Measures Facilitating the Exercise of Rights Conferred on Workers in the Context of Freedom of Movement for Workers, 14 November 2013.
- 35 European Parliament Report on the Work of the ACP-EU Joint Parliamentary Assembly (2014/2154(INI)), 27 January 2015.
- 36 Sylvana Kolačzkowska and Zselyke Csaky, “The State of Europe’s Democracy 25 Years After the Wall,” *EUobserver*, 5 November 2014.
- 37 Yigal Schleifer, “Hungary at the Turning Point,” *Slate*, 3 September 2014.
- 38 Bodnar and Śledzińska-Simon, “Between Recognition and Homophobia,” 211.
- 39 Stephen Wagstyl, “Hungary’s Viktor Orbán Defends Family Values in Berlin Speech,” *Financial Times*, 8 May 2014.
- 40 Fourth Amendment to the Fundamental Law of Hungary, Article 1, February 2013.
- 41 Bodnar and Śledzińska-Simon, “Between Recognition and Homophobia,” 227.
- 42 Stephan Faris, “Power Hungary: How Viktor Orban Became Europe’s New Strongman,” *Bloomberg Business*, 22 January 2015.
- 43 Bodnar and Śledzińska-Simon, “Between Recognition and Homophobia,” 220.
- 44 “Füle, Buglaria and Romania’s Accession Questioned the Credibility of EU Enlargement,” *EurActiv*, 26 June 2014.
- 45 Nikolaj Nielsen, “Belgrade Gay Pride a ‘Milestone,’” *EUobserver*, 29 September 2014.
- 46 Jelisaveta Blagojević, “Between Walls: Provincialisms, Human Rights, Sexualities and Serbian Public Discourses on EU Integration,” in *De-Centring Western Sexualities: Central and Eastern European Perspectives*, eds. Robert Kulpa and Joanna Mizelińska (Farnham, UK: Ashgate, 2011), 28.
- 47 Tanja Miscevic, head of the negotiating team for the Accession of the Republic of Serbia to the European Union, quoted in “Belgrade Pride 2014: Live Blog,” *Balkan Insight*, 28 September 2014.
- 48 Katja Kahlina, “Local Histories, European LGBT Designs: Sexual Citizenship, Nationalism, and ‘Europeanisation’ in Post-Yugoslav Croatia and Serbia,” *Women’s Studies International Forum* 49 (2015).
- 49 Dagmar Herzog, *Sexuality in Europe* (Cambridge, UK: Cambridge University Press, 2011), 184.
- 50 Blagojević, “Between Walls,” 32.
- 51 Herzog, *Sexuality in Europe*, 90.
- 52 Boban Stojanovic, “Dealing with the Past, Transition and Democratization,” *Regional Network Against Homophobia: LGBT Network in the Middle East, The Balkans and Caucasia* (Ankara, Turkey: Kaos GL, 2011).
- 53 Blagojević, “Between Walls,” 39.
- 54 Bogdan Globa, “EU and Ukraine: Too Busy to Protect Gay Rights?,” *EUobserver*, 23 April 2014.
- 55 Evelyne Paradis, executive director of the European Association of LGBT Organizations (ILGA-Europe), quoted by Bogdan Globa, “The EU Says No to Gay Rights in Ukraine,” *oDR*, 21 May 2014.
- 56 Viktor Berezka, “Какой пример дает нам Европа?,” *Украинский Выбор*, 24 February 2013.
- 57 Agnieszka Graff, “The Land of Real Men and Women: Gender and EU Accession in Three Polish Weeklies,” *Journal of International Institute* 15, no. 1 (2007).
- 58 Mireille Rosello and Sudeep Dasgupta, eds., *What’s Queer About Europe* (New York: Fordham, 2013).
- 59 “Viktor Medvedchuk,” *Wikipedia*, last modified 15 March 2015.
- 60 Yevhen Solonyna, “Russia’s Plan for Ukraine: Purported Leaked Strategy Document Raises Alarm,” *Radio Free Europe Radio Liberty*, 20 August 2013.
- 61 Joe Morgan, “Ukraine Throws Out ‘Gay Propaganda’ Bill,” *Gay Star News*, 28 January 2015.

“I Decide Who I Am”: The Right to Self-Determination in Legal Gender Recognition

By Peter Dunne

ABSTRACT

In recent years, there have been significant global steps toward removing arbitrary entry requirements for legal gender recognition. At both the national and international levels, policy makers and judges increasingly understand that considerations of bodily integrity, as well as the personal autonomy of applicants, mean that it is unacceptable to condition legal recognition on the existence of prior medical treatment. Yet, even as States move to end the medicalization of gender recognition, they still retain official structures that—either explicitly or implicitly—pathologize gender identity. In the United Kingdom, applicants for recognition are not required to undergo gender confirmation surgery, but they must present evidence of a “gender dysphoria” diagnosis. In the Netherlands, specialized gender teams do not treat trans* persons as part of the recognition process, but they must confirm an applicant’s intention and capacity to legally transition. This article explores the “pathologization” of legal gender recognition. It discusses the forms in which pathologization-based reasoning arises and considers the suggested policy rationales for treating trans* identities as a mental health concern. The article challenges the continued medical supervision of legal gender recognition, and advocates the alternative self-declaration model adopted by law makers in Argentina and Denmark.

Introduction

In April 2014, Amnesty International published its highly anticipated report on access to gender recognition in Europe.¹ The document, entitled *The State Decides Who I Am*, reflects generally upon the experience of trans* individuals in seven European countries, but focuses specifically on the hardships created by arbitrary or unattainable preconditions for legal recognition. Since 1972, when Sweden first introduced official acknowledgment for an individual’s preferred gender,² legal systems have sought to limit the class of person who can access recognition. Before obtaining State respect for their true identity, trans* persons, in Europe and beyond, have traditionally been required to satisfy a number of “conditions of recognition,” including medical sterilization, gender confirmation surgery, and forced divorce.³ These requirements not only infringe the basic human rights of trans* individuals—including bodily integrity, family life, and nondiscrimination⁴—but also appoint third-party actors, often the State itself, as the ultimate guarantors of legal gender. Rather than respecting the agency of the individuals who live their gender on a daily basis, the established conditions of recognition prioritize the opinions, and frequently the prejudices, of medical officers and state officials who have little experience with, and even less understanding of, diverse gender identities.

Restrictive and unattainable preconditions continue to characterize legal gender recognition around the world. Yet, in recent years, there have been nascent signs that policy makers increasingly understand the harms generated by such prerequisites. Starting with the United Kingdom’s landmark Gender Recognition Act 2004 (“the 2004 Act”), legislatures and courts have begun to move away from requirements for mandatory surgery. In December 2014, New York City became the latest jurisdiction to adopt new rules. Trans* persons in New York City can now amend their birth records with only a supporting “affirmation” from a physician or similar professional.⁵ Beyond medical treatment, there is also a growing realization that legal gender recognition should not affect an applicant’s marital status and, within some jurisdictions, that the State should even acknowledge the preferred gender of minors. These developments significantly increase the accessibility of legal gender recognition and, in consequence, may greatly improve the life quality of trans* persons. However, for the most part, the improvements have arisen in an environment that continues to promote medical officials and state actors as the gatekeepers of gender.⁶ An applicant may be entitled to legal recognition without surgery, but medical professionals can still refuse the necessary support for their request. State officials are losing the power to use civil status as a justification for rejecting an application but,

in many countries, such as the United Kingdom, state-appointed “gender panels” still retain the ultimate discretion whether to extend recognition. Trans* individuals have not obtained a global right to self-determination. It is that struggle—the fight to say that “I decide who I am”—that trans* advocates and their allies will increasingly have to undertake in years to come.

“Gatekeepers of Gender”: State Control over Legal Recognition

The issue of control in legal gender recognition concerns two interconnected questions. First, who assigns a person’s legal gender? Second, why is an individual assigned one gender and not another? In almost all jurisdictions around the world, the answer to these inquiries is: (1) the State, or a state-appointed actor, and (2) because the individual satisfies specific criteria that the State has established for assigning that gender.

State control of legal gender recognition frequently manifests itself through the use of pathologization-based reasoning.⁷ Pathologization involves linking transgender identity to mental impairment. Under this approach, a person who identifies with, or expresses, a gender identity other than their birth-assigned gender is considered to be inherently disordered.⁸ Depending on the jurisdiction, the person may be diagnosed with “transsexualism,” “gender identity disorder,” or “gender dysphoria.” The existence of a diagnosis is normally a precondition for obtaining further state cooperation during the transition process and can act as *the* trigger to access appropriate health care pathways or legal recognition. In this regard, it should be understood that a pathologization-based model does not grant legal gender recognition to satisfy any rights-based argument nor does it act out of respect for lived experiences. Pathologization envisages gender recognition as a legal privilege extended to treat a diagnosable medical illness. Without the diagnosis, pathologization foresees little justification for recognizing a person’s preferred gender. Self-determination is irrelevant. In practical terms, pathologization-based reasoning is evident in standalone requirements, such as s. 2 (1) of the 2004 Act, which require that individuals submit a diagnosis of gender dysphoria with their application. It also arises where gender dysphoria is a precondition for accessing medical treatment, such as hormone therapy or gender confirmation surgery, which is itself a legal requirement for gender recognition.⁹

Explaining State Control: Justifications for Pathologization

A number of explanations and attempted justifications have been offered for the pathologization of legal gender recognition. First, in terms of explanation, policy makers

and judges have historically tended to conflate the processes of medical and legal transition.¹⁰ This is so even where, as under the Spanish and Portuguese recognition models, health care professionals have a strictly limited role. Dean Spade has written extensively about popular misconceptions that all trans* people seek to alter their bodies through surgery.¹¹ Within the general population, there is not so much a belief that all trans* persons seeking legal recognition will access surgical intervention, as there is an assumption that surgery and legal recognition are the same thing. This in turn may be used to justify imposing arbitrary preconditions that bear no relevance to a non-medicalized process of legal recognition. In practice, many trans* persons seeking legal recognition have neither the desire¹² nor the means¹³ to submit to gender confirming treatment. Yet, the continued belief among state officials that medical and legal transitions are synonyms results in applicants for gender recognition being obliged to satisfy conditions, such as the diagnosis requirement, that are more correctly understood as entry guidelines for medical treatment.

There is also a belief that pathologization, in the form of the diagnosis requirement, prevents legal gender recognition from becoming an instrument of fraud or abuse.¹⁴ If recognition could be accessed solely on the basis of self-determination, there is a fear that individuals would use the law for dishonest or inappropriate purposes. In all jurisdictions that have debated the issue, policy makers have raised concerns that self-determination could result in criminals using gender recognition to avoid their legal responsibilities. Allegations have similarly been made that self-determination would establish a “rapists’ charter,” allowing cisgender males to claim a trans* identity in order to enter gender-segregated facilities and assault the occupants.¹⁵ Finally, pathologization is often justified as protecting applicants themselves. Reflecting the culture of mistrust that has historically characterized the law’s relationship with trans* communities, policy makers have suggested that a diagnosis requirement is necessary to verify that an applicant’s self-identification actually reflects a trans* identity and has not arisen because of an unrelated mental illness.¹⁶ Underlying all of these explanations and justifications is a perceived need to ensure that only “real” trans* individuals access legal gender recognition. However, as discussed below, the threat of fraud or misuse is, in practice, imagined rather than actually real.

Denying Lived Experiences: The Stigmatizing Effects of Pathologization

The imposition of pathologization, and the insistence of state control, negatively impacts upon trans* communities and the wider regulation of gender identity. A pathologization-based model fails to comprehend the important

differences between legal gender recognition—the process of accurately reflecting a person’s civil status—and medical transition—a process whereby trans* individuals may access gender confirming treatments, including surgical, hormone, or mental health interventions.¹⁷ While there may be cogent arguments that entry into health care pathways should require evidence of medical necessity—although recent legislation in Argentina challenges even that belief¹⁸—policy makers have yet to offer a convincing explanation as to why legal recognition, particularly in those regimes that do not require any specific medical treatment, should be conditional upon a medical diagnosis.

The reality is that many trans* persons do not experience their gender identity as a mental health concern.¹⁹ These persons feel no discomfort or distress because of the fact that their gender identity conflicts with the gender assigned to them at birth. In some cases, such individuals may experience either frustration because of incongruence in their identification documents or anxiety because of the public’s reaction to their gender expression; these responses, however, are the natural product of social prejudice and discrimination. They are similar to feelings that any other oppressed minority experiences and should not be considered as speaking to an inherent disorder.²⁰ Many people seeking legal gender recognition simply have no need or desire for medical intervention. Yet, as a consequence of pathologization, these individuals—in order to access basic legal rights—must not only seek out but must also concur in a diagnosis of mental illness. Given that trans* populations around the world experience disproportionately low levels of health care,²¹ even finding mental health services may prove a challenge for some applicants. For those who can access treatment, the absence of discomfort or distress may impede their ability to obtain a diagnosis.²² There have been numerous reports of applicants being forced to alter their personal narrative of gender to satisfy an individual physician’s preconception about trans* identities.²³

The pathologization of legal gender recognition has a highly stigmatizing effect on the trans* community.²⁴ While the marginalization of mental illness is a phenomenon that should be challenged rather than avoided,²⁵ the fact remains that being diagnosed with a psychiatric disorder remains a significant social taboo. Pathologization-based reasoning requires stable and well-adjusted applicants to share in the stigma of mental illness. It perpetuates the myth that all trans* persons are confused.²⁶ Where else does the law condition an accurate civil status on the involuntary admission of mental illness? Are cisgender persons ever subjected to such degrading treatment?²⁷ Limiting trans* human rights to those who agree to a diagnosis discriminates against applicants for recognition. It encourages societal prejudice and implicitly validates popular portrayals of trans* individuals as characters of ridicule.²⁸ Pathologization also undermines the credibility

of legal gender recognition. If recognition is merely a legal fiction to treat mentally ill trans* persons, rather than a fundamental human right, why would the general public ever accept state acknowledgment of preferred gender?²⁹

Movements for Reform: Toward a Self-Determination Model

In recent years, a number of jurisdictions have adopted new rules for legal gender recognition, with the stated aim of prioritizing the lived experience of applicants. To differing degrees, these jurisdictions have succeeded in decoupling legal gender recognition from medical transitions. In doing so, they have begun a movement toward respecting the self-determination rights of trans* individuals and promoting greater societal respect for diverse gender identities.

In the Netherlands and Ireland, legislatures have instituted recognition models that require no evidence of medical treatment, including surgery, hormone therapy, or a diagnosis of gender dysphoria.³⁰ Introducing Ireland’s Gender Recognition Bill 2014, the Minister for Social Protection, Joan Burton T.D., stated that the legislation would free trans* persons from preconditions based on “details of care including medical history.”³¹ In one regard, it is possible to conclude that the Dutch and Irish regimes do achieve the depathologization of legal gender recognition. In both countries, access to legal gender recognition is not conditional upon the presence of gender dysphoria. Trans* persons in Ireland and the Netherlands do not have to accept that they are inherently disordered in order to access their basic civil rights. Yet, under both schemes, medical professionals, while not required to provide a diagnosis or gender confirming treatments, do retain a significant gatekeeper role.³² Dutch and Irish law both require that applications for legal gender recognition include a supporting statement from an expert medical officer. The statement must confirm that the individual intends to transition and understands the consequences of legal gender recognition. Submission of the expert’s statement is a mandatory condition of legal gender recognition, and an application will not be approved before the statement is received.

There is an undoubted inconsistency between the purported aims of the Dutch and Irish recognition models and the role that has been retained for medical professionals. It is hard to accept that legal recognition in either jurisdiction has been fully depathologized if support from a doctor or psychiatrist still determines the success of an application.³³ If gender recognition in Ireland and the Netherlands is not a medical process, why must trans* people have any dealings with health care providers? Individuals who seek to change their civil status through marriage or amend their name through deed poll are subject to no similar requirements.³⁴ A doctor need not certify that a would-be

spouse is capable of understanding the consequences of marrying. Surely the simple fact that Dutch and Irish policy makers feel the need for medical supervision of the recognition process at least insinuates that trans* persons, unlike cisgender individuals, do not enjoy full control of their mental capacities. Yet, this is the exact reasoning that depathologization, and the removal of a diagnosis requirement, seeks to avoid. Omitting a requirement for medical treatment will undoubtedly open up legal recognition to a greater number of applicants. However, it would be wrong to assume that, without further legislative action, this omission can make Dutch and Irish trans* persons the gatekeepers of their own gender.³⁵

If policy makers do seek to achieve full self-determination, a preferable model can be seen in the recent reforms adopted by the Argentine and Danish parliaments. In both jurisdictions, legal gender recognition, like in Ireland and the Netherlands, is no longer conditional upon evidence of physical treatment or a diagnosis of gender dysphoria. However, in contrast with the Dutch and Irish regimes, Argentina and Denmark do not require support from a primary treating physician or gender expert. Indeed, under Article 4 of the Gender Identity Act 2012 (“the 2012 Act”), trans* persons in Argentina need only submit a declaration affirming that they come within the protection of the law and that they desire an amendment to their gender records. In Denmark, applicants for recognition must observe a six-month waiting period after they first submit their request to state officials. However, once that time elapses, administrators are required to process the application solely on the basis of the individual’s declared gender. In this way, both Argentina and Denmark have succeeded in creating a legal gender recognition scheme that, to a greater extent than any other jurisdiction, respects the self-determination rights of trans* persons.³⁶ During the six months following its introduction, almost 2,000 individuals invoked the 2012 Act in order to obtain legal recognition of their true gender.³⁷ There have been no reported cases of cisgender persons using the new law in order to commit fraud or perpetrate an assault.³⁸ Indeed, having regard to the significant discrimination that individuals face worldwide because of their gender identity,³⁹ it is highly disingenuous to suggest that trans* persons would gain an unfair advantage by self-determining their legal gender.

Conclusion

Around the world, legal gender recognition rules remain tied to arbitrary, often unattainable, preconditions. In a health care environment where trans* persons frequently struggle to obtain even basic treatment, it is unrealistic to assume that all applicants for recognition can, and will, access expensive, highly specialized medical interventions. To the extent that policy makers—both in the United

States and further afield—have begun to decouple the processes of medical and legal transition, this is a welcome step that reflects the lived realities of trans* communities worldwide. Yet, even under the most progressive recognition regimes, trans* persons rarely stand as the arbiters of their own gender. Pathologization-based reasoning, most frequently seen through a “diagnosis requirement,” invests state-appointed actors with the power to determine gender. Trans* individuals, the people who live their gender on a daily basis, are dismissed as mentally ill or “disordered” and are forced to conform to medical preconceptions and prejudices about gender identity. Despite recent reforms in Argentina and Denmark, trans* persons and their allies have not yet obtained a right to self-determination. Moving forward, achieving this basic, yet fundamental, entitlement represents an important next step in the road toward true and meaningful equality.

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ENDNOTES

- 1 Amnesty International, *The State Decides Who I Am: Lack of Recognition for Transgender People*, 2014.
- 2 *Act (1972:119) Concerning Recognition of Gender in Certain Cases*, trans. into English by Lars Jonsson, Transgender Europe, 2013.
- 3 Thomas Hammarberg, *Human Rights and Gender Identity*, Officer of the Commissioner for Human Rights of the Council of Europe, 2009, 17-23.
- 4 Office of the High Commissioner for Human Rights et al., *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement*, World Health Organization, 2014.
- 5 Transgender Legal Defense and Education Fund website, "Victory! New York City Council Vote to End Discriminatory Birth Certificate Policy," 8 December 2014.
- 6 Human Rights Watch website, "The Netherlands: Victory for Transgender Rights," 20 December 2013.
- 7 Peter Dunne, *The Physician's Statement Requirement in the Revised Gender Scheme of Gender Recognition Bill 2014*, Transgender Equality Network Ireland (TENI), 2014; "Reading Between the Lines," interview with Mauro Cabral, *Stop Pathologising Gender Diversity in Childhood* blog, 10 September 2014.
- 8 Dean Spade, "Resisting Medicine, Re/modeling Gender," *Berkeley Women's Law Journal* 18, no. 1 (2003).
- 9 In Turkey, Article 40 of the national Civil Code requires that an individual who seeks legal gender recognition must satisfy a court that they have submitted to gender confirmation surgery. A person may only access such surgery with court permission. As part of the permission application process, the individual must provide medical evidence that they are "of a transsexual nature."
- 10 For a discussion about the different forms of transitioning, see generally: Paisley Currah and Lisa Jean Moore, "'We Won't Know Who You Are': Contesting Sex Designations in New York City Birth Certificates," *Hypatia* 24, no. 3 (2009): 113-135.
- 11 Dean Spade, "Documenting Gender," *Hastings Law Journal* 59, no. 1 (2008): 754.
- 12 Alain Giami and Emmanuelle Beaubatie, "Gender Identification and Sex Reassignment Surgery in the Trans Population: A Survey Study in France," *Archives of Sexual Behavior* 43, no. 8 (2014):1491-1501.
- 13 Jaime Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, 72.
- 14 Lisa Mottet, "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People," *Michigan Journal of Gender and Law* 19, no. 2 (2013): 413-422.
- 15 Spade, "Documenting Gender," 808-809; see also Kenji Yoshino, "Sex and the City—A Commentary by Kenji Yoshino," Yale Law School website, 11 December 2006.
- 16 See dissenting opinion of Judge Pettiti in *B v France*, application no. 13343/87, 25 March 1992.
- 17 See Laura Nixon, "The Right to (Trans) Parent: A Reproductive Justice Approach to Reproductive Rights, Fertility, and Family-Building Issues Facing Transgender People," *William and Mary Journal of Women and the Law* 20, no. 1 (2013); see also Mottet, "Modernizing State Vital Statistics Statutes and Policies."
- 18 Article 11 of Argentina's Gender Identity Act 2012 provides "All persons older than eighteen (18) years, according to Article 1 of the current law and with the aim of ensuring the holistic enjoyment of their health, will be able to access total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization."
- 19 United Nations Development Program (UNDP). *Transgender Health and Human Rights*, 2013, 20-21.
- 20 Harper Jean Tobin, "Against the Surgical Requirement for Change of Legal Sex," *Case Western Reserve Journal of International Law* 38, no. 2 (2006-2007): 398.
- 21 Stephen Whittle et al., *Transgender Eurostudy: Legal Survey and Focus on the Transgender Experience of Health Care*, ILGA-Europe, 2008, 52-67.
- 22 Nixon, "The Right to (Trans) Parent," 91.
- 23 Franklin H. Romeo, "Beyond a Medical Model: Advocating for a New Conception Gender Identity in the Law," *Columbia Human Rights Law Review* 36 (2004): 724-726.; Nadzeya Husakouskaya, "The Sex Change Commission in Ukraine," *Open Democracy Russia and Beyond* blog, 22 October 2014.
- 24 World Professional Association of Transgender Health (WPATH), "De-psychopathologisation statement," 2010.
- 25 Spade has written about arguments that trans* people should avoid disability-based arguments because of the stigma attached to physical disability and claims that this is an example of "ableism"; Spade, "Resisting Medicine, Re/modeling Gender," 34.
- 26 Dunne, *Physician's Statement Requirement 2014*, 8-9.
- 27 Equality Authority, *Observations on the Revised General Scheme of the Gender Recognition Bill 2014*, 2014, 35-36.
- 28 Hammarberg, *Human Rights and Gender Identity*, 28.
- 29 Dunne, *Physician's Statement Requirement 2014*; see also Sana Loue, "Transsexualism in Medicolegal Limine: An Examination and a Proposal for Change," *Journal of Psychiatry and Law* 24, no. 1 (1996): 35.
- 30 In the Netherlands, see the amended Article 1.4.28 of the Dutch Civil Code; Human Rights Watch website, "The Netherlands: Victory for Transgender Rights," 20 December 2013. In Ireland, see the Gender Recognition Bill 2014.
- 31 Joan Burton T.D., "Tánaiste Announces the Publication of the Gender Recognition Bill 2014," Joan Burton T.D. website, 19 December 2014.
- 32 Peter Dunne, "The Physician's Statement Model in Ireland's Gender Recognition Bill 2013," *European Human Rights Law Review* (2014), 3-5 .
- 33 Ibid.
- 34 Equality Authority, *Observations*, 35-36.
- 35 Werk, "Fucked Up Lip Service," *vreerwerk* blog, 25 February 2013.
- 36 Alejandro Nasif Salum, "Argentina Has Passed the Most Progressive Gender Identity Legislation in Existence," *International Gay and Lesbian Human Rights Commission* blog, 13 May 2012.
- 37 "Argentina: New IDs for 1,720 Transgender Individuals Since 2012 Law; 5,839 Same-Sex Marriages Since 2010 Law," *Blabbeando* blog, 30 December 2012.
- 38 Dunne, *The Physician's Statement Requirement 2014*, 5.
- 39 Redlactrans, International HIV/AIDS Alliance, and What's Preventing Prevention, *The Night Is Another Country*, 2012; EU Fundamental Rights Agency (EU FRA), *Being Trans in the EU: Comparative Analysis of the EU LGBT Survey Data*, 2014.

Police Violence and Social Bigotry Against Hijras in India

By Sreya Banerjee

ABSTRACT

The *hijras* are a group of gender variant people, popularly considered as the third gender/sex in South Asia. Indian history depict *hijras* as spiritually powerful figures who were once significant and integrated members of ancient Indian society, prior to being criminalized by colonizers during imperialism. Considering the emerging gender and sexual politics in India, this article focuses on daily violence experiences and oppression of *hijras*, shaped by discriminatory policies and legislations. First, I discuss sociocultural practices as an attempt to understand the process of becoming and living as a *hijra*. Second, by examining foreign intrusion, I highlight the impact of reemploying colonial laws and legislations (i.e., Section 377 of India's Penal Code) in the development of sexual and physical violence against *hijra* communities. This includes extortion and abuse by the police, rape and harassment by clients during sex work, and familial abuse and coercion. Furthermore, this examination will reveal and highlight the roles of class, caste, and patriarchy in forming discriminatory discourses and doctrines around *hijra* culture and practices. I argue that the reinstatement of Section 377 (in December 2013) and legal recognition of third gender (in April 2014) fail to address the daily hate crimes perpetuated by the police, family members, and clients against *hijras*. Therefore, it is necessary to import a sociological approach to reevaluate and change social norms before introducing new state laws. The purpose of this article is to draw a greater attention to the connections between the social and legal systems to understand how visible gender and sexual identities are suppressed, dehumanized, and tolerated within sociocultural and legal institutions. Lastly, I explain the significance of a *hijra* epistemology in generating distinct intersections between notions of gender and sexuality, class, survival techniques, identity/autonomy, power, and activism.

I screamed that I did not want to go into the cell. I fell at the policeman's feet. He kicked me with his boots. He then asked me to take my clothes off—right there, while the prisoner was watching. I pleaded with him and wept, but he forcibly stripped me. When I was standing naked, he struck his *lathi* where I'd had my operation and demanded that I stand with my legs apart, like a woman would. He repeatedly struck at that point with his *lathi* and said, "So, can it go in there? Or is it a field one can't enter? How do you have sex then?"¹

— A. Revathi

Introduction

The above quote paints a vivid image of the kind of police abuse *hijras*² in India experience because of their gender, sexuality, chosen lifestyle, and self-constructed culture. A. Revathi is now a well-known *hijra* author and activist who beautifully articulates the intersection between socio-cultural, economic, and political discrimination and the dangers involved in the trajectory of sex work.

The core of this article discusses the connections between notions of gender, sexuality, identity/autonomy, political power, and legal techniques to understand human rights issues of *hijras* related to violence and abuse. Referring to original cases and personal narratives of physical, sexual, emotional, and verbal abuse inflicted on

hijras, this article argues that the restoration of Section 377 of India's Penal Code combined with insufficient policies addressing (the lack of) *hijras*' rights is a detriment to their status as citizens. Indian government's legal acknowledgment of transgenders as "third gender"³ reserves a specific quota of jobs for *hijras* and encourages them to pursue an education, but this recognition does not prevent the daily discrimination and violence *hijras* face in society. There are no legal actions being carried out to address the violence and harassment perpetuated by the police, clients of *hijra* sex workers, and family members. Hence, it is important to attend to the social oppression and marginalization of *hijras* through policy that prevents "social cleansing"⁴ of transgender/transsexual communities. This may shrink the gap between social and legal approaches to understanding



Kajal, a hijra sex worker who was wounded by a drunken client.

PHOTOGRAPHER: ALISON MCCAULEY

ARTICLE: "A TRIBE IN PERIL: THE HIJRA IN MUMBAI" (2014)

gender variant people in India, improving their status/position as citizens.

Understanding a Hijra

The word *hijra* is an Urdu translation for hermaphrodite, which defines a person born with ambiguous genitalia. In her ethnography *With Respect to Sex*, Gayatri Reddy explains that Sanskrit and Pali writings describe a *hijra* as “unmales and the third sex,” a “eunuch,” or someone who is “sterile, impotent, castrated, a transvestite, a man who had oral sex with other men, who had anal sex, a man with mutilated or defective sexual organs, a hermaphrodite, or finally a man who produced only female children.”⁵ This traditional definition, shaped by religious understanding of gender roles, paints this group as an “other” gender class outside the social norm. Some transgender/transsexual people may prefer to identify as women, while others are comfortable with the *hijra* identity. However, offensive interpretations continue to play a significant role in influencing homophobic and discriminatory attitudes toward the *hijra* community.

Presently, *hijras* and their subgroups are often regarded (synonymously and interchangeably) as eunuchs or transgender/transsexual/queer people, the latter terms being popularized after the expansion of the global queer and LGBT movements. While the Western terminologies—transgender, transsexual, queer—are used to address a wider global audience, the traditional terms vary between South Asian cultures and geographies. The term “third gender” combines *hijras* and their subgroups under a single category that may decentralize their distinct issues and experiences. Some people choose to identify as a third gender to obtain rights as an organized collective group.⁶ Although the third gender category emerged as a Western concept, it has been developed, reconstructed, and personalized by those who feel comfortable identifying with it. The connotation of the term varies according to each individual, as they accept and interpret it in diverse ways.

The inability to procreate is a significant aspect of *hijra* identities and culture. The “born *hijras*” are hermaphrodites or intersex people, whereas “made *hijras*” are raised as males but become a *hijra* through castration.⁷ To become a “real” or authentic *hijra*, participation in the emasculation ritual is a mandatory duty. The term *nirvan* is used to refer to the emasculation operation anchored in Hindu scriptures. The term symbolizes “a condition of calm and absence of desire; it is liberation from the finite human consciousness and the dawn of a higher consciousness.”⁸ The Hindu scriptures and *hijra* communities consider this ritual as rebirth. Castration is performed by a *hijra* midwife (*dai ma*) after *Bahuchara Mata* is worshipped with special offerings.⁹

Colonial Intrusion

During the colonial period, *hijras* and their subgroups held respected social positions. *Hijras* owned properties and land and were financially independent in pre-colonial periods. They held respectable status in Mughal India as integrated members of society. Under Muslim rule, the primary roles of *hijras* were in the court system as “political advisors, powerful administrators, and ‘chamberlains,’ as well as trusted generals and guardians of the *harim*, or inner/female domain.”¹⁰ The elites in pre-colonial India trusted them for being “gender-neutral, non-‘testiculated’ individuals . . . incapable of impregnating women . . . and yet capable of ‘manly’ protection.”¹¹ *Hijras* were considered loyal, trustworthy, and protective servants because of their feminine attributes.

Under the British Raj, nonnormative gender/sexual beings experienced socioeconomic and legal destitutions. Colonial discourses and sexual regulation set strict parameters for ambiguous sexual/gender identities and stressed the notion of third gender as deviant.¹² The colonial power failed to understand the cultural and religious practices, rituals, and livelihood of the third gender population, which resulted in an exclusion of *hijra* voices during this period. Resulting discourses were based on a bourgeois framework that created rigid class, race, and sexual distinctions, constructing the hegemonic image of the “moral” heterosexual law-abiding citizen. The *hijra* body and their rights and practices (especially castration) were greatly inspected, since they represented corrupted and immoral aspects of Indian society.¹³ Thus, the relationship between representation, knowledge, and power is significant in order to understand the transformation of *hijra* positions during imperialism, and their social, economic, and political conditions in present-day India.

Criminalization of Hijras/LGBTQ People in India

The Criminal Tribes Act of 1871 reinforced these social stigma by denying *hijras* status as Scheduled Castes (SC), Scheduled Tribes (ST), and/or Other Backward Classes (OBC). These status groups were meant for members of the lower castes/class who were allotted a certain number of reserved seats in educational institutions and government jobs. In 1952, the Act was renamed the Habitual Offenders Act and continued to oppress such groups of people.

In 1860, the British introduced Section 377 of the Indian Penal Code, which continues to influence the legal system of present-day India. This section criminalizes consensual homosexual activities between adults and considers them unnatural offences. The Code states:

377. Unnatural offences.—Whoever voluntarily has carnal intercourse against the order of nature with

any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.¹⁴

On 2 July 2009, Section 377 was declared unconstitutional regarding sexual engagement between consenting adults by the High Court of Delhi. As a result, several queer people (including *hijras* and their subgroups) in India felt supported and developed the courage to come out of the closet. Unfortunately, another obstacle appeared when the Supreme Court of India inverted the judgment on 12 December 2013. The Court firmly declared that altering or repealing Section 377 is a decision for the Parliament to make. The recriminalization of homosexuality (and all nonheterosexual acts) caused several queer/LGBT people to feel threatened and discriminated against yet again.

Consequently, *hijras*, including sex workers and activists, continue to experience harassment not only by the general public but by police officers as well. In Nancy Nicol’s documentary *No Easy Walk to Freedom*, members of the transgender/transsexual communities who work with India’s leading nonprofit organizations (such as the Naz Foundation Trust and Sangama) talk about personal experiences of being arrested and assaulted by the police who use Section 377 against them.¹⁵ Several *hijra* activists distribute condoms and try to promote sexual health education among gender variant groups, especially in symbolic and educational spaces such as local parks. However, they face legal discrimination even within safe networks because nonheterosexuality is deemed illegal by the law. Scholar and activist Gautham Bhan indicates that “Section 377 invalidated all other constitutional rights . . . no crime done against [nonheterosexual persons] would be recognized [because of one’s] relation with queerness.”¹⁶ Hence, the state’s intrusion to judge privacy and moral order of individuals defines citizens and noncitizens and their human rights according to how the law (i.e., Section 377 in this case) perceives one’s gender and sexual identity.

Violence Against Hijras in Present-Day India

Nonnormative gender and sexual identities are simply “tolerated”¹⁷ in India, as they struggle to acquire political freedom and social equality. In this sense, “tolerance” means that *hijras* are expected to engage only in sex work or dance and sing for survival, because such activities are normalized and allocated for them for belonging to a lower class. Thus, any effort to uplift their own communities (by holding alternative jobs for instance) is intolerable because

they are not supposed to step out of the assumed roles as ceremonial performers/sex workers.

Following the sanctioning of Section 377, *hijras* remain one of the most vulnerable groups to experience overt police extortion, sexual and physical abuse, and harassment on a daily basis. The International Gay and Lesbian Human Rights Commission (IGLHRC), in support with Sangama, a sexual rights organization based in Bangalore, published an article on the rape and police abuse of a twenty-one-year-old *hijra* named Kokila that occurred on 18 June 2004.¹⁸ After a gruesome experience of gang rape, Kokila went to the police for help, but instead she was harassed and sexually, physically, and verbally tortured by them because of her gender identity and sexual orientation. The violence was promoted by officers in higher ranking who were present at the time of torture. This was followed by the policemen entering *hijra* households without the owner’s consent and for invalid reasons.

Many cases of abuse against *hijras* perpetrated by the police are strongly linked to their engagement with sex work coupled with the criminalization of consensual homosexual conduct. It is important to understand that despite the presence of several *hijras* who self-identify as women, society continues to perceive them as homosexual or queer men. The uniqueness of *hijra* identities is rarely considered or understood, and as a result, they are severely attacked by the police because of their choice to reject their birth-assigned gender and sex. The punishment and humiliation is a way perpetrators remind *hijras* that they are a disgrace for failing to live up to the expectations of a highly patriarchal society. *Hijras*’ inability to procreate and ambiguous genitalia in some prove that they can never be a “complete” woman, and as a result, they experience further marginalization and hostility.

The quote from A. Revathi at the beginning of this article depicts the desire and curiosity to visually witness an authentic *hijra* body. It implies that their physical appearance is put on display to perpetuate the act of “othering.” Such dehumanization of the body through sexual exploitation exposes the police officer’s anger toward the act of a man (who is deemed superior/dominant) physically transforming into a woman (who is deemed subordinate).

It is notable that activists who work to support *hijra*/LGBTQ rights in India are also vulnerable to police harassment for contesting Section 377. According to the Human Rights Watch, the “police arrested five *hijras* in the Girinagar neighborhood of Bangalore, charging them with ‘extortion,’” which was followed by a “drive against the city’s eunuch menace.”¹⁹ Members of Sangama’s crisis team arrived at the police station shortly after to address the physical and verbal abuse and to provide support to the *hijras*. However, they were also abused, as the assistant commissioner of police H.T. Ramesh and police inspector Shivashankara Murthi slapped, kicked, and beat them with

police batons and sexually harassed two of the activists and *hijras* while putting them in a cell.²⁰

In Seemasri Duta's case, she was harassed by the police even when she was not engaging in sex work at the time. As reported to the Human Rights Watch, in November 2008, Duta was suddenly stopped by the police on Irving Road in Bangalore and verbally abused.²¹ This was followed by Duta being dragged by the police by her hair for almost a kilometer, while several onlookers observed passively. One of the officers said, "See, you people, if I hit you, if I hurt you, no one is there to ask you, and no one is there to support you people. I will kick you, see how badly."²²

These are only few of the many incidents involving police violations and *hijras* that occur in India on a daily basis. Due to their gender being inconsistent with their biological sex, *hijras* are unable to attain legal identity documents for fundamental citizenship rights, such as proper housing, employment, education, and in some cases, the right to vote. The lack of essential privileges isolates this group even more and makes them more susceptible to violence and exploitation.

Hijras as Sexual Citizens

Examining citizenship through the lens of sexuality depicts the ways *hijras* transcend political boundaries to reconstruct and secure their social, political, and economic positions. The viewpoints of Subramanian Swamy (Indian politician, economist, and a former cabinet minister) and Rahul Easwar (author and activist) depicted in the video *The Stream: India's LGBT Debate* are an example that represents the way *hijras* or LGBT people are tolerated. This debate challenges the lifestyle, advocacy, and ideas of nonheterosexual people. Both Swami and Easwar point out that although homosexuals should lead a "normal" life, they should not "flaunt" their sexual desires as homosexuality is "a genetic flaw that needs to be cured . . . [and] a deviant behavior which requires medical attention."²³ Representing the legal field, Swami strongly argues that, "We [Indian citizens] are a constitutional democracy, and our constitution has made it very clear that all fundamental rights are subject to reasonable restrictions which include morality, public health, and public order."²⁴ Yet, Swami does not explain why such "reasonable restrictions" apply to the LGBT community specifically, even though they are Indian citizens.

Swami does not clarify how more visibly gender variant people such as *hijras* are supposed to lead a "normal" life by pursuing their education and acquiring jobs, while they struggle with a lack of financial and moral support from the government and society. The privatization of sexuality is clearly represented in Swami and Easwar's standpoints and shows how the impact of political injustice on *hijras* is often disregarded in such discussions and mainstream

media coverage. This exchange of dialogue is an example that shows how *hijras* are tolerated by the law and society to maintain dominant notions of "proper" citizenship.

Domestic Abuse and the Dangers of Sex Work

In the process of becoming a *hijra*, one faces domestic violence and oppression for being neither male nor female in a society with fixed and hierarchal gender norms. Most effeminate men abandoned or challenged their assigned gender rules after developing personal/sexual desires during childhood. The disconnection between the psychological self and the physical body is a common thread that links initial experiences and feelings of understanding one's inner self. This is represented in Revathi's description of her childhood experiences that include memories of struggling to perform gender roles based on biological identity despite strong feelings of detachment. Before becoming a *hijra*, Revathi felt like she was "a woman trapped in a man's body" and often questioned the value of her existence as a "flawed being."²⁵ It was very important for her to become a woman and ensure that she is able to "marry an educated man"²⁶ and live with love and respect. These desires lead many to engage in feminine roles and behaviors such as dressing in female clothing, playing with dolls, secretly putting on makeup, and so on. However, this process is difficult because they grieve in silence from shame, stigma, homophobia, and transphobia that occurs in private and public realms. It is worth mentioning that although *hijra* communities are still growing, the conflation of traditional gender variant identities and contemporary LGBT identities has developed cultural and socioeconomic clashes in current Indian society.

When families are unable to comprehend the feelings, behaviors, and initial preferences of someone who may later become a *hijra*, feelings disgrace and misconceptions transition into violence and abuse. Even in present-day India, there are many families who perceive nonheterosexuality as a phase, illness, or even a bad curse that one should address by taking appropriate measures (for example, psychological/medical assistance, isolation, physical/verbal abuse, religious rituals). Patriarchal influences and unequal power relations in the family result in various forms of negligence and humiliation when a male expresses feminine behaviors. Even in school, such individuals are teased and abused by their peers and teachers, which drives them to discontinue their education.

The 2003 report from the Peoples' Union for Civil Liberties, Karnataka (PUCL-K), *Human Rights Violations Against the Transgender Community*, includes descriptions of violent incidents shared by *hijras*. One of them explains:

When I was studying in my 10th standard I realized that the only way for me to be comfortable with

myself was to join the *hijra* community. It was then that my family . . . found out that I frequently met *hijras* who lived in the city. One day, when my father . . . was away, my brother, encouraged by my mother, started beating me with a cricket bat. I locked myself in my room to escape from the beatings. My mother and brother together tried to break into the room to further beat me up.²⁷

The isolation and neglect effeminate men experience within the family and in society push many to join a *hijra* community in search of their identity. The carefully structured *hijra* household provides an open space and welcomes one to embrace their inner self and the *hijra* lifestyle and culture. After the process of initiation, a *hijra* may still feel depressed and excluded. In *Myself/Mona Ahmed*, *hijra* Mona Ahmed expresses her personal struggle with depression due to a lack of a sense of belonging, frequent relocation from one home to another, and society's mistreatment against the third gender/sex.²⁸

An ongoing debate that is key to determining agency of *hijras* as prostitutes is recognizing the way *hijras* perceive sex work with a focus on notions of choice, coercion, autonomy, and identity. Sex work has been an avenue that allows several *hijras* to earn money and survive independently. The *hijra* communities are more vulnerable to HIV and AIDS mostly due to the low level of condom usage between *hijra* sex workers and their clients. Police extortion, rape, and physical abuse by clients are the main issues that *hijras* endure regularly, but barely receive any assistance from the government for better security and safe space. (See Figure 1.²⁹)

Gender and Sexual Politics

The human right to freely express gender and sexuality is in jeopardy because existing political/dominant discourse outlaws one's choice to be different and love another by looking past fixed gender norms. It is quite strange that although transgender/transsexual and homosexual people have existed as historical and religious figures in ancient India and across the globe, they are criminalized and dehumanized in current societies. The reason for this is not only the dominance of colonialism and the reemployment of colonial laws such as Section 377, but the heterosexism and homophobic mentality engrained in existing sociopolitical laws, policies, and practices that divide groups based on hierarchy and distinctions. The ways in which sex and sexuality are negotiated and expressed in India are shaped by class, hierarchies, subjective positions, and agency. This not only impacts one's own process of forming their personhood, but shows how ideas and discourses of gender and sexuality are synthesized with individual identities such as class/caste, religion, and ethnicity and so on.

It is important to recognize that circumstances and limitations due to differences in class/caste, gender, and sexuality prevent *hijras* from obtaining reputable and dignifying jobs. In some cases, physical and emotional abuse at home forces one to lead a double life and even get married to prove their masculinity, while being in a relationship with a nonheterosexual person. Expressing sexuality visibly often leads to beatings and harassment to force one to give up wearing feminine attire, roles, and behaviors. When one refuses to do so, they are often left homeless. In their personal stories, some *hijras* point out that after undergoing castration and supporting their family through sex work, they still were not completely accepted but they were no longer abused.³⁰

Despite the expansion of several organizations, social/safe queer spaces, helplines, and so on, "the support structures provided in [metropolitan and smaller cities] are painfully inadequate with few or no such organizations for lesbians, bisexuals and *hijras*."³¹ The constant battle between authentic knowledge, power, and status—concerns represented in queer/*hijra* activism—is insufficiently articulated by the law.

Activist and scholar Ranajit Guha argues that "the domain of sexuality is policed not so much by the state in India but by the *samaj* [society]."³² Although I agree with both perspectives, I have yet to find adequate responses or suggestions of a long-term approach to social and political reformation to improve the daily struggles of *hijras* and queer groups in India. Considering Guha's argument, I suggest that a proper assessment of *hijra* and queer movements in India may develop information on how to revise existing methods (or create new ones) to reform state's approaches to understanding and attending gender and sexual minority groups. This may include allowing gender variant candidates to become more actively involved in politics, penalizing offenders for assaulting *hijras* (especially by setting up fast-track courts), and acknowledging *hijras'* human rights as equal citizens. The role and impact of religious doctrines (especially in Hinduism, which follows the four aspects/purposes in human life—*dharma*, *artha*, *karma*, and *moksha*—and in the Manusmriti/The Laws of Manu³³) should be discussed and critically analyzed to understand how they shape societal norms and prejudice around nonheterosexual relations in India. The process to push for a change in law and state regulation through social reformation is lengthy, challenging, and dependent on religious beliefs. This may be true in some cities and many rural areas of India where there is a lack of exposure to education and resistance toward comprehending new knowledge surrounding gender and sexuality. *Hijra*/queer activism attempts to encourage parents and families of nonheterosexual children to engage in dialogues about human rights issues and sexual health education. Through public speaking, workshops, and outreach work, activists

reach out to parents who struggle to accept their *hijra* queer children.

Toward a *Hijra* Epistemology

I believe that promoting *hijra* voices generates a *hijra* epistemology, a subaltern consciousness that extends and incorporates important notions of the body, gender, sexuality, and desire as challenging sites resisting dominant/hegemonic Indian discourses of “proper” citizenship and national belonging. My interpretation of a *hijra* epistemology is that it represents perception and knowledge on how *hijra* identities and subjective positions are produced and influenced by daily experiences, hardships, and articulation of the “self.” Through scholarly/ethnographic work and activism, *hijras* have found a platform to share their stories and educate one another. Discourses on *hijra* practices, desires, and the way they (struggle to) exist are epistemological because they are justified as true knowledge shaped by personal experiences and observations.

A *hijra* epistemology uses an interpretivist approach to stress the importance of their subjective positions and experiences.³⁴ This approach supposes that the researcher and the subject of research (in this case, *hijras* fulfill both roles) are interconnected in the sense that the way they understand others is shaped by how they understand themselves. *Hijras*/activists participate actively to create and configure their knowledge and wisdom in personal stories and narratives that deserve greater acknowledgment. A *hijra* epistemology represents, values, and makes sense of their realities through identity formation.

The purpose of a *hijra* epistemology is to (re)claim rights for their communities focusing on distinct social and cultural needs and issues. Their main goals are to address issues such as the lack of access to education, shelter, employment, and adequate health care. The *hijra* communities are more vulnerable to HIV (a rate of 17.5 percent to 41 percent according to recent studies³⁵), mostly due to the low level of condom usage between *hijra* sex workers and their clients. Police extortion and sexual abuse (by police and local goons) are also prevalent problems that *hijras* face regularly. A *hijra* epistemology points to the fact that existing laws (e.g., Section 377) and limited leeway suppress *hijras* even more. The minor changes proposed by the government thus far are not revolutionary as they do not create long-term social and legal reformations.

One might question, how is the content of a *hijra* epistemology distinct from other contemporary queer activist groups (e.g., lesbian, gay, and bisexual)? To address this question, one should think about *hijra* conditions that are predominantly shaped by class and cultural differences (as discussed above). Police brutality that undermines equal citizenship claims made by *hijras* is a major problem emphasized in the report published by

PUCL-K. *Hijra* epistemology includes personal details of such incidents (many of which have yet to be addressed by mainstream human rights organizations) to show the connection between policing and dehumanization that aims to attack visible gender/sexual groups.

Conclusion

There is a significant lack of *hijra* voices that express thoughts about their lives and experiences during colonialism. As a result, there is not enough substantial evidence of their agency and/or collective initiatives in colonial India to connect their position and actions in the present. Even stories about specific cases involving same-sex people or the third gender are described through the lens of authority figures. This has changed over time with the progressive work of contemporary scholars and *hijra*/queer activists as they encourage the promotion of personal narratives and stories while demanding space, equality, and liberation. It is through agency and consciousness that several *hijras* and their counterparts have been able to resist, question, and challenge legal discourses of citizenship, whether it be through the media, activism, rallies, writing, or oral history.

Several *hijra* writers and activists imply that, it is important to explore class/caste differences between traditional and contemporary identity categories, such as LGBT people and *hijras*, to understand on what grounds they are connected and divided. Acknowledging systematic erasures and barriers requires understanding the relationship between society and state politics/law. Social and political constraints are created, maintained, and intensified as a result of heterosexism within dominant sites such as the family, medical institutions, private and public spaces, the workforce, and popular culture. Respectable employment opportunities, access to education, and sufficient medical care are some of the crucial steps required to improve sociopolitical conditions of *hijras*. It is my hope that the growing advocacy and circulation of *hijra* voices will inspire sufficient long-awaited sociopolitical changes to occur in India.

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ENDNOTES

- 1 A. Revathi, *The Truth About Me: A Hijra Life Story*, trans. Va Geetha (New Delhi: Penguin Books, 2010), 206.
- 2 Definition of the term “hijra” follows as the article proceeds.
- 3 Dhananjay Mahapatra, “Supreme Court Recognizes Transgenders as ‘Third Gender,’” *Times of India*, 15 April 2014.
- 4 Human Rights Watch website, “India: Stop ‘Social Cleansing’ in Bangalore: Illegal Mass Evictions Against a Transgender Community.” Last modified, 18 November 2008.
- 5 Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (Chicago: University of Chicago Press: 2005), 221.
- 6 Mahapatra, “Supreme Court Recognizes Transgenders.”
- 7 Serena Nanda, *Neither Man nor Woman: The Hijras of India* (Belmont, CA: Wadsworth Publishing Company, 1999): 14-15.
- 8 Ibid., 26.
- 9 Ibid., 27.
- 10 Reddy, *With Respect to Sex*, 22
- 11 Ibid., 23
- 12 The Criminal Tribes Act of 1871 was to “civilize” nonnormative groups (i.e., religious cults, gypsies, LGBT people and hijras/third gender groups, petty traders, and so on). Eunuchs were often arrested and tortured for acts of castration, kidnapping children, and even performing in public. Thus, eunuchs/hijras were robbed of their properties, occupations, socioeconomic status, and independence, and scrutinized for their choice of lifestyle. See Arvind Narrain and Gautam Bhan, *Because I Have a Voice: Queer Politics in India* (New Delhi: Yoda Press, 2005), xvi-xvii.
- 13 See *Cutch, Or Random Sketches* (1838) for Marianna Postan’s description of hijra lives prior to and during British ruling.
- 14 World Intellectual Property Organization website, “The Indian Penal Code, 1860 Act No. 45 of 1860,” 6 October 1860.
- 15 Nancy Nicol, *No Easy Walk to Freedom*, Envisioning Global LGBT Human Rights, 2014.
- 16 Ibid.
- 17 Ratna Kapur, “Out of the Colonial Closet, But Still Thinking ‘Inside the Box’: Regulating ‘Perversion’ and the Role of Tolerance in De-radicalising the Rights Claims of Sexual Subalterns,” *NUJS Law Review* 2, no. 3 (2009): 395.
- 18 IGLHRC, “India: Rape and Police Abuse of Hijra in Bangalore: Call for Action by SANGAMA,” 24 June 2004.
- 19 Human Rights Watch website, “Police Violence Against Activists in Bangalore on October 20, 2008,” 28 October 2008.
- 20 Ibid.
- 21 Naureen Shah and Meenakshi Ganguly, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, Human Rights Watch, 2009, 75-77.
- 22 Ibid.
- 23 “The Stream—India’s LGBT Debate,” *YouTube* video, 18 December 2013.
- 24 Ibid.
- 25 Revathi, *The Truth About Me*, 15.
- 26 Ibid., 19.
- 27 Peoples’ Union for Civil Liberties, Karnataka (PUCL-K), *Human Rights Violations Against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India*, 2003, 41.
- 28 Dayanita Singh, *Myself Mona Ahmed* (New York: Scalo Publishers, 2001), 95.
- 29 Figure 1 shows a hijra sex worker named Kajal. Alison McCauley, “A Tribe in Peril: The Hijra in Mumbai,” *Advocate.com*, 6 March 2014.
- 30 See “Sachin’s Testimony,” in PUCL-K, *Human Rights Violations Against Transgender Community*, 25-28.
- 31 Pramrod Mishra, *Human Rights Reporting* (Delhi, India: Isha Books, 2006), 236.
- 32 Arvind Narrain and Alok Gupta, eds., *Law Like Love: Queer Perspectives on Law* (New Delhi: Yoda Press, 2005), xix.
- 33 The Manusmriti, also known as The Laws of Manu, is one of the eldest Sanskrit texts, which includes religious and authoritative laws obeyed by the Hindus. These laws were written by Manu, who is believed to be a messenger of Brahma, the God of creation and also Manu’s father. The text expands on a wide range of topics such as origin of the world, marriage, procreation, gender roles and duties, social/religious rules and codes, etc. In regard to the third gender, the text states, “A male child is produced by a greater quantity of male seed, a female child by the prevalence of the female; if (both are) equal, a third-sex child [*napumsaka*] or boy and girl twins are produced; if (both are) weak or deficient in quantity, a failure of conception (results).” Georg Bühler, trans., “The Laws of Manu” (London: Forgotten Books, 2008), Chapter 3, number 49.
- 34 For more on the interpretivist approach, see Peregrine Schwartz-Shea and Dvora Yanow, *Interpretive Research Design: Concepts and Processes* (New York: Routledge, 2012); Sally Thorne, *Interpretive Description* (California: Left Coast Press, 2008).
- 35 Venkatesan Chakrapani, *Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion*, United Nations Development Programme, India, 2010, 4.

Claiming the Right to Health for Women Who Have Sex with Women: Participation and Contestation in the South African National AIDS Council

By Felicity Daly

ABSTRACT

This health policy analysis seeks to understand why and how interventions to improve the sexual health of women who have sex with women (WSW) were initially proposed in the HIV & AIDS and STI Strategic Plan for South Africa for 2007-2011 and how this was reframed in the National Strategic Plan (NSP) on HIV, STIs, and TB for 2012-2016. A conceptual framework is used to summarize determinants of political priority setting for WSW issues in the NSP development process, although a focus on the sexual health of WSW was not maintained in the 2012-2016 NSP due to limits on political participation and growing politico-cultural conservatism.

Introduction

The need for effective policies to respond to the challenges presented by HIV/AIDS is critical in South Africa, where the burden of disease is considered to be among the highest in the global pandemic.¹ National Strategic Plans (NSPs) for HIV and AIDS are important vehicles to guide HIV/AIDS policy responses and have supported the effective coordination of national responses to HIV/AIDS for over two decades, particularly in settings where other health sector strategies have failed to effectively control the epidemic.² For a protracted period, South Africa’s policy response to HIV/AIDS was disastrous, influenced by discredited debate about the etiology of AIDS that led to entrenched political resistance in the provision of HIV/AIDS services, including antiretroviral treatment (ART), in the public health system.^{3,4} Following a successful legal challenge against the South African government that led to eventual ART provision in 2002, the South African National AIDS Council (SANAC) led a policy process to produce the HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011.⁵

The development of the 2007-2011 NSP sought input from a wide range of actors from civil society organizations including advocates from the LGBT rights movement.⁶ Unique amongst other African political contexts, South African policy actors have a duty to protect LGBT people, as the 1996 South African Constitution outlaws discrimination based on race, gender, and sexuality. LGBT advocates raised concerns that other dynamics driving new

sexually transmitted infections (STIs) required consideration beyond the common perception that South Africa’s generalized HIV epidemic was driven solely by heterosexual sex.

These advocates drew on surveys undertaken by LGBT community-based organizations from 2004 to 2006, which provided insight into the health status of LGBT people in several South African settings. Survey findings revealed higher prevalence than expected of STIs, including HIV, among women who have sex with women (WSW), a behavioral marker representing women who have same-sex partners independent of exclusivity and self-identification as lesbian or bisexual. WSW have traditionally been under-analyzed in high-income as well as low- and middle-income countries for a range of sexual and reproductive health concerns including risk of HIV transmission. A dearth of information on WSW sexual health has engendered a sense that HIV transmission is impossible among WSW, and it has been argued that this false consciousness “may expose WSW to a much higher risk for contracting HIV than is generally perceived.”^{7,8} For example, WSW engage in sexual behaviors as well as substance use, which pose clear risks for transmission of STIs and HIV.⁹ Public health arguments for addressing WSW sexual health needs have often been overpowered by concerns around heterosexual women because sexual transmission of HIV and other STIs is higher among heterosexual partners, particularly in generalized HIV epidemics throughout Africa. WSW concerns are also often overlooked within public health strategies targeting the LGBT community since these

strategies focus on men who have sex with men (MSM), as receptive anal sex carries a relatively higher risk of HIV and STI transmission.¹⁰

WSW sexual health data from the LGBT community surveys undertaken in several South African provinces revealed that among 216 WSW in Gauteng, 9 percent of Black WSW were HIV positive (HIV+), while 5 percent of White WSW were HIV+.¹¹ In addition, 208 of the WSW in the sample showed that 14 percent of Black WSW had an STI within the past twenty-four months compared to 4 percent of White WSW.¹² A different survey of 392 WSW and MSM from KwaZulu Natal reported that 12 percent of WSW had a recent STI and 9 percent of WSW were HIV+, a rate almost as high as prevalence among MSM in the survey (11 percent).¹³ In yet another survey of 460 WSW from the Western Cape, 9 percent of Black WSW had a recent STI compared to 3 percent of White WSW.¹⁴ These findings were considered significant both because they highlighted a relatively high burden of STIs, including HIV, among WSW and also because they demonstrated that Black WSW were at greater risk compared to White WSW.

The 2007-2011 NSP included a goal to target HIV prevention interventions to vulnerable groups including MSM, transsexuals (transgender people), and lesbians (WSW) while also addressing barriers these populations face in accessing nondiscriminatory public health services.¹⁵ Rarely are WSW targeted in public health interventions, and the inclusion of WSW in a national HIV/AIDS response is uncommon. Ultimately, SANAC struggled with implementation of several of the objectives of the 2007-2011 NSP, including the initiatives targeting MSM, transgender people, and WSW.¹⁶

When SANAC set out to develop the 2012-2016 NSP in late 2011, global health policy guidance on addressing key populations at higher risk for exposure to HIV urged that focusing on MSM, transgender people, people who inject drugs, and sex workers and their clients could lower HIV incidence.¹⁷ By this time, there was additional data showing the burden of STIs among South African WSW. These three studies could have been referenced in advocacy efforts aimed at continuing SANAC's commitment to WSW sexual health.

In the first study, a survey of 641 HIV+ women in South Africa revealed that 76 percent of HIV+ WSW had recently had an STI.¹⁸ In the second study, quantitative findings from a multi-country research project conducted from 2009 to 2012 in South Africa and three other countries in Southern Africa found that among 591 WSW, 9.6 percent were HIV+. Of these HIV+ women, 31.7 percent had an infection route other than heterosexual sex, which included transactional sex, forced sex, or injection drug use.¹⁹ In the final study, a smaller sample of twenty-four WSW interviewed through community participatory approaches

within the multi-country research project revealed that twenty had self-reported HIV transmission through their female partner.²⁰

Findings from the Theo Sandfort et al. study also confirmed that WSW face HIV and STI risks through sex with men. Half of the women surveyed had sex with men in their lifetime, and one in five had sex with a man in the previous year, including transactional sex and forced sexual experiences.²¹ Sexual violence is a significant driver of women's vulnerability to HIV, and estimated prevalence of nonpartner sexual violence in South Africa is 12.2 percent, double the global rate.^{22,23} Transgressions of heteronormativity, a social concept that views heterosexuality as the normal or preferred sexual orientation, are punished violently in South Africa, and numerous cases of homophobic attacks on WSW have been termed "corrective rape," perpetrated to "correct" or "cure" a woman of same-sex desire.^{24,25}

Given the available data, South African advocates have argued that the exclusion of WSW in HIV prevention interventions within the 2012-2106 NSP as well as other health and social policies and programs can no longer be justified by assertions that WSW face "low" or "no" risk of HIV or STI infection. South Africa's 2012-2016 National Strategic Plan on HIV, STIs and TB maintained a focus on targeting HIV prevention interventions to MSM and transgender people within a broader set of domestically defined key populations.²⁶ The 2012-2016 NSP did acknowledge challenges that WSW face in accessing public health services given that "discrimination against members of the community with . . . different sexual orientations (e.g. MSM and WSW) . . . may result in reluctance to attend health services for fear of discrimination" but made no specific commitment to provision of HIV/AIDS services targeting WSW as a distinct group.²⁷

Methods

This health policy analysis utilized qualitative methods to understand the policy process around the development of the 2007-2011 and 2012-2016 NSPs in order to scrutinize how and why interventions to improve sexual health and HIV-prevention efforts among WSW were initially proposed and how they evolved over time.

Data was collected through document analysis and twenty-five semi-structured interviews with key public sector informants, government donors, multilateral organization members, nongovernmental and community-based organization members, and academics involved in HIV policy and LGBT rights in South Africa.

The study drew on the model for health policy analysis proposed by Gill Walt and Lucy Gilson, which considers the factors at play when making health policy: context, content, and process with actors—as individuals and

TABLE 1: SELECTED CATEGORIES FOR A FRAMEWORK ON DETERMINANTS OF POLITICAL PRIORITY FOR WSW ISSUES TO BE INCLUDED IN SOUTH AFRICA'S NSP.

	DESCRIPTION	FACTORS SHAPING POLITICAL PRIORITY
ACTOR POWER	The strength and influence of the individuals and organizations representing WSW issues in the NSP development process.	<p>Policy community cohesion: the degree of coalescence in the networks of individuals and organizations involved with NSP development.</p> <p>Policy entrepreneurs: the presence of individuals who seize opportunities, are capable of uniting the policy community, and are acknowledged as strong champions for WSW.</p> <p>Guiding institutions: the effectiveness of Department of Health (DoH) and SANAC mandated to coordinate the NSP.</p> <p>Civil society mobilization: the extent to which community-based organizations mobilized to press DoH/SANAC to address WSW issues (e.g., LGBT organizations).</p> <p>Competition and conflict: both within civil society sectors and between civil society actors and public sector leadership.</p>
POLITICAL CONTEXTS	The political/socio/economic environment in which actors operate: the politics stream.	<p>Policy windows: political moments when conditions aligned favorably for WSW issues and have presented opportunities for advocates to influence decision makers.</p> <p>Governance structure: the degree to which norms and institutions guiding NSP development provide a platform for effective collective action.</p>

as members of groups or organizations at the center of shaping policy formation.²⁸ The study used a theoretical framework adapted from one posed by Jeremy Shiffman and Stephanie Smith to analyze the categories of actor power, ideas, political contexts, and issue characteristics that play a role in decisions about which health issues are integrated into policy.²⁹ Special attention was paid to the elements of the politics stream, policy windows, and policy entrepreneurs within a given category, which John Kingdon suggests are essential to influencing a policy output.³⁰ This article presents selected findings from the analysis of the categories of actor power and political context as outlined in the framework shown in Table 1.

The public health value of the study is grounded in a human rights approach to health, particularly sexual and reproductive health, which considers the causal links between human rights violations and health and the ways that discrimination based on sexuality affects health.³¹ This study looks retrospectively at the 2007-2011 NSP to offer a relevant resource output to inform current SANAC discourse surrounding review of the 2012-2016 NSP in 2015 and subsequent NSP development. Thus, it is timely to present a review of the strengths and weaknesses of advocacy for WSW sexual health within policy formulation opportunities afforded by SANAC.

TABLE 2: RESULTS OF UTILIZATION OF CATEGORIES FOR A FRAMEWORK ON DETERMINANTS OF POLITICAL PRIORITY FOR ISSUES TO BE INCLUDED IN SOUTH AFRICA'S NSPS 2007-2011 AND 2012-2016.

<p>ACTOR POWER</p>	<p>Policy community cohesion: Global health policy guidance highly influential. DoH concerned with proving technical capacity with a few “game changers” to turn the tide against HIV/AIDS.</p> <p>Policy entrepreneurs: WSW emerged from women’s sector. Strength of personal testimony outweighed dearth of evidence but did not translate into public health actors’ ability to understand issues or demonstrate commitment to delivering solutions.</p> <p>Guiding institutions: SANAC not particularly well coordinated. Getting involved in implementation rather than focus on strategy.</p> <p>Civil society mobilization: SANAC women’s sector weakened over time. LGBTI sector mainly concerned with implementing MSM interventions based on strong global evidence, growing domestic evidence base, funding aligned with global focus on key populations.</p>
<p>POLITICAL CONTEXTS</p>	<p>Policy windows: Open in 2007 with breakthrough in civil society participation in national planning for HIV/AIDS. Partially closed by 2011 as SANAC managed the policy process more closely to avoid producing another laundry list that would not be able to be implemented.</p> <p>Leadership changes: At level of president and deputy president (chair of SANAC) after 2009 election, minister of health appointments in 2009 and 2010 and SANAC CEO appointment in 2012. Contraction of civil society actors able to be involved (see economic challenges). President sets problematic tone with sexist and heterosexist views.</p> <p>Economic challenges: Resource constraints due to global recession, some donors stopped funding South Africa. Massive loss of private foundation resources for LGBT organizations led to several closings. Funding available for men’s interventions but not for women’s rights organizing.</p> <p>Social context: Conservatism (and role of conservative faith based organizations) rising. Loss of influence of women’s rights movements. Surge in hate crimes against WSW known as “corrective rape.” No leaders speaking out. Impunity for perpetrators.</p>

Results

The study findings presented several stages in the policy process around South Africa’s 2007-2011 NSP. In 2007, a policy window was available to many interest groups as South African policy actors were able to provide input into planning after contestation of previous policy failings. This allowed for policy entrepreneurs from the affected community of WSW living with HIV to exert power and influence through personal testimony, which outweighed the dearth of evidence of the burden of HIV and STIs among WSW.

Their engagement in policy formulation, mainly through involvement in the SANAC women’s sector, led to policy content of the 2007-2011 NSP setting goals to improve WSW sexual health through targeted HIV prevention interventions and increased access to health services.

During the implementation period, 2007-2011 NSP commitments were not fully realized due to several constraints, including lack of buy-in from the Treasury to fund an overly ambitious plan that was regarded as a *laundry list* of actions against HIV/AIDS. The 2007-2011 NSP’s main achievement was scaling-up access to antiretroviral therapy.

Document review and interviews confirmed that, within this context, neither government nor non-state actors were funded to implement commitments made to advance the sexual health of WSW. Interviews revealed that programing for MSM was initiated under commitments made in the 2007-2011 NSP and that programing continued to expand.

The findings reflected that several developments occurred between 2007 and 2011 that adversely affected the influence of advocates for WSW sexual health. Contextual changes in the political and social spheres brought more conservative voices to the fore within policy spaces by 2011. Jacob Zuma, who became president of the African National Congress (ANC) in 2009, personified increasing conservatism in his public statements that have been perceived as sexist and homophobic. Concurrently, there were limitations that actors and constituencies with an interest in WSW advocacy faced in participating in the policy process to develop the 2012-2016 NSP. Time constraints were a significant barrier as the policy formulation process was managed by SANAC in a condensed period in the last quarter of 2011, which did not allow for extensive participation of civil society. Importantly, the constrained economic climate, particularly declines in aid from foreign donors due to the global recession, limited funding to many women’s rights and LGBT organizations that had previously been able to engage in SANAC processes.

A dedicated space that could have been used to bring issues affecting the sexual health of WSW to the attention of policy makers was available following the establishment of the SANAC LGBTI sector in 2009. Study results reveal that informants perceived the LGBTI sector to lack the capacity and/or the will to advocate for all populations for which it was mandated to coordinate, which adversely affected prioritization of WSW issues. In 2011—as opposed to 2007—the SANAC women’s sector was not effectively utilized to highlight WSW concerns due to issues linked to leadership struggles within the membership, the decline in funding for women’s rights work, the rise of conservative members, and a loss of influence of arguments around the feminization of the HIV epidemic. Overall, other SANAC sectors believed the LGBTI sector would prioritize WSW issues that led to a paucity of policy work on WSW sexual health in the development of the 2012-2016 NSP.

Advocates for WSW were not able to explicitly link their issues to the discourse on key populations under consideration for targeting of HIV and STI prevention programming in South Africa. Moreover, WSW advocates seemed unable to effectively marshal available evidence involving the burden of disease among WSW living with HIV and STIs despite the existence of compelling research cited earlier. As a result, the policy content of the 2012-2016 NSP did not maintain a focus on the sexual health needs of WSW. Other main findings in the categories of actor power and political context are detailed in Table 2.

Discussion

The findings provide insight into SANAC policy processes and the opportunities these afford to civil society sectors representing the interests of groups involved in the national response to HIV, STIs, and TB. The findings showed that the SANAC sectors were a site wherein the prioritization of issues and interests are contested. Contestation in policy making sometimes leads to a refinement in agenda setting and enhances coordination but often results in competing interests. The results show that there are missed opportunities to consider strategic or emerging policy issues when the civil society sectors are mainly concerned with technocratic implementation of their funded work to deliver NSP priorities. Findings on the functionality of the SANAC LGBTI sector were centrally concerned with coordination and completion as well as questions regarding whose health rights are represented and addressed therein.

Gay men and lesbian women were involved in South African activism during the struggle against apartheid and worked in solidarity to secure their rights in the 1996 Constitution and subsequent laws outlawing discrimination on the basis of sexuality in the new South Africa. As has occurred elsewhere, gay and lesbian rights movements have expanded their agenda over time to assert the sexual rights of bisexual women and men and the right to self-determination of gender identity of transgender and intersex people. A platform for raising the interests of WSW in the context of HIV/AIDS emerged from the SANAC women’s sector in 2007. Afterwards, a recommendation was put to SANAC that there should be a separate sector to coordinate the agenda for WSW and other populations within the LGBTI communities.

In 2009, LGBTI people came to be represented by one sector in SANAC, and the sector began functioning by 2011. There are some general concerns with placing the health interests of all of subpopulations of sexual and gender identities under one LGBTI category. This approach does not resonate with a public health focus on targeting interventions based on sexual behavior rather than identity. Within public health research at global and national levels, concerns around MSM vulnerability to HIV have been delinked from the sexual identities of gay and bisexual men in order to place attention on sexual behaviors and their corresponding risks. Arguments regarding organizing around sexual identity versus focusing public health strategies around sexual behavior seem to have been one of the factors that complicated effective discourse within SANAC and elsewhere on the HIV and STI risks faced by WSW. It also seems ironic that the SANAC sector is defined by the sexual and gender identities of the LGBTI community while the main outcomes of the sector’s work has been addressing the sexual behaviors around HIV risks faced by MSM.

It is problematic that there is a conflation of a broad spectrum of LGBTI concerns with a focus on only the populations commonly recognized as facing higher HIV risk: MSM and transgender women. A precarious precedent is being set that makes it seem that LGBTI peoples' health needs are broadly represented and responded to in South Africa, while lesbian and bisexual women in particular remain invisible and unaccounted for in HIV and STI programming despite the available data showing WSW vulnerability in the South African epidemic context. This conflation seems to be occurring elsewhere in global health policy. For instance, a recent US President's Emergency Plan for AIDS Relief (PEPFAR) gender strategy outlines key affected populations that its funding will focus on including "LGBT populations" yet only highlights HIV prevention interventions for MSM and transgender persons.³² Similarly, the European Commission Regional HIV/AIDS Helpdesk's assessment on HIV prevention gaps in South Africa included a section titled LGBTI that only highlighted data on HIV prevalence among MSM and explicitly conflated terminology in their recommendation to "increase financial resources and/or technical support for organizations that provide health service specifically to LGBTI, as many MSM feel more comfortable using services specifically targeting MSM."³³

This conflation results in invisibilization and is a central reason why WSW sexual health lost prominence within SANAC discourses over time. Some informants reflected it was perhaps premature for WSW advocates to join the LGBTI sector as it has led to depreciation of attention to their concerns. WSW are not the only group within the LGBTI sector structure that has missed out. The health needs of transgender and intersex people have been overlooked in SANAC processes as well. For instance, an informant noted that a transgender community organization took independent actions to influence the 2012-2016 NSP drafting team lest their issues be forgotten.

The findings reveal that advocates for MSM succeeded in gaining attention within SANAC processes, and several organizations in the LGBTI sector received funded interventions to target that population. The evidence base on MSM vulnerability to HIV and STIs, grounded in data collected globally over three decades of the HIV pandemic, provided a strong platform for reflecting on what could be done for the population in the South African context. Global consensus around the need to target key populations spurred the efforts of South African public health actors and major global health financing partners, including the Global Fund and PEPFAR, to enhance their ability to dedicate funding for interventions for MSM and other key populations. For example, PEPFAR's Partnership Agreement with South Africa for 2013-2017 highlights the US government's intentions to support the South African government's prevention efforts for key populations

including MSM.

As resources for MSM programming began to flow, certain LGBTI sector members worked together to coordinate implementation of funded initiatives. Thus, the sector's discourse became increasingly dominated by implementation of MSM interventions as those organizations with the capacity and/or remit to respond to MSM took the one option they had to attract funding and deliver programs. The opportunity cost is that the sector has been unable to serve as an effective space to advocate for the strategic interests and unmet health needs of WSW and others that are underrepresented within the LGBTI sector. The SANAC LGBTI sector is missing opportunities to consider the health needs of all the populations under its mandate and to represent those populations' strategic interests to the South African government and its development partners. Some informants expressed a sense of resignation that the SANAC LGBTI sector would not be in a position to prioritize WSW sexual health agendas in the future. While solidarity in confronting homophobia and enshrining sexual rights in law was the basis for South Africa gay men and lesbians to collaborate in the past, the disparate contexts of MSM and WSW vulnerabilities to HIV and STIs may mean that their needs might be better addressed through different sectors.

Thus, advocates for WSW may need to reposition their agenda again within the SANAC women's sector or identify advocates in other sectors that have the capacity to promote their concerns. Some informants contended that in a patriarchal society such as South Africa, wherein men hold greater power than women, public health interventions for men tend to take precedence. Informants cited recent examples of funding to initiate medical male circumcision programs to decrease HIV transmission risks among heterosexual men as well as resourcing of programs that work with men and boys to challenge harmful gender norms. Some of these interventions are coordinated by the SANAC men's sector and have been prioritized within the context of the generalized HIV/AIDS epidemic. Comparing these funding trends demonstrating increasing prioritization of men's needs with the emergent focus on MSM is somewhat problematic. Gay and bisexual men continue to face stigma and discrimination within South African society to the extent that most of the HIV interventions currently available for them are delivered through siloed services, not through the public health system. Nevertheless, several informants expressed a feminist critique that the rise in funding for men, including MSM, coincides with a decline in funding for programming to address the burden of HIV among women, including WSW, and that this is an overarching feature of competition within SANAC.

Reflecting on the relative power of different actors involved in policy making in SANAC, it is important to acknowledge that the LGBTI sector represents populations

who are relatively disempowered within South African society. The political aspects of sexuality were examined by Gayle Rubin, who argued that many societies "appraise sex acts according to a hierarchical system of sexual value. Marital, reproductive heterosexuals are alone at the top erotic pyramid . . . as sexual behaviors . . . fall lower on the scale, the individuals who practice them are subjected to a presumption of mental illness, disreputability, criminality, restricted social and physical mobility, loss of institutional support, and economic sanctions."³⁴ The reason why LGBTI people's human rights, including their health rights, have often been denied is because they reside lower down the scale of such an "erotic pyramid" and thus hold less power.

The framers of South Africa's Constitution intended to end discrimination on the basis of sexuality, but homophobic views have persisted. For example, a general population survey showed that 80 percent of adults feel that same-sex behavior is "always wrong."³⁵ MSM may seem to hold greater actor power within SANAC than other powerless groups represented by the LGBTI sector, but the findings show that the influence that advocates for MSM have wielded correlates directly to the prominence public health actors have accorded to the evidence of the HIV risks experienced by MSM.

The relative powerlessness of WSW seems to be unshakable as they become less visible within SANAC processes. Moreover, many public health actors seem to have been disinterested in the risks posed by female same-sex sexual behaviors. For example, from the early years of the US AIDS epidemic, the Centers for Disease Control and Prevention (CDC) omitted an indicator to capture HIV infections among WSW in part due to misconceptions around female same-sex sexuality. At the time, a CDC official explained that transmission risks among WSW were not being tracked because "lesbians don't have much sex."³⁶ CDC guidance was recently updated based on findings of a case involving a WSW couple in an exclusive relationship. One woman in the relationship was HIV+, and HIV transmission to the other woman was likely to have occurred due to sexual contact between the two women. Thus, the CDC now recognizes that "although rare, HIV transmission between WSW can occur."³⁷

The South African literature presented herein also supports the notion that female-to-female HIV transmission is possible in this hyperendemic context. Thus, advocates should continue to call for HIV and STI prevention programming for WSW in South Africa that addresses risks within same-sex behaviors. Other key risks for WSW in the South African context are clear in the association between sexual violence and vulnerability to HIV and other STIs. Nevertheless, there is a concern that rape is not conflated as the sole risk facing South African WSW and advocates envision public health programming that promotes healthy

relationships between women, including safe sex among same-sex partners and with other partners.³⁸

Conclusion

Efforts to address the sexual health needs of WSW require a contestation of the power of male-dominated culture and institutions including public health orthodoxies, which do not recognize the possibility of STI and HIV transmission risks among WSW. Such contestation is unlikely to be expressed by vested interests, such as conservative members of the SANAC women's sector, particularly those aligned to the ANC under Jacob Zuma's leadership. If the prediction that the SANAC LGBTI sector will not be able to prioritize WSW concerns is correct, then advocates for WSW's unrealized health rights need to identify other allies within SANAC and may have to seek other policy spaces to make their case to government for a response to WSW sexual health and personal safety.

In the next phase of NSP development, policy entrepreneurs must reiterate the human rights arguments around the multiple vulnerabilities that WSW face in the context of HIV/AIDS. Reviews of the 2012-2016 NSP should afford an opportunity for advocates to reassert the vulnerability of women in all their diversity, reposition the available data on the burden of HIV and STIs among WSW, and insist on the inclusion of interventions to improve their sexual health within South Africa's public health system.

FELICITY DALY began working on the response to HIV/AIDS in New York City in the early 1990s. She graduated from the City College of New York with a BA in international studies before studying and working on gender and development initiatives. She attended the London School of Economics on a scholarship and earned a master of science in development management. She has worked in the British international nongovernmental sector for the last fifteen years, holding leadership roles in sexual and reproductive health and rights organizations. She recently completed a doctor of public health degree at the London School of Hygiene and Tropical Medicine, where she undertook research on the implementation of the Gender Equality and Sexual Orientation and Gender Identity strategies of the Global Fund to Fight AIDS, TB, and Malaria. This article is a synthesis of some findings emerging from the health policy analysis approach of her DrPH thesis research. Daly was recently appointed as executive director of the Kaleidoscope Trust, which was founded in 2011 to urge policy actors in the British government, the Commonwealth, and elsewhere to use their power and influence to support the rights of LGBT people worldwide.

ENDNOTES

- 1 Joint United Nations Programme on HIV/AIDS (UNAIDS), *Gap Report*, 2014.
- 2 Erasmus Morah and Mira Ihalainen, "National AIDS Commissions in Africa: Performance and Emerging Challenges," *Development Policy Review* 27, no. 2 (2009): 185-214.
- 3 Edwin Wouters, H.C.J. van Rensburg, and H. Meulemans, "The National Strategic Plan of South Africa: What are the Prospects of Success after the Repeated Failure of Previous AIDS Policy?" *Health Policy and Planning* 25, no. 3 (2010): 171-185.
- 4 Bongani Mayosi et al., "Health in South Africa: Changes and Challenges Since 2009," *Lancet* 380, no. 9858 (2012): 2029-2043.
- 5 Republic of South Africa, *HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011*, 2006.
- 6 Johanna Kehler, *HIV and AIDS and STI National Strategic Plan (NSP), 2007-2011 and HIV Prevention: A Responsibility of All* (Mowbray, South Africa: AIDS Legal Network, 2007).
- 7 Kathleen Dolan and Phillip Davis, "Nuances and Shifts in Lesbian Women's Constructions of STI and HIV Vulnerability," *Social Science & Medicine* 57, no. 1 (2003): 25-38.
- 8 Seja J. Fishman and Elizabeth H. Anderson, "Perception of HIV and Safer Sexual Behaviors Among Lesbians," *Journal of the Association of Nurses in AIDS Care* 14, no. 6 (2003): 53.
- 9 Audrey S. Koh et al., "Sexual Risk Factors Among Self-Identified Lesbians, Bisexual Women, and Heterosexual Women Accessing Primary Care Settings," *Sexually Transmitted Diseases* 32, no. 9 (2005): 563-569.
- 10 Victor DeGruttola et al., "Infectiousness of HIV Between Male Homosexual Partners," *Journal of Clinical Epidemiology* 42, no. 9 (1989): 849-856.
- 11 Helen Wells and Louise Polders, *Levels of Empowerment Among Lesbian, Gay, Bisexual and Transgender [LGBT] People in Gauteng, South Africa*, OUT LGBT Well-Being, 2004.
- 12 Helen Wells and Louise Polders, *HIV and Sexually Transmitted Infections (STIs) Among Gay and Lesbian People in Gauteng: Prevalence and Testing Practices*, OUT LGBT Well-Being, 2004.
- 13 Helen Wells, *Levels of Empowerment Among Lesbian, Gay, Bisexual and Transgender [LGBT] People in Kwa-Zulu Natal, South Africa*, OUT LGBT Well-Being, 2006.
- 14 Eileen Rich, *Levels of Empowerment Among LGBT People in the Western Cape, South Africa*, Triangle Project and University of South Africa Center for Applied Psychology, 2006.
- 15 Republic of South Africa, *HIV & AIDS and STI Strategic Plan for South Africa 2007-2011*, 2006.
- 16 Mark Heywood, Naëtt Atkinson, and Anso Thom, eds., *2012-2013 Review*, Section 27, 2011.
- 17 Joint United Nations Programme on HIV/AIDS (UNAIDS), *Getting to Zero: UNAIDS 2011-2015 Strategy*, 2010.
- 18 Allanise Cloete, Nadia Sanger, and Leickness C. Simbayi, "Are HIV Positive Women Who Have Sex with Women (WSW) an Unrecognized and Neglected HIV Risk Group in South Africa?" *Journal of AIDS and HIV Research* 3, no. 1 (2011): 1-5.
- 19 Theo G.M. Sandfort et al., "Forced Sexual Experiences as Risk Factor for Self-Reported HIV Infection Among Southern African Lesbian and Bisexual Women," *PLoS ONE* 8, no. 1 (2013).
- 20 Zethu Matebeni et al., "'I Thought We Are Safe': Southern African Lesbians' Experiences of Living with HIV," *Culture Health & Sexuality* 15 (2013): 34-47.
- 21 Sandfort et al., "Forced Sexual Experiences."
- 22 Jamila K. Stockman, Marguerite B. Lucea, and Jacquelyn C. Campbell, "Forced Sexual Initiation, Sexual Intimate Partner Violence and HIV Risk in Women: A Global Review of the Literature," *AIDS and Behavior* 17, no. 3 (2013): 832-847.
- 23 Naemah Abrahams et al., "Worldwide Prevalence of Non-Partner Sexual Violence: A Systematic Review," *Lancet* 383, no. 9929 (2014): 1648-1654.
- 24 Rachel Jewkes and Robert Morrell, "Gender and Sexuality: Emerging Perspectives from the Heterosexual Epidemic in South Africa and Implications for HIV Risk and Prevention," *Journal of the International AIDS Society* 13, no. 6 (2010).
- 25 Susan Holland-Muter, *Outside the Safety Zone: An Agenda for Research on Gender-Based Violence Targeting Lesbian and Bisexual Women in South Africa* (Braamfontein, South Africa: MaThoko's Books, 2012).
- 26 Republic of South Africa, National Strategic Plan on HIV, STIs and TB, 2012-2016, 2011.
- 27 Ibid., 39.
- 28 Gill Walt and Lucy Gilson, "Reforming the Health Sector in Developing Countries: The Central Role of Policy Analysis," *Health Policy and Planning* 9, no. 4 (1994): 353-370.
- 29 Jeremy Shiffman and Stephanie Smith, "Generation of Political Priority for Global Health Initiatives: A Framework and Case Study of Maternal Mortality," *Lancet* 370, no. 9595 (2007): 1370-1379.
- 30 John Kingdon, *Agendas, Alternatives, and Public Policies* (New York: Pearson, 2003).

Removing Barriers to Legal Transition: An Examination of Identification Documentation Policy and Transgender Individuals

By Jonah DeChants

ABSTRACT

Many transgender people are vulnerable to harassment, discrimination, and violence because they do not have access to identification documents that affirm their gender identity. The policies governing the change of gender markers on identification documents are varied and frequently rely on the opinion of a medical professional rather than the experiences of transgender people. This article will explore the historical context of gender marker policies, discuss the benefits and challenges of existing policies, and offer perspectives on best practices for future policy work and advocacy.

Introduction

Presenting identification documentation, such as a driver's license or passport, has become an everyday activity for most Americans. We present them in a variety of contexts, from boarding a plane to ordering a beer. But what if your driver's license had the wrong gender marker on it? Your body, your mannerisms, and your sense of self may all be female, but your license is marked with an "M" for male. Would this make you less likely to present your driver's license at the local bar? For many transgender people, this awkward situation is a daily reality. Thanks to a collection of confusing and onerous policies at various document-issuing agencies across the United States, there are significant financial, medical, and legal barriers to updating one's gender marker on identification documents. Because of these barriers, only one-fifth of transgender people who have transitioned have updated all of their documents, while one-third have not changed any documents at all. When they present identification that does not match their gender expression, transgender people report harassment, being denied service or asked to leave an establishment, and even physical violence.¹ Too many transgender people are vulnerable to discrimination and violence because they are not able to update their identification documents to match their gender presentation.

What Is Legal Transition?

Legal transition is the process by which a transgender person changes their name and gender marker on a number

of national, state, and institutional documents (e.g., passports, driver's licenses, college IDs). This article exclusively discusses policies and procedures for changing the gender marker, due to the fact that legal name change is an issue that includes situations beyond gender transition. Not all transgender people choose to legally transition and update the gender marker on their documents. However, those who do face different procedures, requirements, and costs for each document they change. Some document-issuing institutions in the United States require medical procedures such as sex reassignment surgery or gender counseling. Others require court orders or legal fees.

While some transgender people may choose not to legally transition, many others are prevented from doing so by the financial cost or the medical requirement. Many transgender people, who already face significant discrimination in housing and employment, do not have the resources to hire a lawyer or purchase a new passport. Others may not have access to gender-affirming health care and may not have the ability to, or interest in, complying with requirements for doctors' letters or proof of surgery. Many transgender people choose not to pursue medical treatments as part of their transition and are therefore automatically barred from changing their legal gender. In 2011, the National Transgender Discrimination Survey found that only 21 percent of transgender people have changed all of their identification documents and 33 percent have not changed any.² In 2012, Jody L. Herman of the Williams Institute estimated that as many as 183,000 transgender Americans do not have updated driver's licenses and 124,000 have

- 31 Alice Miller, "Sexual But Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights," *Health and Human Rights* 4, no. 2 (2000): 69-109.
- 32 The United States President's Emergency Plan for AIDS Relief (PEPFAR), *The U.S. President's Emergency Plan for AIDS Relief: Five-Year Strategy*, 2013.
- 33 Jean-Francois Aguilera, *Rapid Assessment on HIV Prevention Gaps in South Africa*, European Commission Regionals HIV/AIDS Helpdesk, 2011, 23.
- 34 Gayle Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole Vance (London: Pandora, 1992), 267-319.
- 35 Benjamin Roberts and Vasu Reddy, "Pride and Prejudice: Public Attitudes Toward Homosexuality," *HSRC Review* 6, no. 4 (2008): 9-11.
- 36 Denise Montcalm and Laura Myer, "Lesbian Immunity from HIV/AIDS: Fact or Fiction?," *Journal of Lesbian Studies* 4, no. 2 (2000): 131-147.
- 37 Shirley K. Chan et al., "Likely Female-to-Female Sexual Transmission of HIV—Texas, 2012," *Morbidity and Mortality Weekly Report*, Centers for Disease Control and Prevention (2014): 212.
- 38 Carmen Logie and Margaret Gibson, "A Mark That Is No Mark? Queer Women and Violence in HIV Discourse," *Culture, Health & Sexuality* 15, no. 1 (2013): 29-43.

no form of updated identification.³ Transgender people of color and those with low income or less education are less likely to have changed their identification documents. Those without updated documents face serious challenges; 40 percent of transgender people who present gender incongruent identification have reported being harassed, asked to leave the establishment, and even attacked.⁴

Why Is Legal Transition Important?

The widespread use of identification documents is a relatively recent phenomenon in American history. Originally, birth certificates were only necessary for the wealthy to determine matters of inheritance. It was not until the early twentieth century that a majority of births were actually recorded. With the creation of Social Security benefits in 1935, the necessity of establishing inheritance was extended to all classes and the federal government began to standardize and coordinate the states' efforts to issue birth certificates.⁵ Today, birth certificates are used to prove one's eligibility for a variety of entitlements and services, including insurance, public education, and pensions.

Massachusetts was the first state to issue driver's licenses in 1907. The use of the license as a form of identification spread so rapidly that by 1977, forty states had started issuing nondriver's licenses for nondrivers who still needed a form of identification for other purposes, such as transportation or buying certain products.⁶ With 86 percent of driving-aged Americans holding driver's licenses,⁷ they are now the most ubiquitous form of identification in the day-to-day lives of most Americans.⁸

These days, we are accustomed to presenting identification documents as we go about our everyday lives. We use them in a variety of settings, including airports, restaurants, drug stores, and office buildings. Additionally, advances in technology and concerns about national security have led to more government legislation on how identification can be issued and when it is required. Examples of this legislation include the Help America Vote Act of 2002, which mandated that first-time voters present identification at the polls if they had registered by mail,⁹ and the Real ID Act, which requires federal verification of state-issued IDs.¹⁰ In the past, a transgender person might move to a new state or city and simply apply for new documents under their new name. However, the advent of technology and the ability to verify one's identification with multiple states and institutions has made this nearly impossible. Simultaneously, over the last several decades, transgender people have gained more visibility, social acceptance, and access to medical treatments such as hormone replacement therapy and sexual reassignment surgery. More transgender individuals are choosing to transition

and are in need of new identification documents for their day-to-day lives.

Why Is Legal Transition So Difficult?

Historical Perspectives

Transgender people have long faced a variety of obstacles to acquiring updated identification documents. Current policies for changing one's gender marker are the legacy of preexisting policies and court rulings on the nature of legal gender. State and legal institutions were unprepared in the 1960s and 1970s as transgender (or "transsexual" as they were then and are still sometimes called) people began to petition the courts to change their legal gender. In 1965, a transgender woman petitioned the New York Board of Health to change the gender marker on her birth certificate. However, the Health Code explicitly stated that a certificate could only be changed if "the Commissioner or his designee is satisfied [that] the evidence submitted shows the true facts and that an error was made at the time of preparing and filing the birth certificate."¹¹ The woman's petition was therefore denied, since she could not prove that the gender on her birth certificate was the result of a clerical error. The first comparable court ruling on changing one's legal gender took place in England in 1970 when a man filed a declaration that his marriage to a transgender woman was null because she was still legally a man. In *Corbett v. Corbett*, the court determined that the transgender woman's genitalia, chromosomes, and gonads at birth were the determining factor in deciding her legal gender. Furthermore, the court stated that one's sex was assigned at birth and could not be changed except in case of error. This ruling set a precedent for similar judgments in Canada and the United States.¹²

These rulings display how state and legal institutions did not perceive transgender people's desire to change their gender as a problem, or even as a possibility. They operated under the assumption that gender is an immutable characteristic and that, unlike hair color or weight, it will not change over the course of one's lifetime. Additionally, the rulings prioritized the medical gender criteria over personal self-identification. This emphasis on medical examinations as part of determining one's "correct" gender has played a critical role in determining when and how transgender people can change their legal gender.

Current Obstacles

The first federal measure to even recognize the possibility that one might need to change their legal gender came with an update of the Model Vital Statistics Act in 1977. This update stipulated that a petitioner would be allowed to change their name and sex on their birth certificate when they present a court order establishing sex change

by surgical procedure and name change. This law, while not having the power to change state laws about birth certificates, is credited with encouraging states to update their policies and allow for change of gender.¹³ However, the rules for changing one's gender still vary widely from state to state. Two states—Idaho and Tennessee—do not allow for a change of gender on birth certificates.¹⁴ Of the forty-eight states that do allow a change of gender on a birth certificate, all require proof of some type of surgical procedure, although definitions of what counts as proof of surgery vary. Policies for changing one's driver's license are similarly diverse and require either proof of medical treatment or another updated document such as a birth certificate.¹⁵

The problems that current policies create for transgender people can be divided into two main categories: the inconsistency in policy between different types of documentation, and the requirement of proof of medical treatment. The variety of regulations from state to state can create complex legal issues. For example, a transgender woman who was born in Tennessee but lives in Pennsylvania may be able to change her driver's license with a letter from her counselor, but she will not be able to change her birth certificate. In today's technologically advanced society, where our identification is verified in state and national systems, the difference between this woman's license and birth certificate may cause her problems when flying or claiming Social Security benefits.

While legal authorities now acknowledge that legal gender can be changed, they continue to value the opinions of medical professionals (now primarily therapists and surgeons, rather than the doctor present at birth who was so important in *Corbett v. Corbett*) more than the experiences or wishes of the transgender person. This effectively establishes medical transition as a means test, determining one's eligibility for the "benefit" of changing one's legal gender. Dean Spade, an associate professor of law at Seattle University and founder of the Sylvia Rivera Law Project, has critiqued the use of medical procedures as criteria for changing legal gender; noting that these procedures are prohibitively expensive for low-income transgender people and also do not account for transgender people who wish to change their legal gender but are not interested in medically altering their bodies.¹⁶ Laura Langley, an attorney specializing in transgender issues, argues that legal transition without the interference of the medical community is a right to self-determination: "To fully realize the Fourteenth Amendment's promise of liberty, people must be able to determine their gender for themselves."¹⁷ Spade, Langley, and other scholars present compelling arguments that the state and medical community should not create barriers to legal transition and that existing barriers only serve to stigmatize and discriminate against transgender people.

Policy Options

There are a number of questions to consider when evaluating legal transition policies: Under what jurisdiction does the policy fall? Does it favor the opinion of a medical professional or the experiences of the transgender person? It is practical to implement across the entire agency or jurisdiction? The three gender marker policies discussed below illustrate the tensions and questions faced by these agencies: (1) medical proof versus self-identification, (2) federal policy versus state sovereignty, and (3) radical change versus practical implementation.

Argentine National Identification: Legal Transition by Choice

On 8 May 2012, Argentina passed a law radically changing legal transition.¹⁸ The law not only allows transgender people to change their legal gender without any sort of surgery or doctor's note, but it also allows people to change both their national identification card and their birth certificate for free and without a lawyer.¹⁹ The strength of this policy solution is the amount of control it places in the hands of the transgender people themselves. It effectively grants all citizens the right to decide their own legal gender without being required to receive permission or support from a medical professional.²⁰ This strength is also the policy's greatest vulnerability.

In the United States, there is a long history of cultural and political conservatives portraying transgender people as deceptive or fraudulent. This has been demonstrated most recently by the introduction of laws designed to criminalize transgender people who do not use the restroom that matches their sex at birth.²¹ These laws rely on, and perpetuate, fears that men who want to attack women will pretend to be transgender in order to access the women's restroom. When it comes to identification documents, some cultural and political conservatives have argued that, without the use of doctors as gatekeepers, there is no guarantee that only "real" transgender people are changing their gender. They suggest that some people will change their legal gender in order to escape criminal records or commit fraud. This line of reasoning was used by an organization called Capitol Resource Family Impact to oppose a California law seeking to lessen requirements for legal transition. They argued that the law would create "special privileges for a select segment of society [which] will pose a significant public safety concern for the rest of the public."²² While there is little evidence of people transitioning genders to escape debts or convictions, some politicians and policy makers in the United States could argue that a doctor's approval is a necessary step to prevent fraud. Given that the Argentine law is the first of its kind in the entire world, Argentina serves as a test case: does reducing the barriers to legal transition lead to increased fraud, and are medical professionals necessary in the process of

changing one's legal gender?

In addition to eliminating the role of medical professionals, the Argentine law also highlights differences in how legal documentation is administered in Argentina and the United States. The key difference is the existence of Argentina's National Bureau of Vital Statistics, a centralized institution that has the authority to change both the person's national identification card and their birth certificate.²³ In the United States, there is no such central institution and the federal government does not have the authority to dictate document policies to the states, each of which issues birth certificates and driver's licenses according to its own regulations.²⁴ Because of the nature of the Argentine governmental structures, the implementation of this new policy is not likely to pose too large of a burden on their existing document-issuing organizations and will not conflict with local or provincial policies. A similar national-level policy would not have the same simple effect in the United States.

The Pennsylvania Department of Transportation: Genderless Identification

In the midst of a close election and controversial voter ID legislation, the Pennsylvania Department of Transportation made a largely overlooked but nevertheless radical policy change in the fall of 2012: they began issuing voter identification cards with no gender marker whatsoever.²⁵ This policy was the first of its kind; David Rosenblum of the Philadelphia-based Mazzone Center stated, "To my knowledge, this is the first time the state has ever issued an ID where gender doesn't matter."²⁶ Despite this, the policy change went largely unnoticed by the mainstream media and the general public. The effects of this policy were short-lived, however, because the Pennsylvania Supreme Court struck down the state's voter ID law in January 2014.²⁷ Without the urgency of the voter ID law, the Pennsylvania Department of Transportation has returned to issuing only driver's license and photo identifications, both of which have gender markers.

The strength of this policy solution is its radical simplicity; it elegantly sidesteps the entire problem of updating a gender marker. If identification documents have no gender, then there is a no way for transgender people to have gender-incongruent identification. This solution is comprehensive; it accommodates transgender people who do not seek medical treatment, as well as those who do not feel like the categories of "male" and "female" accurately describe their gender. The policy solution also raises an interesting question: for several decades we have included gender on these documents because it helped us identify people, but is this still relevant in a world of digital technology?

The simplicity of this policy solution and the

questions that it provokes are also its greatest weaknesses. It may be politically unrealistic to make such a profound change. It is easy to imagine politicians, voters, and policy makers objecting to such a radical change from the long-standing tradition of including a person's gender on identification documents. Opponents could argue the removal of gender markers would lead to an increase in fraud or a decrease in the usefulness of documents at identifying their holders. The deletion of gender markers may also require expensive changes to equipment or bureaucratic paperwork and stretch the capacity of document-issuing organizations. It also has the potential to place these organizations in conflict with one another. If federal documents discontinue the use of gender markers but state documents maintain it, there could be clerical or computational errors when verifying identify in a national database. Ultimately, the deletion of the gender marker on identification documents is conceptually simple but difficult to put into practice.

The US Department of State: Legal Transition with a Medical Letter

On 9 June 2010, the US Department of State officially changed its policies regarding gender changes on US passports.²⁸ Applicants who wish to change the gender marker on their passport must now present a letter from a medical physician stating that they have undergone, or are undergoing, medical transition.²⁹ This policy was celebrated as a large step forward by transgender advocates, largely because it allows people to change their documents *during* their medical transition and because it does not explicitly require sex reassignment surgery.

The strength of this policy change is its pragmatism. Instead of mandating which medical procedure or what kind of medical professional qualifies for legal transition, it sets an ambiguous low standard. This ambiguity allows transgender people and their health care providers the opportunity to determine which procedures are best for them and their transition. However, this policy continues to value the opinions of medical professionals more than the experiences and desires of the transgender person. The doctor or surgeon effectively acts as a gatekeeper, deciding who does or does not qualify for transition. Low-income transgender people who do not have access to medical care and transgender people who do not seek medical care for their transition are not able to legally transition under the new passport policy.

Nonetheless, the US Department of State's passport policy is the most pragmatic policy solution in our current political and cultural climate. The fact that it requires a low level of medical proof means that most transgender people who medically transition will be able to update their passports. It also appeases those who may be resistant to

making legal transition "too easy," ultimately leaving the decision up to a medical professional. By retaining the medical requirement, it is not too much of a drastic departure from existing policies, and its simple design allows the existing passport application structures to be only slightly modified, not overly taxing the existing procedures and organizational capacity. Overall, while the use of medical transition as a means test is not inclusive of all transgender people's experiences, this policy is a large improvement over the majority of legal transition policies at the state and local level.

Policy Recommendation

Adopting a policy similar to the law in Argentina would be a large improvement over most policies in the United States. This policy would allow all transgender people, regardless of their ability or desire to pursue medical transition, to update their gender markers without any sort of gatekeeping by medical personnel. Argentina's existing policy could even be improved upon if it allowed for the recognition of more gender identities beyond "female" and "male." However, given the current political and cultural climate in the United States, where transgender people are accused of committing fraud or asking for special privileges, this kind of radical policy change is unlikely to occur.

The gender marker policy of the US Department of State is a more pragmatic and feasible solution. It maintains the role of the medical gatekeeper, therefore silencing critics who believe that people may change their gender marker to escape debt or criminal convictions. By not mandating any particular medical treatment or procedure, though, it allows more autonomy for transgender people to decide what is best for them. This policy could be improved if the definition of "medical professional" were expanded to include a counselor or social worker. These professionals are included in the policy to change one's gender marker on a driver's license in Pennsylvania.³⁰ A visit to a counselor or social worker requires less time and fewer resources than pursuing hormone or surgical treatment. It would effectively keep the means test but lower the bar. By including more professional opinions, an expanded policy would ultimately accommodate more transgender people. However, this policy would still exclude those transgender people who never pursue medical transition or who cannot access a gender-affirming professional.

Therefore, the best policy change for transgender people would be to eliminate the use of gender markers across all forms of identification documents. Deleting gender markers would eliminate the role of the gatekeeper and accommodate transgender people who do not have the resources or desire to pursue medical transition.

Additionally, this policy would not exclude transgender people whose identities fall outside the binary categories of "male" and "female." Most importantly, it would prevent transgender people from being discriminated, harassed, or menaced because of the "M" or "F" on their identification documents.

This policy would be a radical departure from our current identification documents. But in this increasingly digital age, where there is a photo on nearly every identification document we possess, is it still necessary to include gender as a descriptive characteristic? The short-lived voter ID cards issued by the Pennsylvania Department of Transportation in 2012 demonstrated that genderless documents may be the way of the future. Before they were discontinued due to the overturn of Pennsylvania's voter ID laws, these ID cards functioned perfectly well without describing the cardholder's gender. Other important documents, such as most school-issued student IDs, do not currently include gender markers. This indicates that gender markers are not indispensable components of documentation.

This policy is not a perfect solution. It does not dispose of the need for legal transition: many transgender people would still need to update the name and photo on their various documents. Modifying the structure of these identification documents would also be a significant clerical undertaking—it may require expensive changes to paperwork or computer systems. Such costs could be mitigated by a gradual rollout of new documents, rather than investing lots of resources in a sudden shift. Ultimately, removing gender markers would remove another locus of government control over transgender people and their lives. Current criteria for changing one's gender marker on various identification documents are divergent and burdensome. They prevent transgender people from having accurate documentation and expose them to discrimination, harassment, and violence. Eliminating gender markers would reduce the number of hoops that transgender people must jump through in order to acquire accurate documents and reduce their risk of harm.

It may be many years before we see genderless identification documents. Each document-issuing agency—whether at the federal, state, or local level—has jurisdiction over its gender marker procedures. Therefore, each agency would have to delete gender markers from its documentation and computer systems. Transgender advocates and allies are already working hard with these agencies to communicate the needs and concerns of transgender people. Their successes, such as New York State's recent decision to eliminate the surgical requirement to change a birth certificate,³¹ provide the lessons needed to continue advocating for better policies and the eventual elimination of gender markers.

Conclusion

Transgender people face a number of obstacles to changing their legal gender, including confusing, and sometimes contradictory, variations in policy and medical procedures used as a means test. These barriers are unnecessary, inefficient, and the result of outdated understandings of gender. The deletion of gender markers from identification documents would significantly reduce these barriers. It would free transgender people from the burden of consulting with a medical professional about their identity and legal status. It would be inclusive of gender identities that are outside the gender binary. This deletion, in conjunction with streamlined procedures for legal name change, would give transgender people access to the documents they need to live their lives free from discrimination, harassment, and violence. Until gender markers are eliminated, we must continue to advocate for identification-issuing agencies to make their gender marker policies more accommodating to transgender people for their civil rights, their dignity, and their safety. These policies, along with other much-needed policies regarding nondiscrimination in employment, housing, and medical care, can contribute to transgender people being able to live their lives authentically and safely.

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ENDNOTES

- 1 Jaime Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011.
- 2 Ibid.
- 3 Jody Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters*, The Williams Institute, April 2012.
- 4 Grant et al., *Injustice at Every Turn*.
- 5 Dean Spade, "Documenting Gender," *Hastings Law Journal* 59, no. 1 (2008): 1.
- 6 James B. Rule et al., "Documentary Identification and Mass Surveillance in the United States," *Social Problems* 31, no. 2 (1983): 222.
- 7 Tony Dutzik and Phineas Baxandall, *A New Direction: Our Changing Relationship with Driving and the Implications for America's Future*, US PIRG Education Fund, 2013, 12.
- 8 Spade, "Documenting Gender."
- 9 Robert A. Pastor et al., "Voting and ID Requirements: A Survey of Registered Voters in Three States," *American Review of Public Administration* 40, no. 4 (2010): 461-481.
- 10 Spade, "Documenting Gender."
- 11 Gail Brent, "Some Legal Problems of the Postoperative Transsexual," *Journal of Family Law* 12, no. 3 (1972-1973): 405.
- 12 Marybeth Herald and Julie A. Greenberg, "You Can't Take It with You: Constitutional Consequences of Interstate Gender-Identity Rulings," *Washington Law Review* 80, no. 4 (2005): 819.
- 13 Spade, "Documenting Gender."
- 14 National Center for Transgender Equality website, "ID Documents Center."
- 15 Ibid.
- 16 Dean Spade, "Resisting Medicine, Re/modeling Gender," *Berkeley Women's Law Journal* 18, no. 1 (2003): 15.
- 17 Laura K. Langley, "Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities," *Texas Journal on Civil Liberties & Civil Rights* 12, no. 1 (2006): 101.
- 18 Emily Schmall, "Transgender Advocates Hail Law Easing Rules in Argentina," *New York Times*, 24 May 2012.
- 19 Global Action for Trans Equality, "English Translation of Argentina's Gender Identity Law as Approved by the Senate of Argentina on May 8, 2012."
- 20 Schmall, "Transgender Advocates Hail Law."
- 21 Wilson Dizard, "Florida Bill Seeks to Ban Transgender People from Choosing Their Bathrooms," *Al Jazeera America*, 6 February 2015.
- 22 Office of Senate Floor Analyses, "Bill Analysis: AB1121," 26 August 2013.
- 23 Global Action for Trans Equality, "English Translation of Argentina's Gender Identity Law."
- 24 Spade, "Documenting Gender."
- 25 Amy Worden and Jessica Parks, "New Nondriver Photo ID Is Unveiled," *Philly.com*, 29 August 2012.
- 26 Jen Colletta, "Gender Markers Dropped for New Voter IDs," *Philadelphia Gay News* 36, no. 39 (2012).
- 27 Zachary Roth, "Pennsylvania Governor Won't Challenge Ruling Striking Down Voter ID Law," *MSNBC.com*, 8 May 2014.
- 28 US Department of State website, "New Policy on Gender Change in Passports Announced," 9 June 2010.
- 29 US Department of State website, US Passports and International Travel, "Gender Reassignment Applicants."
- 30 TransCentralPA website, "PennDOT & Gender Markers."
- 31 Empire State Pride Agenda Foundation website, "New York City Proposes Birth Certificate Modernization," 7 October 2014.

Corrective Rape in South Africa: Cultural Issues and Policy Solutions

By Charles Fletcher

ABSTRACT

This article reviews the cultural and legal issues of corrective rape of lesbian women in South Africa and proposes policy solutions to ameliorate this social problem. Corrective rape negatively affects lesbians through sexist discrimination and homophobia, but it also impacts gay men and hinders economic growth in the country. A lack of legal protections and improper enforcement keep lesbian women in a precarious state. Despite these issues, the South African government has the tools and resources to create policy interventions such as tailored health services, education, and legal reforms. These policy measures can lead to a safer and more productive environment for lesbian women and other LGBT persons.

Executive Summary

Corrective rape is the rape of lesbian women as a form of homophobic violence, gender-based violence, and conversion therapy to turn them heterosexual. South Africa has a poor record of reported rape and the highest reported rate of corrective rape of any country. The cultural drivers behind these rapes include homophobia and gender discrimination that place lesbian women in a precarious state of double discrimination. However, such rapes also affect gay men in a culture that values heteronormative gender norms. Beyond the individual impacts of corrective rape, the national economy suffers as fewer people are able to contribute to society and instead fall into poverty. Although legal frameworks provide some protections based on sexual orientation, there are many gaps in legislation, enforcement, and public attitudes that result in weaker protections. Despite these issues, the South African government has the resources to ameliorate the problem. The government can engage with national and international organizations to provide more health resources, address cultural education of gender issues, and strengthen the judicial system. Through these efforts, South Africa can serve as an example of human rights through the protection of lesbian and gay rights.

Overview of Corrective Rape

South Africa was regarded as the rape capital of the world in 2011, with someone being raped every seventeen seconds. It was estimated that a woman in South Africa had a greater chance of being raped than learning how to read. Other figures say that a girl born in South Africa has a 50 percent chance of being raped in her lifetime. In 2011, it was estimated that 66 percent of rape victims did not report

their attack, many for fear of not being taken seriously. Only 20 percent of reported cases went to court, with 4 percent of those resulting in a conviction.¹ As one survivor stated, "In South Africa there is no safe space for women, there is nowhere you can be safe from rape."²

Such a high prevalence of sexual violence creates significant public health implications. The effects of sexual assault can include posttraumatic stress disorder, depression, suicidal thoughts, antisocial behavior, and physical injury.³ Such negative consequences disrupt the lives of survivors so that they do not continue with education or employment and subsequently fall into poverty. Since many cases of rape do not involve protection with the use of a condom, there also exists a high prevalence for pregnancy, sexually transmitted infections, and HIV. The risk of HIV transmission is especially dire for South Africa as UNAIDS estimates 19 percent of the population between ages fifteen and forty-nine was living with HIV in 2013.⁴

"Corrective rape" describes rape committed to forcefully "cure" and convert a lesbian (or bisexual) woman to heterosexuality. Also known as *curative*, *reparative*, or *punitive* rape, the term was coined in the early 2000s when charity workers in South Africa began to notice an influx of such attacks.⁵ Corrective rape goes beyond a form of sexual assault to include physical, psychological, and sexual harm inflicted on an individual based on his/her sexual orientation or gender expression. Not only does South Africa have the highest reported rate of corrective rape of any country, but reported cases have increased in the last decade.⁶ Moreover, some survivors report multiple rapes in their lifetime. One lesbian woman was first raped by a school friend at age fifteen, then later gang raped at age seventeen: "At school I was betrayed by my best friend. He told me to come to his house for a school assignment but when I got to the house

we fought until he hit me so hard I collapsed, and then he raped me because he said I needed to stop being a lesbian.”⁷

However, even the record levels of corrective rape understate its prevalence in South Africa. In a survey of homophobic hate crime survivors in the Western Cape province, 66 percent of lesbian women stated they did not report their attack for fear of secondary victimization from police, incredulous disregard, exposure of their sexual orientation, or further abuse.⁸ As one woman explained, “When a lesbian woman is raped, her family and people in the street say she deserved it and her rapist showed her how to be a woman. It’s easier to keep quiet.”⁹ Another woman did not report her rape and succumbed to victim blaming in which she viewed her rape as being her fault: “I blamed myself for the rape. I did not tell anyone, not my family or the friends with me that night.”¹⁰

Carrie Shelver, coordinator for the One in Nine Campaign, describes all rape as a violent attempt to correct behavior. The behavior being corrected can be broad, such as rejecting the sexual advances of a perpetrator or acting outside cultural gender norms. In this way, rape is a matter of dominance and control, using sex as a weapon to put a person in his/her “place.”¹¹ Corrective rape goes a step further in having sexual orientation as the driving force and justification for rape.

Cultural Issues

Gender inequality in economic, political, and social spheres exacerbates issues surrounding sex and sexuality as women are deemed powerless compared to men. This power imbalance extends to lesbian, gay, bisexual, and transgender (LGBT) individuals, relegating them to low rungs of social hierarchy for not conforming to traditional gender norms. Based on their sex and sexual orientation, lesbian women face double discrimination; they are discriminated and marginalized for being women and further discriminated for being homosexual. Additional factors like race, socioeconomic status, or education level compound these conditions. They become more susceptible to sexual violence, particularly when they live in poverty or lack education and access to social and economic resources.

Discrimination against LGBT persons is reinforced by ideas of heteronormativity in South African culture. This idea, dominant in most societies, supports heterosexuality as the normal sexual orientation and prescribes norms and gender roles to each sex (male and female). Women and men who challenge these roles often face discrimination and violence.¹² A shameful record of rape in South Africa and a traditional culture of male domination have fostered an increasingly brutal and oppressive environment in which lesbian women are forced to conform to gender stereotypes or suffer extreme consequences.¹³ According to interviews with South African men, violent conversion through corrective rape is appropriate since they believe lesbian women just

need forced heterosexual sex to be cured.¹⁴ Survivors also report verbal abuse preceding and during corrective rape to “teach a lesson” and show them how to be a “real woman.” This verbal abuse further underscores the prevalence of heteronormativity in South African society and indicates that these crimes are fueled by misogyny and homophobia.

Anti-homosexual sentiments stem from strong religious and cultural influences in South African society. Homosexuality is viewed as a “Western concept” that was imported to Africa by White culture. Due to the racial segregation and tensions during apartheid, the oppressive view of homosexuality is considered a post-colonial and post-apartheid reaction to the White culture in South Africa. To be homosexual or to support homosexuality is un-African and violently opposed.¹⁵ The male-dominated culture also serves to instill men with a false sense of entitlement and ownership over women.¹⁶ This idea and a culture of rape appear to be passed down to younger generations, thereby continuing the cycle of culturally empowered violence. The 2006 hearing report on school-based violence by the South African Human Rights Commission expressed alarm at the growing phenomenon of corrective rape in schools, with young boys believing that lesbian girls need to be raped to correct their sexual orientation.¹⁷

More Than Just Women

Contrary to many views, rape and sexual assault are not unidirectional. Both men and women can commit or assist with rape and both can be victims of rape, regardless of their sexual orientation. Unfortunately, even fewer men report suffering rape than women, keeping the issue of male rape silent. Men may not report rape for various reasons including shame, confusion, guilt, fear, and stigma; but men may also choose not to report because they wish to avoid being viewed as victims, particularly in heteronormative cultures where victimhood is incompatible with ideas of masculinity.¹⁸ Corrective rape therefore serves to feminize and emasculate gay (and bisexual) men through violent means, while reinforcing the cultural dominance of heteronormativity and established gender norms.

A 2003 study conducted by Out LGBT Well-Being and the University of South Africa Centre for Applied Psychology found an equal percentage of male and female study participants who reported experiencing corrective rape.¹⁹ The same concerns about not being taken seriously and the lack of confidence in the criminal justice system are commonplace among male and female survivors. Bisexual men and women and transgender individuals also suffer gender-based violence, with the latter frequently suffering higher rates. In addressing corrective rape, it is therefore imperative to consider all victims, regardless of sex, since the motivation remains the same: “teaching’ those who deviate from society’s patriarchal norm a lesson.”²⁰

Economic Issues

International development agencies including the World Bank and ActionAid are committed to eradicating global poverty through economic development, and they view gender equality and the rights of women as necessary components to realize this goal.²¹ However, violence against women is a direct barrier to gender equality and the promotion of women’s rights. The impacts of sexual violence impede women from education, employment, and contributing to society, resulting in an economic loss for the survivors and the nation as a whole as fewer women and men work.

Corrective rape and other forms of homophobia pose an economic cost to South Africa as well. A preliminary World Bank study of the economic costs of homophobia and the exclusion of LGBT people in India found that such discrimination could result in a loss up to 1.7 percent of gross domestic product (GDP).²² While the results of this study are still being reviewed and the case applies to India rather than South Africa, there is no doubt that LGBT discrimination leads to lost economic output and hinders overall economic development. Corrective rape survivors who are unable to receive proper treatment and recover may not be able to continue their education or find employment. They may subsequently fall into a vicious cycle of poverty and more violence.

Legal Issues

Human rights violations targeted at people because of their sexual orientation are a global epidemic; these include hate crimes, sexual assault, rape, torture, and murder, as well as various forms of discrimination such as the denial of employment, education, and other basic rights. Although some South African legislation provides rights and protections based on sexual orientation, the aggression against lesbian women and gay men is a clear illustration of the gap between legislative ideals and the cultural attitudes of the public.

The South African Constitution is considered very progressive, pledging equality for all citizens and protection from discrimination on the grounds of gender, race, and sexual orientation. Section 9 of the Bill of Rights specifically prohibits discrimination against people on the basis of their sexual orientation.²³ South Africa was even the first African nation to legalize same-sex marriage in 2006; it remains the only one as of 2014.²⁴ However, the rights extended to LGBT individuals are rarely translated into everyday practice.

The Equality Act, passed in 2000 and last amended in 2008, specifically prohibits hate speech and harassment, and includes sex, gender, and sexual orientation under the definition of “harassment.” However, in defining the objective of the act, Chapter 1, Article 2 only lists race, gender, and disability. Chapter 2 outlines specifics on prohibited forms of discrimination based on race, gender, and disability, but

sexual orientation is notably excluded when it was previously listed under “harassment.” However, Article 8 on the prohibition of unfair discrimination on the grounds of gender lists gender-based violence as the first form of discrimination. Lesbian women may be loosely protected against gender-based violence under the act, but a weakness of the legislation is not clarifying what constitutes gender-based violence and omitting sexual orientation altogether beyond the initial definition of “harassment.”²⁵

Simply listing rights and providing protection through legislation does not guarantee that the laws match reality. In 2012, South Africa was reported to have one of the highest rates of violence in the world, with more than forty murders a day on average, and the highest rate of rape.²⁶ Women still experience gender-based violence even though such transgressions are explicitly prohibited by law. The double discrimination suffered by lesbian women through both the violence against women and LGBT discrimination and violence makes a mockery of the constitution and puts millions of women’s safety at risk.

Clare Carter’s research with lesbian women and local nongovernmental organizations (NGOs) in South Africa also revealed issues with the criminal court system. Many rape cases sent to the criminal court system take up to six years to be heard, and even then it is very difficult to receive a conviction. Furthermore, despite constitutional protections, many citizens do not know their rights or cannot afford court fees.²⁷

Organizations such as the Eastern Cape Gay and Lesbian Association (ECGLA) and the International Gay and Lesbian Human Rights Commission (IGLHRC) have petitioned for high sentences for corrective rape and to have it defined as a hate crime.²⁸ The South African Human Rights Commission has called upon the South African government to take more action and develop more effective solutions in the criminal justice system to protect the human rights and dignity of survivors, particularly in holding perpetrators responsible for their crimes.²⁹ The government formed a task force in 2011 to develop a legislative plan and public awareness strategies to address corrective rape.³⁰ However, progress has been slow and corrective rape has still not been classified as a hate crime. Without this classification, survivors and activists must rely on existing legislation and judicial precedent, which have not favored well for survivors.

Few women report confidence in the current justice system. However, Judge Tshifiwa Maumela set a precedent in a recent court decision in the High Court sitting at the Palm Ridge Magistrate’s Court by sentencing a man to thirty years in prison after he pled guilty to the corrective rape and murder of a young lesbian woman. Judge Maumela reported that the ruling was his effort to uphold the law and make a difference to all vulnerable groups of society by setting an example of how to address hate crimes. He stated, “No one has been given the right to correct others when it

comes to the right to love their own gender.³¹ Although the thirty-year sentence has been criticized for being too lenient for the crime by some South African activists, they are pleased to see judicial action that recognizes the motivation of hate in corrective rape crimes.³²

Policy Solutions

South Africa has the opportunity to become a judicial and social leader in Africa by protecting the civil rights of all its citizens, particularly LGBT citizens. Addressing corrective rape as an intersection of women's rights and LGBT rights through policy interventions can serve a larger purpose in supporting human rights in South Africa. The 2009 ActionAid report on corrective rape outlined specific actions for the South African government to take against corrective rape,³³ but five years later, it seems that little progress has been made. Rather than simply checking a box on a list of policy actions, the South African government must commit itself to better serving survivors, supporting education as a form of prevention, strengthening the legal protection of sexual orientation, and prosecuting perpetrators to give force to the laws. Luckily, the South African government has the resources and can engage with civil society and international organizations such as ECGLA, IGLHRC, and UNAIDS to combat corrective rape.

The unique homophobic motivation behind corrective rape necessitates tailored services for survivors beyond standard survivor services. In investigating male rape in conflict, researcher Charli Carpenter found a lack of support services for men and suggested culturally appropriate medical assistance and psychological support.³⁴ Such services address the unique issues and differences of male survivors that are not served by traditional services for women. Similarly, the Department of Health must ensure that proper medical and psychological services are available to all survivors of corrective rape, male or female. Recognizing the sexual orientation and gender identity elements of a survivor's recovery is essential to provide appropriate medical, psychological, and social services. Sexuality-sensitive services can help survivors recover and lead productive lives for themselves and the larger South African society.

Including HIV treatment is also essential in these services. Although the South African public health system provides HIV prophylaxis free of charge to rape survivors who report their rape,³⁵ this information needs to be more widely disseminated so all survivors know. Furthermore, the access to postexposure prophylaxis and services available to rape survivors needs to ensure confidentiality so survivors don't fear secondary victimization in seeking treatment. Partnering with existing organizations such as the South African National AIDS Council and UNAIDS can utilize current HIV programs to educate on corrective rape and support all survivors of sexual assault. Small steps can have a

large impact to help survivors of corrective rape and combat HIV.

As corrective rape is a cultural problem, it requires a cultural solution. The South African Human Rights Commission report on the rising number of young boys and men learning to commit violence against girls is a red flag that intervention is needed to end the spread of gender-based violence in the next generation. Working with the South African Human Rights Commission and other local NGOs, the Department of Education must ensure that students are being educated on their rights through civics studies, as well as gender studies. Discussions on these topics are imperative for students to know their rights and respect the rights of others. Cultural change is not quick though, and the result may take several years or generations, but education and awareness are necessary to begin the change.

Finally, legal reforms and executive implementation are required to tie everything together. The Equality Act should be amended to explicitly include sexual orientation in the list of protections. Adding corrective rape as a hate crime will create specific penalties leading to more effective punishment and deterrence of future perpetrators. Laws also need to be properly and universally enforced across South Africa. The government task force must continue to act as a platform to review and address corrective rape as policy changes are implemented. Citizens have called upon the government to act and the government has a responsibility to respond by sending a clear message that such crimes will not be tolerated.³⁶

Conclusion

South Africa stands at a crossroads. Corrective rape affects South Africa in nearly every sector, ranging from social and economic to education and public health. With more cases of corrective rape, the economy becomes less productive, the judicial and political systems become weaker with citizens losing faith, and social discrimination and public health concerns become more pervasive. The South African government has the framework in its existing judicial and public health systems to address this problem, and it has the knowledge and support of local and international organizations. Through these efforts, South Africa can champion for human rights, strengthen its judicial system, ensure a more educated and healthy population, and increase economic growth as more lesbian women and gay men are able to contribute to the economy. Acting now will move the country forward on the right path to equality and the eradication of gender-based injustice.

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ENDNOTES

- 1 Clare Carter, "Corrective Rape Video," 18 May 2013.
- 2 Andrew Martin et al., *Hate Crimes: The Rise of "Corrective" Rape in South Africa*, ActionAid, 2009, 15.
- 3 "Effects of Sexual Assault," Rape, Abuse, and Incest National Network (RAINN) website.
- 4 "South Africa: HIV and AIDS estimates (2013)," UNAIDS website.
- 5 Patrick Strudwick, "Crisis in South Africa: The Shocking Practice of 'Corrective Rape'—Aimed at 'Curing' Lesbians," *The Independent*, 4 January 2014.
- 6 Carter, "Corrective Rape Video."
- 7 Martin et al., *Hate Crimes*, 5.
- 8 Eileen Rich, *Overall Research Findings on Levels of Empowerment Among LGBT People in the Western Cape, South Africa*, Triangle Project and UNISA Center for Applied Psychology, 2006.
- 9 Martin et al., *Hate Crimes*, 13.
- 10 Ibid., 14.
- 11 "Is 16 Days Enough? Part 3: The Corrective Rape Debate," *Eyewitness News*, YouTube video, 1 December 2013.
- 12 Martin et al., *Hate Crimes*, 6.
- 13 Ibid., 5.
- 14 Carter, "Corrective Rape Video."
- 15 Megan Morrissey, "Rape as a Weapon of Hate: Discursive Constructions and Material Consequences of Black Lesbianism in South Africa," *Women's Studies in Communication* 36, no. 1 (2013): 72-91.
- 16 Martin et al., *Hate Crimes*, 8-12.
- 17 *Report of the Public Hearing on School-Based Violence*, South African Human Rights Commission, 2006.
- 18 Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict," *European Journal of International Law* 18, no. 2 (2007).
- 19 Angelo Louw, "Men Are Also 'Corrective Rape' Victims," *Mail & Guardian*, 11 April 2014.
- 20 Ibid.
- 21 "Gender," World Bank website.
- 22 M.V. Lee Badgett, *The Economic Costs of Homophobia & the Exclusion of LGBT People: A Case Study of India*, World Bank, 2014.
- 23 Constitution of the Republic of South Africa; Chapter 2: Bill of Rights; Section 9: Equality.
- 24 "The Freedom to Marry Internationally," Freedom to Marry website, March 2015.
- 25 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Republic of South Africa, 16 June 2003.
- 26 Charlayne Hunter-Gault, "Violated Hopes," *New Yorker*, 28 May 2012.
- 27 Carter, "Corrective Rape Video."
- 28 Stephanie Coutrix, "UN Women: 'Corrective Rape' Should Be Recognized As a Hate Crime, Says Advocate," *United Nations Radio*, 4 September 2014.
- 29 Martin et al., *Hate Crimes*, 3.
- 30 Tiffani Wesley, "Classify 'Corrective' Rape As Hate Crime," *Open Society Initiative for Southern Africa*, 25 November 2012.
- 31 Shain Germaner, "Respect Gay Rights, Judge Tells Killer," *Independent Online*, 26 November 2014.
- 32 J. Lester Feder, "South African Court Sentences Man to 30 Years in Prison for Rape and Murder of Black Lesbian," *BuzzFeed News*, 25 November 2014.
- 33 Martin et al., *Hate Crimes*, 17.
- 34 R. Charli Carpenter, "Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations," *Security Dialogue* 37, no. 1 (2006): 98.
- 35 Louw, 2014.
- 36 Ibid.

School-Based Services for LGBTQ Youth

By Jessie Kember

ABSTRACT

There is limited empirical evidence of school-based practices and anti-bullying policies intended to serve LGBTQ youth, despite indications that such interventions are beneficial to the entire school community. Implications for practice are discussed.

Introduction

Experiences of victimization for LGBTQ youth occur across various settings, including the home, school, and community.¹ Research has established the association between identifying as LGBTQ and increased victimization amongst youth. Identifying as LGBTQ is also associated with risk of substance and alcohol use,² sexual risk behaviors,³ school problems,⁴ and suicidality⁵ amongst youth. It is a reasonable assumption that some of these outcomes are a result of the victimization LGBTQ youth experience. The 2011 National School Climate Survey conducted by the Gay, Lesbian, and Straight Education Network (GLSEN) found that 84.9 percent of the 8,584 student respondents heard "gay" used in a negative way frequently or often at school, and 91.4 percent of students felt distressed because of this language.⁶

Tamera Murdock and Megan Bolch identified peer victimization as one of the strongest predictors of school disengagement for LGBTQ youth, providing a foundation for the development of depression and anxiety.⁷ LGBTQ youth report experiences of harassment, discrimination, and social exclusion, often specifically related to their sexual orientation, gender identity, or expression.⁸ Huda Ayyash-Abdo demonstrated that a hostile school environment can lead to emotional distress, depression, anxiety, and suicidal ideation.⁹

A likely setting for victimization,¹⁰ schools are a practical setting for intervention, yet there is limited empirical evidence of successful LGBTQ school-based initiatives.¹¹ Good schools positively shape culture and foster healthy behaviors, relationships, and social responsibility amongst students, regardless of sexual orientation.¹² This article will review statutory policies, "no promo homo" legislation, and anti-bullying legislative action surrounding school-based support for LGBTQ students. Implications for practice and research are discussed within the context of successful interventions and support services implemented across the nation, such as: Project 10, the Safe Schools Program for

Gay and Lesbian Students, and the Gay Straight Alliance (GSA) Network. Recommendations for research and practice are discussed.

Statutory Policies

State Policies

As of 2010, forty-four states explicitly prohibit bullying and harassment in schools.¹³ However, while some schools have anti-bullying policies with protections based on sexual orientation, gender identity, and expression, others simply promote general efforts for which such protections against bullying and harassment apply. These vague policies exclude personal characteristics for which various groups are protected from discrimination. In sum, the United States remains divided regarding school systems' curricular policies and educational codes.

"No Promo Homo" Legislation

Some policy developments have worked *against* protecting LGBTQ youth through explicitly or implicitly prohibiting teachers from discussing LGBTQ-related topics, creating confusion amongst staff and students in addressing bullying and violence directed toward LGBTQ students.¹⁴ Not surprisingly, some teachers fear losing their job if they intervene in LGBTQ-related harassment issues.¹⁵

In eight states (Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah), school districts and state governments have adopted "no promo homo" policies.¹⁶ The most extreme of these policies only allow for classroom discussion of LGBTQ individuals if portrayed as immoral, unhappy, or disease-prone.¹⁷ While some state policies strictly prohibit LGBTQ-related topics (e.g., Louisiana and South Carolina),¹⁸ others require teachers to actively condemn homosexual practices (e.g., Texas).¹⁹ Failure to comply with such policies can result in termination of a teacher's position within the school system.²⁰

"No promo homo" legislation often results in negative consequences. In the Minnesota school district of

Anoka-Hennepin, a “no promo homo” policy was overturned in 2012, after it was said to be influential in the suicide of eight students after being relentlessly bullied and harassed due to their real and perceived sexual orientation and gender identity. An additional seven students were hospitalized for attempted suicide.²¹

Anti-Bullying Legislative Protection Based on Sexual Orientation

In contrast to “no promo homo” legislation, some states have laws that protect LGBTQ youth. In an analysis of anti-gay bullying in schools, Jason Wallace documented comprehensive anti-bullying legislation specific to sexual orientation in Illinois, Iowa, Maryland, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Vermont, and Washington.²² These illustrative statutes specify sexual orientation and gender identity as characteristics upon which students shall *not* be harassed²³ and have been shown to be associated with a reduced prevalence of suicide attempts among LGB youth.²⁴ Regardless of sexual orientation, LGBTQ-inclusive laws protect all students from anti-gay verbal harassment. These policies can provide impetus for other school-based interventions, enabling educators to serve as advocates for LGBTQ youth and ensuring a safe and successful school environment.

School-Based Interventions

Individual Level

School staff members have an ethical obligation to provide a safe environment for all students. For this to occur, Sanna Thompson and Lon Johnston challenge practitioners to increase personal awareness of their feelings toward sexuality and acknowledge how these feelings affect their values, beliefs, and relationship with LGBTQ youth.²⁵ It is also important for practitioners to communicate with LGBTQ youth to gain a better understanding of feelings they may be experiencing, such as confusion, uncertainty, and dissonance.²⁶ This awareness allows practitioners to assume supportive roles when assisting youth in developing self-acceptance and self-esteem.²⁷

Setting Level

School-based programs that emphasize positive behavioral supports, such as direct support services, social opportunities, and school climate improvements, have been found to improve school environments,²⁸ contribute to enhanced school safety and student mental health,²⁹ foster a sense of connectedness and safety amongst all students,³⁰ and contribute to a decrease in dating violence, threats, truancy, injuries at school, and suicide attempts.^{31,32} In qualitative studies, LGBTQ students exposed to LGBTQ-affirmative school-based interventions reported increased well-being and academic success.³³ The success

of LGBTQ-affirmative school-based interventions does not require that everyone in the community endorse LGBTQ-affirmative views, but rather, that LGBTQ students are provided with an affirmative climate.³⁴

There are four overarching school-based supports for LGBTQ students in the literature: presence of a gay-straight alliance (GSA), supportive educators, inclusive curriculum, and a comprehensive anti-bullying or harassment policy.

Gay-Straight Alliance

School-based student-led support groups, such as GSAs, aim to guide systemic change in school culture and increase respect for diversity, supporting LGBTQ students and their heterosexual allies and reducing prejudice, discrimination, and harassment.³⁵ In 2013, more than 4,000 groups existed within US middle schools, high schools, and colleges.³⁶ GSAs disseminate information about LGBTQ-relevant topics (e.g., coming out, connecting with supportive faculty/staff, developing coping strategies for living in a hostile climate) and improve interpersonal relationships,³⁷ sponsor social events, and initiate change in schools that enhance understanding of sexual orientation, reducing stigma, prejudice, and hostility.³⁸

A large statewide survey of high school-age students across sixty-four public schools revealed that the presence of a GSA or other support group for LGBTQ students was significantly associated with greater school safety.³⁹ LGBTQ youth in schools with support groups were less than half as likely than those in schools without such groups to skip school out of fear or safety concerns.⁴⁰ The presence of peer-support groups and nonacademic counseling was associated with lower rates of at-school victimization and lower risk for past-year suicide attempts amongst LGBTQ youth.⁴¹ GSAs have been shown to relate directly to improved mental health, and GSA participation is associated with higher grade point averages (GPAs).⁴² Overall, having a GSA may increase the subjective experience of safeness that students have in schools.⁴³

Despite this evidence, fewer than half of LGBTQ students attended a school that had a GSA or other student club that addressed LGBTQ issues in 2011, nationwide.⁴⁴ GSAs may be beneficial for both LGBTQ youth and heterosexual youth,⁴⁵ providing support for LGBTQ students and students with same-sex parents, and reminding students, faculty, and staff that harassment is not acceptable.⁴⁶

Supportive Educators

From a sample of 5,730 LGBT youth ages thirteen to twenty-one years, Joseph Kosciw and colleagues found that a greater number of educators supportive of LGBTQ youth was related to decreased victimization and truancy, greater student self-esteem, and higher GPAs.⁴⁷ Kosciw et al. provided evidence that the strongest positive influence for LGBTQ students was having supportive adults at school,

a factor that strongly predicted a less hostile school climate and greater self-esteem for LGBTQ students.⁴⁸

Creating supportive educators begins with professional development for all school personnel.⁴⁹ During daily conversations and interactions, some educators say and do things that perpetuate social and cultural norms of heteronormativity.⁵⁰ Training school staff to be more sensitive to LGBTQ issues is an essential step in attaining effective school-based services⁵¹ and providing impetus for organizational change.⁵² Carol Goodenow et al. found that staff training on sexual harassment was associated with lower rates of victimization and suicidality amongst LGBTQ youth.⁵³ Staff may also be trained to recognize and intervene when students engage in homophobic or transphobic behaviors.⁵⁴

Organizational change requires teacher education and administrator training in credentialing programs, district professional development, school-family-community partnerships, and collaborative leadership by educators.⁵⁵ Treating every student with equal respect and dignity entails learning more about the challenges faced by members of such marginalized groups.⁵⁶

Inclusive Curriculum

Kosciw et al. found that students exposed to a more inclusive curriculum, where youth were taught positive representations of LGBTQ individuals, history, and events, reported less victimization.⁵⁷ In 2011, GLSEN discovered that less than two out of ten students were taught positive representations of LGBTQ individuals, history, or events in their classes.⁵⁸ From a school-climate perspective, LGBTQ-related content has been shown to aid in the personal growth and well-being of gay and gender nonconforming students, while also fostering a collaborative and safe environment.⁵⁹

Comprehensive Anti-Bullying Policies

School climates may benefit from effectively communicated comprehensive anti-bullying policies.⁶⁰ Despite an insignificant relationship between comprehensive anti-bullying policies and victimization, GPA, or truancy, these policies were significantly related to positive feelings of self-esteem.⁶¹ Kosciw et al. reasoned that schools with such policies demonstrate to LGBTQ students that the school is an affirming environment, enhancing student self-esteem. LGBTQ students who attend schools with LGBTQ-inclusive anti-bullying policies experience less harassment related to their sexual orientation, compared to students in schools with no policy or a generic policy.⁶²

Application: State and Nationwide School-Based LGBTQ-Affirmative Interventions

California and Massachusetts have led the United States in efforts on behalf of LGBTQ youth.⁶³ In the 1980s, the

Los Angeles Unified School District initiated Project 10; the Safe Schools Program for Gay and Lesbian Students was established by the Massachusetts Board of Education in 1993; GLSEN was established in 1995, through the work of Boston-area gay and lesbian educators; and the Gay-Straight Alliance Network (GSA Network) was established in San Francisco in 1998.⁶⁴ While a comprehensive review of model programs throughout the United States is beyond the scope of this article, several noteworthy programs are briefly summarized.

Project 10

Project 10 originated as a dropout prevention program for LGBTQ students at Fairfax High School in the Los Angeles Unified School District.⁶⁵ With a central location in the district for resources on LGBTQ issues, Project 10 provides ongoing workshops to train counselors, teachers, and staff on issues of institutional homophobia and the needs of LGBTQ youth while also training and maintaining on-site teams for student support. These team members also provide assistance to school librarians in building collections of fiction and nonfiction LGBTQ subjects. Project 10 relies on the development and enforcement of nondiscrimination clauses, anti-slur resolutions, or codes of behavior with regards to name calling, advocacy for LGBTQ student rights through commissions, task forces, parent-teacher associations and community outreach programs, and networking with community agencies, parents, educational organizations, and teachers' unions.⁶⁶ The nation's first public school program dedicated to providing on-site educational support services to LGBTQ youth,⁶⁷ Project 10 may be modified to address the needs and goals of specific schools or districts.

The Safe Schools Program for Gay and Lesbian Students (SSP)

With origins in Massachusetts, the SSP has offered services designed to help schools implement state laws impacting LGBTQ students since 1993.⁶⁸ The SSP's mission is to develop school policies protecting gay and lesbian students from harassment, violence, and discrimination; provide training to school personnel in crisis and suicide interventions; establish school-based support groups (e.g., GSAs); and provide school-based counseling for family members of LGBTQ students.⁶⁹

GSA Network

Founded in 1998 in the San Francisco Bay Area, the Gay-Straight Alliance Network (GSA Network) is a national youth leadership organization designed to facilitate communication between GSAs across the nation.⁷⁰ The GSA Network's mission is to create safe and supportive school environments where students can learn about homophobia, transphobia, and other forms of oppression as well as gender identity and sexual orientation issues, and

to fight discrimination, harassment, and violence.⁷¹ The GSA Network has expanded from forty to more than nine hundred clubs, with GSAs in 61 percent of all California public high schools and a growing number of middle schools, serving over 30,000 student members. The GSA Network has also launched the National Association of GSA Networks in order to unite statewide organizations supporting GSAs and accelerate the GSA movement.

Recommendations

There are few empirical evaluations of efforts to improve the school environment for LGBTQ youth.⁷² Future research should evaluate the effect of interventions on LGBTQ youth and investigate outcomes for students following implementation of professional development.⁷³ Research establishing the interaction between school climate, victimization, and sexual orientation elicits a need for empirically sound school-based interventions.⁷⁴

GLSEN's 2011 School Climate Survey found that there has been an increase in GSAs and other supportive student clubs; supportive school staff; positive representations of LGBTQ individuals, history, and events in school curriculum; accessibility of LGBTQ-related Internet resources through school computers;⁷⁵ and the presence of school anti-bullying and harassment policies. Despite these improvements, the presence of comprehensive school anti-bullying and harassment policies are few and far between. Although national anti-bullying legislation does not yet exist in the realm of education, the recent movement in other federal legislation concerning LGBTQ-related issues foreshadows potential success.⁷⁶ For example, the repeal of "Don't Ask, Don't Tell," a policy that prevented gay and lesbian soldiers from openly serving in the military, has provided strong evidence that Congress can in fact pass LGBTQ-inclusive policies at a national level. Such legislation can support the establishment of effective school-based prevention and intervention efforts.

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ENDNOTES

- 1 Daniel Chesir-Teran and Diane Hughes, "Heterosexism in High School and Victimization Among Lesbian, Gay, Bisexual, and Questioning Students," *Journal of Youth and Adolescence* 38, no. 7 (2009): 963.
- 2 Robert H. DuRant, Daniel P. Krowchuk, and Sarah H. Sinal, "Victimization, Use of Violence, and Drug Use at School Among Male Adolescents Who Engage in Same-Sex Sexual Behavior," *Journal of Pediatrics* 133, no. 1 (1998): 116. <http://www.sciencedirect.com.ezp-prod1.hul.harvard.edu/science/article/pii/S0022347698701891#>
- 3 Robert Garofalo et al., "The Association Between Health Risk Behaviors and Sexual Orientation Among a School-Based Sample of Adolescents," *Pediatrics* 101, no. 5 (1998): 899.
- 4 Tamera B. Murdock and Megan B. Bolch, "Risk and Protective Factors for Poor School Adjustment in Lesbian, Gay, and Bisexual (LGB) High School Youth: Variable and Person-Centered Analyses," *Psychology in the Schools* 42, no. 2 (2005): 163.
- 5 Gary Remafedi et al., "The Relationship Between Suicide Risk and Sexual Orientation: Results of a Population-Based Study," *American Journal of Public Health* 88, no. 1 (1998): 58.
- 6 Joseph G. Kosciw et al., "The 2011 National School Climate Survey," GLSEN, 2011, 14.
- 7 Murdock and Bolch, "Risk and Protective Factors," 160.
- 8 Joseph G. Kosciw, Emily A. Greytak, and Elizabeth M. Diaz, "Who, What, Where, When, and Why: Demographic and Ecological Factors Contributing to Hostile School Climate for Lesbian, Gay, Bisexual, and Transgender Youth," *Journal of Youth and Adolescence* 38, no. 7 (2009): 976.
- 9 Huda Ayyash-Abdo, "Adolescent Suicide: An Ecological Approach," *Psychology in the Schools* 39, no. 4 (2002): 465.
- 10 Anthony R. D'Augelli, Neil W. Pilkington, and Scott L. Hershberger, "Incidence and Mental Health Impact of Sexual Orientation Victimization of Lesbian, Gay, and Bisexual Youths in High School," *School Psychology Quarterly* 17, no. 2 (2002): 148.
- 11 Joseph G. Kosciw et al., "The Effect of Negative School Climate on Academic Outcomes for LGBT Youth and the Role of In-School Supports," *Journal of School Violence* 12, no. 1 (2013): 47-48.
- 12 Carol Goodenow, Laura Szalacha, and Kim Westheimer, "School Support Groups, Other School Factors, and the Safety of Sexual Minority Adolescents," *Psychology in the Schools* 43, no. 5 (2006): 575.
- 13 Stuart Biegel and Sheila James Kuehl, "Safe at School: Addressing the School Environment and LGBT Safety Through Policy and Legislation," National Education Policy Center (2010): 17, 48.
- 14 Ashley E. McGovern, "When Schools Refuse to 'Say Gay': The Constitutionality of Anti-LGBTQ 'No-Promo-Homo' Public School Policies in the United States," *Cornell Journal of Law and Public Policy* 22 (2012): 467.
- 15 Sabrina Rubin Erdely, "One Town's War on Gay Teens," *Rolling Stone*, 2 February 2012.
- 16 Ilan H. Meyer and Ronald Bayer, "School-Based Gay-Affirmative Interventions: First Amendment and Ethical Concerns," *American Journal of Public Health* 103, no. 10 (2013): 1766.
- 17 McGovern, "When Schools Refuse to 'Say Gay,'" 467.
- 18 *Ibid.*, 472.
- 19 *Ibid.*
- 20 *Ibid.*
- 21 *Ibid.*, 473
- 22 Jason A. Wallace, "Bullicide in American Schools: Forging a Comprehensive Legislative Solution," *Indiana Law Journal* 86, no. 2 (2011): 751.
- 23 *Ibid.*, 753.
- 24 Mark L. Hatzenbuehler and Katherine M. Keyes, "Inclusive Anti-Bullying Policies and Reduced Risk of Suicide Attempts in Lesbian and Gay Youth," *Journal of Adolescent Health* 53 (2013): 525.
- 25 Sanna J. Thompson and Lon Johnston, "Risk Factors of Gay, Lesbian, and Bisexual Adolescents: Review of Empirical Literature and Practice Implications," *Journal of Human Behavior in the Social Environment* 8 (2003): 122.
- 26 *Ibid.*
- 27 *Ibid.*, 122-123.
- 28 Anastasia L. Hansen, "School-Based Support for GLBT Students: A Review of Three Levels of Research," *Psychology in the Schools* 44, no. 8 (2007): 839.
- 29 Susan Jacob, Dawn M. Decker, and Timothy S. Hartshorne, *Ethics and Law for School Psychologists* (Hoboken: John Wiley & Sons, 2010), 155.
- 30 Kosciw et al., "2011 National School Climate Survey," xvi.
- 31 Goodenow, Szalacha, and Westheimer, "School Support Groups," 580-583.
- 32 Hilary Burdge et al., "Implementing Lessons that Matter: The Impact of LGBTQ-Inclusive Curriculum on Student Safety, Well-Being, and Achievement," Gay-Straight Alliance Network and Frances McClelland Institute, 2013, 2.

- 33 Ibid., 3-8.
- 34 Meyer and Bayer, "School-Based Gay-Affirmative Interventions," 1768.
- 35 Goodenow, Szalacha, and Westheimer, "School Support Groups," 575.
- 36 V. Paul Poteat et al., "Gay-Straight Alliances Are Associated with Student Health: A Multischool Comparison of LGBTQ and Heterosexual Youth," *Journal of Research on Adolescence* 23, no. 2 (2013): 319.
- 37 N. Eugene Walls, Sarah B. Kane, and Hope Wisneski, "Gay-Straight Alliances and School Experiences of Sexual Minority Youth," *Youth & Society* 41, no. 3 (2010): 311.
- 38 Goodenow, Szalacha, and Westheimer, "School Support Groups," 580-583.
- 39 Ibid., 580.
- 40 Ibid.
- 41 Ibid.
- 42 Walls, Kane, and Wisneski, "Gay-Straight Alliances," 323.
- 43 Ibid., 314, 325.
- 44 Kosciw et al., "2011 National School Climate Survey," xvi.
- 45 Nicholas C. Heck, Annesa Flentje, and Bryan N. Cochran, "Offsetting Risks: High School Gay-Straight Alliances and Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth," *School Psychology Quarterly* 26, no. 2 (2011): 163-164.
- 46 Walls, Kane, and Wisneski, "Gay-Straight Alliances," 312.
- 47 Kosciw et al., "The Effect of Negative School Climate," 55.
- 48 Ibid., 58.
- 49 Biegel and Kuehl, "Safe at School," 12.
- 50 Ibid., 13.
- 51 Goodenow, Szalacha, and Westheimer, "School Support Groups," 584.
- 52 Biegel and Kuehl, "Safe at School," 9.
- 53 Goodenow, Szalacha, and Westheimer, "School Support Groups," 582.
- 54 Heck, Flentje, and Cochran, "Offsetting Risks," 169.
- 55 Biegel and Kuehl, "Safe at School," 9.
- 56 Ibid., 13.
- 57 Kosciw et al., "The Effect of Negative School Climate," 55.
- 58 Kosciw et al., "2011 National School Climate Survey," 45.
- 59 Biegel and Kuehl, "Safe at School," 12.
- 60 Walls, Kane, and Wisneski, "Gay-Straight Alliances," 325.
- 61 Kosciw et al., "The Effect of Negative School Climate," 55.
- 62 Kosciw et al., "2011 National School Climate Survey," xvii.
- 63 Meyer and Bayer, "School-Based Gay-Affirmative Interventions," 1765.
- 64 Tina Fetner and Kristin Kush, "Gay-Straight Alliances in High Schools: Social Predictors of Early Adoption," *Youth & Society* 40, no. 1 (2008): 115-116.
- 65 Mary Henning-Stout, Steve James, and Samantha Macintosh, "Reducing Harassment of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth In Schools," *School Psychology Review* 29, no. 2 (2000): 184.
- 66 Ibid.
- 67 Laura A. Szalacha, "Safer Sexual Diversity Climates: Lessons Learned from an Evaluation of Massachusetts Safe Schools Program for Gay and Lesbian Students," *American Journal of Education* 110, no. 1 (2003): 60.
- 68 Ibid., 60-61.
- 69 Ibid.
- 70 GSA Network website, "What We Do."
- 71 Meyer and Bayer, "School-Based Gay-Affirmative interventions," 1765.
- 72 Goodenow, Szalacha, and Westheimer, "School Support Groups," 575.
- 73 Hansen, "School-Based Support," 840.
- 74 Ibid., 846.
- 75 Kosciw et al., "2011 National School Climate Survey," 107, 111, xviii.
- 76 Wallace, "Bullicide," 755.

Exploring the Contradiction of Cooperative Marriage Between Gay Men and *Lalas* as a Strategy of Practicing Reproductive Rights in Mainland China

By Wang Yingyi

ABSTRACT

As a new form of rainbow kinship and filial solution in the Chinese *tongzhi* (queer)¹ community, cooperative marriage² has raised increasing research and media attention in recent years. Debates in the *tongzhi* community also abound. This article explores cooperative marriage by *lalas*³ and gay men⁴ as a contradicting strategy, specifically focusing on the issue of reproductive rights. The seemingly heterosexual marriage provides a legal guarantee for reproduction, so gay men and *lalas* who wish to have children may take advantage of such institutional bias. However, from a cultural perspective, almost-compulsory heterosexual marriage and reproduction have exerted even greater pressure on the gay couples, making these marriages vulnerable to social scrutiny and sanctions. Given these stresses, this article calls for anti-discrimination legislation on LGBT people and more inclusive policies of protecting people's reproductive rights in mainland China.

Cooperative marriage (*Xing Shi Hun Yin*) refers to a heterosexual marriage entered into by a gay man and a *lala*. A popular phenomenon in mainland China since a decade ago, more and more gay men and *lalas* have practiced or intend to experience cooperative marriage.^{5,6} The Chinese *tongzhi* community generally casts doubt on whether such an arrangement offers a solution to the perplexing situation encountered by many Chinese gay men and *lalas*.⁷ Some criticize it as an immoral act of cheating one's parents and peers, compromising the progress of the LGBT movement in China while having the best of both worlds (enjoying the benefits of a heterosexually married couple while continuing same-sex relationships in secret).⁸ Others suggest that Chinese *tongzhi* have little alternative in resolving the conflicts between themselves and the older generation, therefore cooperative marriage is the best and most reasonable strategy.⁹ Discussions have extended from the motivations of cooperative marriage to the cultural and sociological analysis of this phenomenon. However, many of the legal and policy aspects have not been explored.

In the context of China's family planning policy, reproductive rights are mostly fulfilled in the institution of heterosexual marriage.^{10,11} Even though children born out of wedlock are protected by law as stated, in reality they are a minority who cannot get a proper *bukou*¹² for future development in most parts of China.¹³ Besides insufficient institutional support, unmarried women with children are under a lot of social pressure due to the stigma attached to

the situation.¹⁴ Heterosexual marriage is the only legitimate form of coupledness, even though proposals for same-sex marriage rights are being filed every year by activists and scholars to the National People's Congress.¹⁵

For this article, I adopted a practice approach to examine the related issues of reproductive rights in cooperative marriage. Fieldwork included in-depth interviews of twenty gay men and *lalas* in cooperative marriages, located in five different cities in China (Shenyang, Beijing, Hangzhou, Guangzhou, and Foshan), as well as participant observation and focus group interviews in Guangzhou. Starting from a critical examination of the institutional discrimination of heterosexual marriage and reproductive pressure in China, I want to explore the contradictions and difficulties of cooperative marriage as a strategy adopted by gay men and *lalas* in securing reproductive rights.

All of my interviewees mentioned the legitimacy of childbearing in heterosexual marriage. Besides the legal consideration, my informants emphasized the cultural pressure and stigmatization of raising children in a same-sex household. They also referred to the still-prevalent social discrimination against homosexuality and the lack of social support. Therefore, the difficulties for gay people in China to realize their desire to reproduce legally and practically cannot be ignored. On the other hand, the strong social connection between heterosexual marriage and reproduction becomes a major drawback of cooperative marriage.¹⁶ Gay men and *lalas* with no desire to reproduce have to go

through series of negotiations and tactical delays, fighting for their reproductive rights to not have children. I will examine cooperative marriage as a major strategy for gay men and lalas who want to have children, as well as gay men and lalas' lived experiences in negotiating their reproductive responsibilities with their natal and in-law families.

Cooperative Marriage as Parenting

The informants who highlighted their familial responsibility generally plan to have children by cooperative marriage. They consider heterosexual marriage the most appropriate unit for reproduction. I will use the stories of Jun, Dong, and Yang to elaborate on this point.

Jun — Lala, 31, in Family Business (Guangzhou)

Jun's family is in business. It is typical for children born in this type of family to maintain their business association and showcase their company's strength by throwing large and luxurious wedding ceremonies. Moreover, getting married and having children are considered important to extend the family line and secure the family property. As Jun told me in our first interview:

I am born as a *lala*. No matter who I am with, I have to fulfill my duties. Also my family is in business, my parents have been pushing me to have children, whether boy or girl, for the sake of inheritance. I'm a single child, which is an important point to consider. Even if I break up with Xin, I will find another girl. However, I have to have a baby.

Given that Jun's family was in business, it was difficult for her to remain single. According to Jun, having children was not her genuine desire, but more of a family responsibility. Resorting to cooperative marriage is considered the optimal choice for her since it is difficult for her to imagine marrying a heterosexual man.

Dong — Gay Man, 35, Doctor (Shenyang)

I met Dong in the shared house of four *lalas* in Shenyang. He came by to seek suggestions on issues related to childbearing. Like Jun, he was the only child in his family and was concerned with the childbearing issue, since extending the family line was considered the duty of male offspring. He explained to me:

Doing cooperative marriage was very clear for both of us, me and my wife, since we wanted to appear normal as heterosexual people. We wanted to have children, build a family, and live together. It is so very simple.

Dong is not alone. I've met many other gay men and *lalas* who were seeking potential cooperative marriage partners in different occasions, and many said the same thing to me. "Being normal" means one should be married at a suitable age, have children at a suitable age, and so on. Breaking these rules is the least desirable thing for a majority of my informants.

Yang — Lala, 31, Freelance (Suzhou)

Yang was married to a gay man ten years older than her in her hometown Suzhou. A conventional type of heterosexual marriage was not an attractive idea to her once she learned cooperative marriage was an option. She explains:

I had no idea that cooperative marriages actually existed. It was not so popular back then. I came to know about it through my ex-girlfriend. I used to have a boyfriend. I was very conventional, just like my family. I thought I had to get married sooner or later, like a normal heterosexual. I became especially unwilling to marry a straight guy after I became aware of this type of marriage. I kept procrastinating. Later on, I found a website called "Lalas' Back Garden," which was so popular that there were a lot of matchmaking posts on it.

Yang was actively negotiating her way of "doing" marriage, but when asked why childrearing was an inescapable fate for her, she pondered for a moment:

On the issue of childrearing, I often wondered whether I could do something that was extraordinary, above the level of other people, so I could be freed from the obligation of having children. After all, for us, marriage is to have offspring. It feels like a "must" thing to do.

For Jun, coming out to her mother did not mean that she was immune from her filial duty in a wealthy family. For Dong, being the single son in the family also put him under great pressure to extend the family line. For Yang, the family ideology was just too strong to fight. With the help of cooperative marriage, those who considered their filial obligation as the utmost important thing were granted the legal right to have children.

Negotiating Compulsory Reproductive Responsibilities

On one hand, cooperative marriage provides the lawful right to have children and enables those gay men and *lalas* who want to have babies to take advantage of institutional privilege in China. On the other hand, the close connection

between heterosexual marriage and reproductive responsibilities has imposed enormous cultural pressure on those who don't want to reproduce. Here I will recount Ling's and Shan's stories to illustrate this point.

Ling — Lala, 25, in Family Business (Foshan)

Ling married her husband Su at the age of twenty-four in her hometown Foshan. Su is a gay man who works for the government. Unlike other informants with strong familial orientation, Ling resorted to cooperative marriage because she was desperate to leave her natal family. She recounts:

Actually, I wanted to leave my parents' place not because of my girlfriend, but because I felt so bothered by my parents. They controlled me on everything, where to go for dinner and with whom, and asked me to return to home before a certain time at night. What's more, they kept on introducing men to me. I was so cold to them . . . I'm so much freer after marriage [cooperative marriage]. At least my mum wouldn't call me every night to check whether I had returned home. Now there are fewer phone calls. I'm so much freer! This is because she thinks that now I'm my husband's responsibility, not hers.

After marriage, Ling moved to Su's place. A conjugal home provides this *gay-lala* couple independence from their respective natal families, both physically and emotionally.

I met this couple twice, once at their wedding ceremony and once at the 2013 annual LGBTQ pride parade in Hong Kong. Ling mentioned in her account that Su was like a big sister to her. His idea of taking care of each other when they get old was both very practical and ideal from a cultural point of view:

When we just met, we were like two people falling in love. We could chat twenty-four hours a day on WeChat [an SNS app on mobile phones]. We had so much to say to each other. When she moved into my house after she broke up with her ex-girlfriend, we would chat until 3 a.m. almost every night for the first month and then we lived together. We were then legally married, bound together by law. And we've said to each other, if we remain single, we have to take care of each other. We have to be mentally prepared because we would not have children.

Though satisfied with each other's companionship, Ling and Su are facing pressure from their natal families again. Ling told me in our recent chats that they might consider a divorce. In shock, she told me:

It's been almost two years. My parents are pushing us to have kids even though we really don't want to. What can we do if our parents insist that children must come along with the marriage and force us to do so—if not physically, but mentally? It is difficult for us to take care of ourselves, and how can we afford to have a child?

Compulsory reproductive responsibility is far more punitive than Ling and Su had imagined. The assumed natural connection between heterosexual marriage and reproduction has become a route that does not allow divergence in the Chinese society. The idea of getting married without the next move of having children is considered abnormal in a majority of people's minds, especially in Ling's parents' generation. Thus, the more difficult task of persuading their parents of their right not to have children is even more central for these gay couples.

Shan — Lala, 30, Makeup Artist (Shenyang)

Shan got married in Shenyang to a gay nonlocal. She is among the two Shenyang *lala* couples who live together in a shared house without their gay husbands. The shared house had become a gathering space for gay people in Shenyang to seek advice on cooperative marriage and to hang out. It is in Shenyang that I most find the growing trend of self-help groups and the possible direction of a developing subculture among gay people in cooperative marriages. Xiong, one of the four *lalas* and the leader of a local LGBT group, told me the key idea of this shared house:

It is not to say that we don't have conflicts. But we understand and tolerate each other. The four of us [two pairs of *lalas*] may still live together when we get old, even with our cooperative-married partners. We are friends anyway. Actually we've always thought about establishing a home for the aged here for *lalas* or *tongzhi*. Although it is not possible here in China, the least we can do is to live in a shared house . . . a new type of family arrangement.

In spite of the organizational advantage and sound preparation of cooperative marriage, Shan's gay husband divorced her after they'd been married for one year, because she was still hesitating over the child issue. In our first interview, Shan told me that she was not sure about having children but was thinking over the issue. However, the fact that her husband could not wait for her and remarried another *lala* after the divorce proved that reproduction is a key issue in the management and negotiation of cooperative marriage.

Discussion

Strategic Rainbow Families

Lalas and gay men who want to have children have creatively taken advantage of the institution of heterosexual marriage. By cooperating to make up a legitimate union for reproduction, *lalas* and gay men strategically resort to the institutional safeguard of heterosexual marriage. These rainbow families¹⁷ not only serve to relieve gay people's constant pressure of being discovered, being discriminated against, and failing filial expectations, but are also emerging in gay politics to initiate new forms of families.¹ Consensus is central in the process of negotiating a cooperative marriage, and the issue of childbearing becomes the primal concern among all the "terms and conditions." Consensual childbearing and childrearing could provide the motivation for the couples to preserve their rainbow families. Even if some couples do not want to raise children together, they are more likely to compromise/cooperate with each other on family matters and to make use of the networks created by the rainbow families.

Moving Forward to a Healthier Legal System

Activists and critics have pointed out that couples in cooperative marriages have clung to the notion of compulsory heterosexual marriage without challenging its

fundamental discriminatory and disciplinary sanctions on social members.¹ This is especially evident when it comes to the legal issues concerning childbearing. Children born out of wedlock are barely protected by law, one of the most popular reasons for *lalas* and gay men to rely on the institution of heterosexual marriage. What I find more troubling are the biased perceptions, intolerance, and injustice against both sexual minorities and single people in China. These so-called deviants from cultural norms are further rendered abnormal and are not entitled to certain rights. Couples in a cooperative marriage who do not want to have children are constantly being pressured after their marriage to extend the family line. Such a disciplinary mechanism is difficult to fight, since the structural inequality and injustice are not addressed in the Chinese culture and legal system—though we are continuing to see how creative and cooperative these new rainbow families may be.

As argued above, the legal system in China is discriminatory and unfair. Anti-discrimination policies and legislation against gay people should be put on the agenda. It is equally important to raise awareness of the issue of compulsory heterosexual marriage and reproduction. Community events and activism should include general public education on sexual minorities and the prejudiced compulsory heterosexual marriage in China.

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ENDNOTES

- 1 *Tongzhi* (同志) literally means “comrade,” which is a term commonly used to refer to people in unity and solidarity, especially in the revolutionary periods of China. It was reclaimed by a Hong Kong gay playwright, Edward Lam (林奕華), to refer to lesbian and gay persons at the Lesbian and Gay Film Festival in Hong Kong in the late 1980s. The term later became popularized and adapted in both Hong Kong and Taiwan as “a preferred term of self-identification that replaces the more clinical term *tongxinglian* (homosexuals) and later as widely accepted umbrella term of reference to sexual minorities.” Helen Hok-Sze Leung, *Undercurrents: Queer Culture and Postcolonial Hong Kong* (Hong Kong: Hong Kong University Press, 2008).
- 2 The choice of the term “cooperative marriage” is not accidental. Though generally referred to as *Xing Shi Hun Yin* (形式婚姻), which could be translated as functional marriage, contract marriage, or marriage of convenience, “cooperative marriage” is used by Lucetta Kam in her book *Shanghai Lalas*. I chose to adopt this term because *Xing Shi Hun Yin*, as my research finds, is more than marriage without substance or merely functional, but rather, it emphasizes more on the cooperation between different parties in the marriage.
- 3 *Lala* (拉拉) refers to women with same-sex desires, including lesbian, bisexual, and transgender women in mainland China, from the official definition of the Chinese Lala Alliance (CLA). It originated from the famous lesbian novel called *E Yu Shou Ji* (鱷魚手記) by Taiwanese author Qiu Miaojin, in which the character was called Lazi (拉子), which later became the localized term for Taiwanese lesbians.
- 4 In this research, the informants include only homosexual and bisexual women and men, since transgender people and other sexual minorities are not the key actors of cooperative marriage.
- 5 Chou Wah-shan, *Tongzhi: Politics of Same-Sex Eroticism in Chinese Societies* (New York: Haworth Press, 2000).
- 6 Lucetta Yip Lo Kam, *Shanghai Lalas: Female Tongzhi Communities and Politics in Urban China* (Hong Kong: Hong Kong University Press, 2013).
- 7 Elisabeth L. Engebretsen, *Queer Women in Urban China: An Ethnography* (New York: Routledge, 2014).
- 8 Cho, “The Wedding Banquet Revisited: ‘Contract Marriages’ Between Korean Gays and Lesbians,” *Anthropological Quarterly* 82, no. 2 (2009): 401-422.
- 9 Wang Yingyi “Cooperative Marriage, A ‘Fake Marriage’ or a New Intimate Alliance?” (Unpublished MPhil thesis, University of Hong Kong, 2015).
- 10 李銀河, & 鄭宏霞. 一爺之孫: 中國家庭關係個案研究: (呼和浩特: 內蒙古大學出版社, 2009).
- 11 Suiming Pan and Yingying Huang, *Xing Zhi Bian: 21Sshi Ji Zhongguo Ren De Xing Sheng Huo* (880-04 Di 1 ban. ed.). (Beijing: Zhongguo ren min da xue chu ban she, 2013).
- 12 A *hukou* is a record in the system of household registration required by law in the People’s Republic of China (mainland China). They generally divide the urban and rural populations: people with an urban *hukou* are entitled to a whole set of institutional benefits facilitating city life, whereas people with a rural *hukou* are vulnerable living in the cities. A *hukou* is given to people by birth following their parents’ *hukou*—it is a hierarchy/caste system.
- 13 鐘曉慧, & 何式凝. “協商式親密關係: 獨生子女父母對家庭關係和孝道的期待.” 開放時代, 2014, 1.
- 14 李銀河. 生育與村落文化. (呼和浩特: 內蒙古大學出版社, 2009).
- 15 Travis Kong, *Chinese Male Homosexualities: Mamba, Tongzhi and Golden Boy* (New York: Routledge, 2010).
- 16 李銀河, & 鄭宏霞. 一爺之孫: 中國家庭關係個案研究: (呼和浩特: 內蒙古大學出版社, 2009).
- 17 Judith Stacey, “Cruising to Familyland: Gay Hypergamy and Rainbow Kinship,” *Current Sociology* 52, no. 2 (2004): 181-197.
- 18 Elisabeth Lund Engebretsen, “Intimate Practices, Conjugal Ideals: Affective Ties and Relationship Strategies Among Lala (Lesbian) Women in Contemporary Beijing,” *Sexuality Research & Social Policy* 6, no. 3 (2009): 3-14.
- 19 Wang Yingyi and Petula Ho Sik-Ying, review of Lucetta Yip Lo Kam, *Shanghai Lalas in China Information* 28 (2014): 113-114.

Addressing Harassment and Discrimination by Law Enforcement Against LGBT Police Officers and Community Members to Improve Effective Policing

By Christy Mallory, Amira Hasenbush, and Brad Sears

ABSTRACT

This article examines the impact of discrimination and harassment against LGBT people within the law enforcement context and presents options for addressing these issues to improve policing efforts. We find that mistreatment of LGBT people in the context of law enforcement is ongoing and widespread. Discrimination and harassment based on sexual orientation and gender identity can negatively impact the ability of law enforcement departments to effectively police within their communities. Several policies and practices can be implemented by governments and law enforcement departments to reduce discrimination and harassment against LGBT people and, in turn, improve policing efforts across the United States.

Introduction

Discrimination and harassment based on sexual orientation and gender identity within the context of law enforcement have been widespread and pervasive problems for decades. Data from a wide range of sources shows that such harassment and discrimination is greatest for LGBT people of color, transgender persons, and youth. Historically, police forces often targeted LGBT citizens through the use of sodomy laws, bar raids, profiling, entrapment tactics, selective arrests, and excessive physical violence. Additionally, beginning in the 1940s, many LGBT people were driven out of careers in law enforcement through purges at the federal, state, and local levels. Recent research shows that employment discrimination against LGBT officers and police harassment of LGBT citizens by law enforcement continue to occur throughout the United States, despite changes in laws and policies to become more protective of LGBT people over time.

Discrimination and harassment against LGBT people by and in law enforcement can impede effective policing in several ways. Specifically, such discrimination and harassment can:

- Result in police forces with characteristics that do not reflect those of the community
- Make LGBT citizens hesitant to approach the police to report crimes or to seek help

- Make police departments less responsive to and less able to meet the needs of the LGBT community
- Prevent LGBT people from engaging with the police to develop and implement proactive crime control measures

Several types of LGBT-supportive policies and practices could be implemented by governments and law enforcement departments to reduce discrimination and harassment against LGBT people. For example, the federal government could mandate LGBT-inclusive nondiscrimination requirements as a condition of receiving Department of Justice grant funding, and individual departments could establish positions for officer liaisons with the LGBT community. By reducing discrimination and harassment against LGBT people, these policies and practices would likely improve policing efforts.

Evidence of Recent Discrimination and Harassment Against LGBT People Within the Law Enforcement Context

Recent survey data, court cases, administrative complaints, qualitative research studies, and anecdotal evidence documented in media outlets, reports by governments and nongovernmental organizations, academic journals, and other scholarship indicate that discrimination against and harassment of LGBT people in the law enforcement

context is widespread and pervasive. Additionally, evidence collected from these sources suggests that members of the LGBT community are less likely to report when they have been victims of crimes, as well as less likely to cooperate with law enforcement more generally.

Discrimination Against the LGBT Community by Members of Law Enforcement

A number of surveys have found evidence of mistreatment of LGBT citizens by law enforcement, including verbal, physical, and sexual harassment and assault; inadequate handling of crime reports and complaints filed against law enforcement; and baseless stops and entrapment. Survey data indicates that certain groups, including transgender people, youth, and people of color are particularly vulnerable to such mistreatment.

Across five surveys conducted since 2011, of LGBT people who had interacted with police, 14 percent to 66 percent reported being verbally harassed or assaulted, 2 percent to 21 percent reported being physically harassed or assaulted, and 3 percent to 24 percent reported being sexually harassed or assaulted.¹

Specific examples of recent verbal, physical, and sexual harassment and assault of LGBT people by law enforcement have been documented in court cases, media outlets, and academic journals. For example, in 2011, a Philadelphia man filed a complaint against the city, alleging physical and verbal harassment by police who responded to his report of domestic violence.² According to the complaint, several police officers beat the man's partner while repeatedly calling him "nigger" and "faggot." When the man complained of pain due to being handcuffed, the officers said to him, "Shut up, you pussy faggot," and "Let me hear you squeal, faggot." Both men were treated for their injuries at a hospital. In another case filed against the city of Fresno, a man reported that he was subjected to a violent anal cavity search by a police officer who said, "I know where you faggots keep your shit," during his arrest for drug possession. According to the man, he also had to be treated at a hospital for injuries related to the search.³

Rates of harassment and assault found in the surveys were highest among particularly vulnerable groups within the LGBT community, including transgender people, youth, and people of color. For example, in response to a 2012 survey examining the interactions of law enforcement with Latina transgender women, 66 percent of the women reported that they had been verbally harassed, 21 percent reported that they had been physically assaulted, and 24 percent reported that they had been sexually assaulted by law enforcement.⁴ In one incident in 2003, a Native American transgender woman was reportedly raped in an alley by two officers of the Los Angeles Police Department. According to the woman, one officer yelled at her, "You

fucking whore, you fucking faggot," and slapped her across the face. Before they left, the second officer reportedly told her, "That's what you deserve."⁵ In another 2013 incident, the Wayne County Sheriff's Department in Michigan reportedly caused injuries to several patrons when they raided a private club in Detroit whose members were primarily African American gay men, lesbians, and transgender women. Between fifty and one hundred officers entered the club and "[o]ver 350 people . . . were handcuffed, forced to lie down on the floor, and detained for up to twelve hours, left to 'sit in their and others' urine and waste.' Some were kicked in the head and back, slammed into walls, and verbally abused. Officers on the scene were heard saying things like 'it's a bunch of fags' and 'those fags in here make me sick.'"⁶

Many LGBT people also report that their complaints of discrimination and harassment by law enforcement are inadequately handled. In a 2014 national survey of LGBT people and people living with HIV, of respondents who had filed complaints within the five-year period prior to the survey, 71 percent said that their complaint was not fully addressed by those they reported it to.⁷

Survey data further show that LGBT people report that law enforcement officials often mishandle their reports of violence and other crimes. For example, in the 2014 national survey of LGBT people and people living with HIV, 41 percent of those who had experienced intimate partner violence and 39 percent of those who were victims of sexual assaults reported that police failed to address their complaints.⁸ Further, in the largest survey of transgender people to date, 46 percent of respondents reported that they were uncomfortable seeking police assistance.⁹

LGBT people also report that they experience other types of negative interactions with law enforcement, including baseless stops and entrapment. For example, in response to a 2013 survey of LGBT violence survivors, 56 percent of respondents reported that they had been unjustly arrested and 12 percent reported that they had been entrapped by police.¹⁰ Additionally, an investigation of the New Orleans Police Department by the US Department of Justice determined that LGBT people were "unfairly target[ed] for stops, searches, and arrests."¹¹

Employment Discrimination Against LGBT Law Enforcement Personnel

Survey and Qualitative Data

Four surveys and one qualitative research study of law enforcement personnel conducted since 2008 have found evidence of discrimination based on sexual orientation and gender identity within law enforcement departments.¹² For example, in response to a 2009 survey of LGBT officers, 22 percent reported experiencing discrimination in promotions, 8 percent reported having been discriminated against

in hiring, and 2 percent reported being fired because of their sexual orientation or gender identity.¹³ Additionally, 67 percent reported hearing homophobic comments on the job, 51 percent reported being treated like an outsider by their colleagues, and 48 percent reported social isolation at work.¹⁴

A survey of only transgender law enforcement personnel showed higher rates of discrimination and harassment than found in surveys that also include LGB respondents. In a survey of sixty transgender law enforcement officers who had transitioned on the job, 93 percent of respondents reported having negative experiences with their departments.¹⁵ Of those respondents, 15 percent reported being terminated, 37 percent reported being threatened with termination, 68 percent reported being verbally harassed by their coworkers, 43 percent reported being threatened with violence, 18 percent reported being physically attacked by coworkers, and 53 percent felt that their safety was jeopardized due to isolation by peers.¹⁶

Specific Examples of Discrimination and Harassment

Our research identified 106 documented examples of employment discrimination and harassment based on sexual orientation or gender identity against law enforcement personnel that occurred from 2000 through 2014.¹⁷

Many accounts included allegations of repeated and demeaning anti-LGBT comments and slurs. For example, an Illinois police officer was compared to "pedophiles" and told he "was like a criminal" due to his sexual orientation;¹⁸ a lieutenant with the Erie County Sheriff's Office in New York reached a settlement in a case where she alleged her fellow officers referred to her as having "balls . . . and a penis," and said that she was a "cancer" to the department, "the worst person, or dog, that has ever lived;"¹⁹ a UC Davis police officer settled his case in which he alleged fellow officers subjected him to a death threat and called him a "fucking fag,"²⁰ and a trial court awarded a Massachusetts corrections officer more than \$620,000 in back pay and damages after he attempted suicide, in part, as a result of his coworkers calling him "fucking fag" and "sissy" and sending children's toy blocks spelling "FAG" to his home.²¹

In addition, the accounts included examples of severe physical and sexual harassment. For example, a jury found in favor of a New York police officer whose fellow officers revealed their naked body parts to him and "pressed him against a table and humped him" in front of others;²² a police department in California settled a case in which an officer alleged that fellow officers harassed him by "simulating anal sex on him during a training class, insinuating that he masturbates in front of young boys, [and] suggesting that he was infected with HIV;"²³ a jury awarded \$1.5 million to a correctional officer with a sheriff's department in New York whose harassment included the display of

simulated pornographic images of him engaged in sex with children and animals, being attacked with a chair, and having his knee injured;²⁴ and a transgender correctional officer in New Hampshire reported that she resigned after she endured three years of harassment and physical abuse based on her gender identity, including coworkers kicking her, snapping her in the breasts, threatening to handcuff her to a flagpole and take off her clothes, and slamming her into a concrete wall.²⁵ Additionally, two accounts included stories of officers being denied backup in dangerous situations because their fellow officers did not like working with someone who was LGBT.²⁶

The Impact of Sexual Orientation and Gender Identity Discrimination in the Law Enforcement Context on Effective Policing

Data from the 2014 Gallup Daily Tracking Survey suggests that there are nearly 9.5 million LGBT adults living in the United States,²⁷ and Census data shows that same-sex couples live in 99 percent of US counties.²⁸ As such, LGBT people live in every community that law enforcement departments serve and protect, regardless of geography or population size.

Discrimination and harassment based on sexual orientation and gender identity both within law enforcement employment and by law enforcement against LGBT citizens in their communities can impede effective policing in a number of ways.

First, discrimination against LGBT law enforcement personnel likely leads to underrepresentation of LGBT officers, resulting in police forces that are less diverse than the communities they serve. Research indicates that having a police force with personal characteristics, including sexual orientation and gender identity, that are reflective of the community it serves makes law enforcement departments more effective by increasing understanding of community needs and facilitating the development of positive relationships between officers and citizens.²⁹ For example, "when openly lesbian and gay officers are integrated into policing . . . [a] police agency can more effectively respond to issues like intimate partner violence, public sex environments . . . prostitution, hate and bias crimes, bullying and gay youth homelessness."³⁰

Recognizing these benefits, several law enforcement departments in various localities across the country have increased efforts to hire LGBT law enforcement personnel as part of their policing strategies.³¹ The police chief in St. Louis, for example, decided to actively recruit LGBT law enforcement personnel, explaining that "[i]t only makes sense as we try and recruit officers for the department that are reflective of the community we serve. . . . What I try and do as the chief is mainstream everybody. . . . If it affects the gay and lesbian community, it affects the entire

community.³² Similar recruitment policies have been implemented in other large metropolitan areas—including Los Angeles,³³ New York,³⁴ Seattle,³⁵ Salt Lake City,³⁶ Atlanta,³⁷ Indianapolis,³⁸ Milwaukee,³⁹ and Baltimore⁴⁰—as well as in much smaller communities, including Wilton Manors, Florida, a town with fewer than 12,000 residents.⁴¹

Second, persistent targeting, profiling, and harassment of the LGBT community by law enforcement can make LGBT people hesitant to report crimes and seek help from the police. Several studies suggest that LGBT people underreport crimes committed against them, including instances of hate violence and intimate partner violence. A 2013 survey of LGBTQ people and people living with HIV found that only 56 percent of hate violence survivors reported such incidents to the police.⁴² Additionally, in response to a survey of gay and bisexual men, 40 percent of respondents indicated that they believed contacting the police about intimate partner violence would be unhelpful or very unhelpful, and 59 percent thought that police would be less helpful to gay or bisexual men experiencing intimate partner violence than to heterosexual women.⁴³ Underreporting of crime and reluctance to reach out to police presents a barrier to effective policing.⁴⁴

Third, law enforcement departments that are hostile toward LGBT citizens are most likely unable to meet the needs of the members of their communities, even if individuals do report crimes to the police. For example, research has found that police officers often do not understand how to react to reports of intimate partner violence between same-sex couples and will therefore arrest the partner who is surviving the abuse or both individuals.⁴⁵ A 2012 study of intimate partner violence in LGBTQ and HIV-affected communities found that among those people who reported intimate partner violence to the police, the survivor was arrested instead of the abuser 28 percent of the time.⁴⁶ Additionally, 41 percent of respondents to the 2014 national survey of LGBT people and people living with HIV who reported intimate partner violence to the police, and 39 percent of those who were victims of sexual assault said that their complaints were not fully addressed.⁴⁷ When police officers exhibit explicit or underlying anti-LGBT attitudes, they most likely will not be able to support and help the communities they are supposed to protect and serve.⁴⁸

Fourth, tensions between LGBT citizens and the police due to discrimination and harassment can inhibit LGBT people from working with law enforcement to proactively address crime. Community engagement can help law enforcement departments develop effective crime control strategies by identifying where problems exist, prioritizing issues to be addressed, and providing information about criminal activity.⁴⁹ For these reasons, a number of local police departments⁵⁰ and the US Department of Justice⁵¹ have taken steps to ensure that outreach to LGBT

communities is part of developing and implementing their proactive crime control strategies.

Recommendations

State and Local Law Enforcement Actions

Nondiscrimination Policies and Anti-Harassment Policies

Statewide and local law enforcement and corrections departments could implement their own internal nondiscrimination and anti-harassment policies that protect employees and citizens based on their sexual orientation and gender identity.

Several metropolitan police, even in states without legislative protections from discrimination based on sexual orientation and gender identity, have adopted internal policies to prohibit employment discrimination against LGBT officers.⁵²

Additionally, several major metropolitan police forces have implemented bias-based profiling prohibitions that include sexual orientation and gender identity, including the Chicago Police Department,⁵³ the Los Angeles Police Department,⁵⁴ the Phoenix Police Department,⁵⁵ and the San Francisco Police Department.⁵⁶ Further, several major metropolitan police departments have internal policies regarding police interactions with transgender community members. Such policies establish standards for using preferred pronouns as requested by the individual, transporting and housing people based on safety and gender identity, and requirements that personal searches be conducted only when appropriate. Boston,⁵⁷ Chicago,⁵⁸ Los Angeles,⁵⁹ Philadelphia,⁶⁰ and the District of Columbia⁶¹ are some examples of cities that have these policies in place.

By building these policies from the inside, they are likely to be more easily implemented and accepted internally, resulting in higher levels of tolerance and equality. This could lead to more LGBT people working with police forces and higher community collaboration and acceptance from LGBT people.

Trainings

Police departments could implement trainings focused on reducing discrimination and harassment of LGBT law enforcement personnel and LGBT citizens. Such trainings can include general sensitivity and diversity issues or can focus on more specific issues that impact LGBT individuals and communities differently, such as hate violence or intimate partner violence. Such trainings could be a standard part of all police academy education or continuing officer education and could also be implemented specifically when they may be especially salient, like around the time of Pride Parades. Police departments in Chicago,⁶² Philadelphia,⁶³ Santa Barbara,⁶⁴ and Michigan⁶⁵ have implemented sexual orientation and gender identity specific trainings in a

variety of contexts. These trainings could improve the effectiveness of the department by increasing acceptance in the workplace, improving the department's ability to assist LGBT victims of crimes, and facilitating engagement with the LGBT community.

Outreach and Liaisons to the LGBT Community

Some localities have created LGBT liaison positions within their departments. For example, Washington, DC's Metropolitan Police Department created a Gay and Lesbian Liaison Unit as part of its community policing strategy, which correlated with an increase in the reporting of crimes against the LGBT community.⁶⁶ Many other cities across the country have also appointed liaisons to the LGBT community, including San Francisco,⁶⁷ Atlanta,⁶⁸ Dallas,⁶⁹ Cincinnati,⁷⁰ Boise,⁷¹ Fargo,⁷² Minneapolis,⁷³ and New York City.⁷⁴ These examples of direct departmental support of LGBT officers and the LGBT community can encourage engagement of the LGBT community with law enforcement, improve reporting of crimes among LGBT victims, and send a message of acceptance to LGBT officers within departments.

Citizens Complaint Review Boards

Local agencies separate from the police or community volunteers could establish independent citizen complaint boards to offer unbiased review of complaints filed against law enforcement agents and agencies. Such independent boards—especially if given necessary investigative powers, including subpoena power, the resources and mandate to investigate and document patterns of discriminatory policing and abuse, along with proper guidelines, trainings, and representation from the LGBT community—are more likely to be fully responsive to complaints of profiling, discrimination, or harassment. Independent review boards are also likely to have greater community engagement and higher levels of reporting of police misconduct, because they are separate entities from the police departments themselves. Many cities throughout the nation already have independent review boards in place, including Charlotte,⁷⁵ Cleveland,⁷⁶ New York City,⁷⁷ Oakland,⁷⁸ and San Diego.⁷⁹ By establishing these boards, local communities demonstrate their dedication to maintaining proper standards in their police departments and improving relations between the community and law enforcement.

Federal Level Protections

Nondiscrimination Requirements in COPS Grants

The Community Oriented Policing Services (COPS) Office is one of three subagencies of the Department of Justice. The COPS Office issues grants under several different programs that advance community policing efforts across the nation.⁸⁰ Through its grant programs, the COPS

Office has “provided funding to more than 13,000 of the nation's 18,000 law enforcement agencies. Approximately 81 percent of the nation's population is served by law enforcement agencies practicing community policing.”⁸¹

Given the extensive financial and community reach of the COPS Office, implementing nondiscrimination requirements that include sexual orientation and gender identity in COPS grants could have a substantial impact on community policing policies and practices in police forces throughout the nation. Widespread adoption of these policies would likely not only lead to better treatment of LGBT law enforcement personnel and community members, but also greater safety and community engagement of LGBT citizens across the country.

Increased Data Collection Efforts

Federal administrative agencies could include questions about sexual orientation and gender identity in surveys that provide information about citizens' interactions with police. For example, the National Crime Victimization Survey (NCVS)⁸² and its supplemental survey, the Police-Public Contact Survey (PPCS),⁸³ together provide information about citizens who have had contact with law enforcement and the circumstances of that contact. Adding questions about sexual orientation and gender identity to the demographic section of the NCVS would allow for data collected by the PPCS to be analyzed according to the respondents' LGBT status. These analyses could provide important information about where and what types of interventions are needed to reduce discrimination, harassment, and profiling of LGBT communities by police.

Enforcing Existing Legal Protections

Statutes in twenty-one states⁸⁴ and many local ordinances in cities and counties across the country⁸⁵ explicitly prohibit discrimination on the basis of sexual orientation and/or gender identity. These statutes and ordinances protect LGBT people from various forms of discrimination, such as discrimination in employment and in access to public accommodations and government services.⁸⁶ However, the extent to which such laws are enforced varies from place to place. Many localities with inclusive nondiscrimination ordinances lack the funding or mechanisms to adequately enforce the law.⁸⁷ Some refer complaints to state nondiscrimination agencies, even if the state law does not prohibit discrimination.⁸⁸ Even though such laws and ordinances exist, consistent enforcement of existing laws could provide greater protection to LGBT people.

Adopting New Legal Protections

Twenty-nine states do not explicitly prohibit discrimination based on sexual orientation by state statute, and thirty-two states do not explicitly prohibit discrimination based on gender identity by state statute.⁸⁹ Absent federal

protections, statutes could be passed in these states to extend nondiscrimination protections for LGBT people across the country. Additionally, ordinances prohibiting sexual orientation and gender identity discrimination can be passed at the local level. Such statutes and ordinances can be comprehensive in terms of the types of discrimination prohibited, including discrimination in public and private sector employment, government services and activities, education, and public accommodations. Prohibiting discrimination in these areas will reduce discrimination and harassment against both LGBT law enforcement officers and LGBT community members.

Conclusion

Research indicates that LGBT people experience discrimination within law enforcement employment and by law enforcement as citizens. Such discrimination can impede effective policing in several ways, including by reducing diversity in police forces and discouraging LGBT people from engaging with police. Several types of LGBT-friendly policies and practices could be implemented by governments and law enforcement departments to reduce discrimination and harassment against LGBT people, including the passage of nondiscrimination laws and policies, nondiscrimination requirements in COPS grants, departmental trainings on LGBT issues, and appointment of LGBT liaison officers.

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ENDNOTES

- 1 Lambda Legal, *Protected and Served?*, 2014; National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2012*, 2013; Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights*, 2012; Frank H. Galvan and Mohsen Bazargan, *Interactions of Latina Transgender Women with Law Enforcement*, Williams Institute, 2012, 1-2; Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, 5.
- 2 Jen Colletta, "Gay Couple Alleges Police Brutality," *Philadelphia Gay News*, 20 January 2011.
- 3 *Gonzales v. City of Fresno*, No. 1:06-cv-01751-OWW-TAG, 2007 WL 2288322 (E.D. Cal. Aug. 8, 2007).
- 4 Galvan and Bazargan, *Interactions of Latina Transgender Women*.
- 5 Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011), 63.
- 6 *Ibid.*, 46.
- 7 Lambda Legal, *Protected and Served?*
- 8 *Ibid.*
- 9 Grant et al., *Injustice at Every Turn*.
- 10 National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2012*.
- 11 US Department of Justice, Civil Rights Division, *Investigation of the New Orleans Police Department*, 16 March 2011, ix.
- 12 Mark W. Charles and Leah M. Rouse Arndt, "Gay- and Lesbian-Identified Law Enforcement Officers: Intersection of Career and Sexual Identity," *Counseling Psychologist* 41, no. 8 (2013): 1167; Roddrick Colvin, "Shared Perceptions Among Lesbian and Gay Police Officers: Barriers and Opportunities in the Law Enforcement Work Environment," *Police Quarterly* 12, no. 1 (2009): 86; Kimberly D. Hassell and Steven G. Brandl, "An Examination of the Workplace Experiences of Police Patrol Officers: The Role of Race, Sex, and Sexual Orientation," *Police Quarterly* 12, no. 4 (2009): 419-420; Phillip M. Lyons, Jr., Michael J. DeValve, and Randall L. Garner, "Texas Police Chiefs' Attitudes Toward Gay and Lesbian Police Officers," *Police Quarterly* 11, no. 1 (2008): 102; Patrick Callahan, Public Information Officer, TCOPS (Transgender Community of Police and Sheriffs) International, Inc., e-mail message to the Williams Institute, 31 May 2013.
- 13 Colvin, "Shared Perceptions."
- 14 *Ibid.*
- 15 Callahan, e-mail message to the Williams Institute.
- 16 Analysis of raw data gathered by TCOPS performed by Latham & Watkins LLP (on file with author).
- 17 Christy Mallory, Amira Hasenbush, and Brad Sears, *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity*, Williams Institute, 2013; *Finkle v. Howard County*, 12 F. Supp. 3d 780 (D. Md. 2014); *Johnson v. County of Nassau*, 2014 U.S. Dist. LEXIS 133175 (E.D.N.Y. Sept. 22, 2014); *Saeed v. County of Nassau*, 31 NY J.V.R.A. 3:22, 2014 WL 1622888 (E.D.N.Y. Feb. 6, 2014); *Etheridge v. Henry*, 2014 U.S. Dist. LEXIS 1036 (M.D. Pa. Jan. 6, 2014); John Christofferson, "Francesca Quaranta, Transgender Police Officer in Connecticut, Files Complaint Against Supervisors," *Huffington Post*, 5 December 2013; Evan Allen, "Mendon Police Officer Alleges Gay Bias in Suit," *Boston Globe*, 30 November 2014; Fred Hanson, "Gay Hull Sergeant Alleges Harassment by Chief, Top Officers," *Patriot Ledger*, 20 November 2014; Chris Harris, "Former Glen Rock Policeman Alleges Sex Harassment," *NorthJersey.com*, 9 November 2014; Michaelangelo Conte, "WNY Cop Sues Police Department, Director Alleging Discrimination Due to Sexual Orientation," *NJ.com*, 10 September 2014; Fred Barbash, "Small Town Revolt Saves Job of South Carolina Lesbian Police Chief," *Washington Post*, 1 July 2014; Lloyd Nelson, "Former Police Officer Sues Helmetta, Alleging Discrimination for Being Gay, Ticket 'Quota,'" *NJ.com*, 6 March 2014.
- 18 *Shankle v. Village of Melrose Park*, No. 12 C 6923, 2013 WL 1828929 (N.D. Ill. April 30, 2013).
- 19 *Kretzmon v. Erie County*, No. 1:11-CV-0704, 2013 WL 636545 at *1 (W.D.N.Y. February 20, 2013).
- 20 David Greenwald, "Lawsuit by Former UCS Officer Alleging Race and Sexual Orientation Discrimination Moves Forward After Two Years," *Vanguard Court Watch*, 14 February 2011.
- 21 *Salvi v. Suffolk County Sheriff's Department*, 67 Mass App 596, 597 (Mass. App. Ct. 2006).
- 22 *Pitts v. Onondaga County Sheriff's Department*, No. 5:04-CV-0828 (GTS/GJD), 2009 WL 3165551 (N.D. N.Y. Sept. 29, 2009); *Willis v. County of Onondaga Sheriff's Department*, No. 5:04-CV-828 (GTS/GHL), 2010 WL 6619685 (N.D. N.Y. February 24, 2010).
- 23 Settlement, *Bereki v. Huntington Beach Police Department*, No. 07CC09351, 2008 WL 2901945 (Cal. Super. Ct. April 29, 2008).
- 24 Human Rights Campaign, *Documenting Discrimination: A Special Report from the Human*

- Rights Campaign Featuring Cases of Discrimination Based on Sexual Orientation in America's Workplaces*, 2001.
- 25 GLAD (Gay & Lesbian Advocates & Defenders) Hotline Intake Form, Report of Employment Discrimination, 26 November 2007 (on file with GLAD).
- 26 "Cook County Sheriff's Deputy Suing over Anti-Gay Harassment at Work," *Sun-Times Media*, 27 October 2012; Negotiated Settlement and General Release, *Colle v. City of Millville, D. Conn.*, Civil Action No. 07-5834.
- 27 Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, Williams Institute, 2014.
- 28 Trudy Ring, "Gay Couples in Almost Every US County," *Advocate.com*, 6 September 2011.
- 29 Russell W. Glenn et al., *Training the 21st Century Police Officer: Redefining Police Professionalism for the Los Angeles Police Department* (Los Angeles: Rand 2003), 91-117; Rodrick A. Colvin, *Gay and Lesbian Cops: Diversity and Effective Policing* (Boulder: Lynne Rienner Publishers, Inc. 2012), 153.
- 30 Colvin, *Gay and Lesbian Cops*, 153.
- 31 Glenn et al., *Training the 21st Century Police Officer*, 102-103 ("[D]iversity issues, particularly those regarding race, gender, and sexual orientation, are most effectively handled by actively recruiting officers from the communities of concern. Resulting community partnerships can help police 'make the transition to facilitator of community needs and, through a positive relationship, work to achieve a desirable community.'").
- 32 Sam Levin, "PrideFest St. Louis: Police Dept. Launches First-Ever Booth, Promotes LGBT Recruitment," *Riverfront Times*, 28 June 2013.
- 33 Aaron Belkin and Jason McNichol, "Pink and Blue: Outcomes Associated with the Integration of Open Gay and Lesbian Personnel in the San Diego Police Department," *Police Quarterly* 5, no. 2 (2002): 63.
- 34 Ibid.
- 35 Ibid.
- 36 Tonya Papanikolas, "Police Set Up Recruiting Booth at Gay Pride Event," *KSL.com*, 4 June 2006.
- 37 "Atlanta Wants Gay Officers," *Star-News*, 3 August 1986.
- 38 "Indianapolis Police, Fire Forces Reach Out to LGBT People," *Journal Gazette*, 5 November 2010.
- 39 Louis Weisberg, "Dahmer Case Changed Police Relations," *Wisconsin Gazette*, 14 July 2011.
- 40 Rachel Monroe, "Baltimore Police Work Hard to Recruit LGBT Officers," *Baltimore Fishbowl*, 17 June 2013.
- 41 Karla D. Shores, "Mayor Calls for Hiring of Openly Gay Officers," *Sun Sentinel*, 23 January 2002.
- 42 National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2012*, 9.
- 43 Catherine Finneran and Rob Stephenson, "Gay and Bisexual Men's Perceptions of Police Helpfulness in Response to Male-Male Intimate Partner Violence," *West Journal of Emergency Medicine* 14, no. 4 (2013): 357.
- 44 National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Intimate Partner Violence in 2012*, 39.
- 45 "2012 Report on Intimate Partner Violence in Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in the US Released Today," National Coalition of Anti-Violence Programs, Media Release, 1 October 2013.
- 46 Ibid.
- 47 Lambda Legal, *Protected and Served?*
- 48 Lynn Langton et al., *Victimization Not Reported to Police, 2006-2000*, Bureau of Justice Statistics, US Department of Justice, August 2012; "Importance of Crime Reporting," New York State Division of Criminal Justice Services website.
- 49 Community Oriented Policing Services, US Department of Justice, *Community Policing Defined*, 2014.
- 50 For example, Atlanta, Baltimore, and Iowa City. See "LGBT Liaison," Atlanta Police Department website; Kevin Rector, "Baltimore Police Form New Advisory Council on LGBT Issues," *Baltimore Sun*, 14 June 2014; "Lesbian, Gay, Bisexual, and Transgender (LGBTQ) Community Liaisons," City of Iowa City, Iowa, website.
- 51 Parker Marie Molloy, "US Department of Justice Launches Trans Outreach Training Initiative," *Advocate.com*, 21 April 2014; *America's Peacemaker: Community Relations Service, Annual Report FY 2011*, Community Relations Service, US Department of Justice, 6.
- 52 For example, Columbus, Fort Wayne, and St. Louis. See "Columbus Police Division Directive 3.26," Columbus, Ohio, Police Division; "FWPD Career Information" Fort Wayne, Indiana, Police Department website; St. Louis Metropolitan Police Department employment form.
- 53 Chicago Police Department, "General Order G02-04 Prohibition Regarding Racial Profiling and Other Bias Based Policing," 22 February 2012.
- 54 Los Angeles Police Department, *2014 1st Quarter Manual*, 2014, item 345.
- 55 Phoenix Police Department, *Operations Orders Manual*, Section 4.11: Search and Seizure, 19 (sexual orientation only).
- 56 San Francisco Police Department, "General Order 5.17: Policy Prohibiting Biased Policing," 2011.
- 57 Boston Police Department, "Boston Police Department Issues Special Order for Interacting with Transgender Individuals," *bpdnews.com*, 11 June 2013.
- 58 Chicago Police Department, "General Order G02-01-03 Interactions with Transgender, Intersex, and Gender Nonconforming (TIGN) Individuals," 21 August 2012.
- 59 Charlie Beck, "Police Interactions with Transgender Individuals," Los Angeles: Office of the Chief of Police, 10 April 2012.
- 60 Philadelphia Police Department, "Directive 152: Department Interactions with Transgender Individuals," 20 December 2013.
- 61 Metropolitan Police, District of Columbia, "General Order 501.02: Handling Interactions with Transgender Individuals," 5 January 2015.
- 62 PFLAG website, "Chicago Event: Honoree Officer Jose Rios. See also, the GOAL Chicago website.
- 63 "Sensitivity/Diversity Training and Reviewing the New Directive 152 at the Philadelphia Police Academy," Philly LGBT Police Liaison Commission Facebook Page.
- 64 Kristin Crosier, "LGBT Safety Concerns Prompt Police Department to Conduct New Training," *Daily Nexus*, 22 May 2012.
- 65 Equality Michigan website, "Training and Speaking."
- 66 Colvin, *Gay and Lesbian Cops*.
- 67 Wyatt Buchanan, "Elliot Blackstone—Police Liaison for LGBT Community," *San Francisco Chronicle*, 17 November 2006.
- 68 Atlanta Police Department website, "LGBT Liaison."
- 69 Dallas Police Department website, "GLBT Liaison Officer."
- 70 Courtis Fuller, "CPD Adds Liaison Officer for LGBT Community," *WLWT.com*, 6 June 2013.
- 71 Steve Martin, "Boise LGBT Liaison Katie Davey: 'Let Me Help,'" *Pride Foundation*, 4 June 2013.
- 72 City of Fargo website, "Gay, Lesbian, Bisexual, Transgender Liaison Officer."
- 73 Human Rights Campaign, Municipality Equality Index, Minneapolis, Minnesota.
- 74 City of New York Police Department website, "LGBT Liaison Unit."
- 75 CharlotteNC.gov website, "Police Complaint Review Program."
- 76 City of Cleveland, Ohio, website, "Office of Professional Standards Civilian Police Review Board."
- 77 NYC Civilian Complaint Review Board website.
- 78 City of Oakland, California, website, "Citizens' Police Review Board: Filing a Complaint."
- 79 City of San Diego, California, website, "Citizens' Review Board on Police Practices: Frequently Asked Questions."
- 80 US Department of Justice, "Community Oriented Policing Services (COPS): 2013 Summary."
- 81 Ibid.
- 82 "National Crime Victimization Survey (NCVS)," Bureau of Justice Statistics, US Department of Justice.
- 83 "Data Collection: Police-Public Contact Survey (PPCS)," Bureau of Justice Statistics, US Department of Justice.
- 84 "State Nondiscrimination Laws in the US," National LGBTQ Task Force, 21 June 2013.
- 85 "Local Non-Discrimination Ordinances," Movement Advancement Project.
- 86 Cal. Gov. Code §§ 12900-12996 (2013) (prohibits discrimination in employment and housing); Cal. Welfare & Inst. Code § 10000 (2013); CAL. GOV. CODE § 11135 (2013) (prohibit discrimination in government services); Cal. Civ. Code §§ 51-51.3 (2013) (prohibits discrimination in public accommodations); Cal. Educ. Code § 51500-51501 (2013) (prohibits discrimination in education); City of Albany, NY, Code art. III, § 48-26.
- 87 Christy Mallory and Brad Sears, "Discrimination Against State and Local Government LGBT Employees: An Analysis of Administrative Complaints," *LGBTQ Policy Journal* 4 (2014): 50.
- 88 Ibid.
- 89 "State Nondiscrimination Laws in the US," National LGBTQ Task Force.

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